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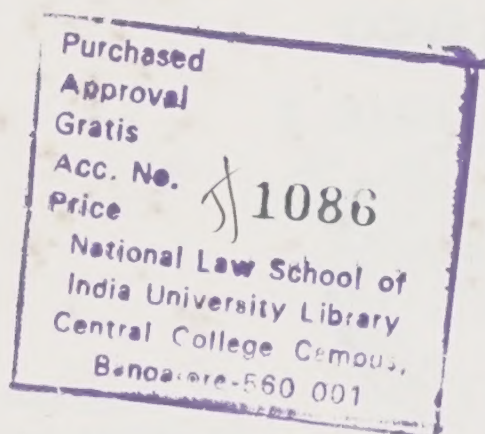
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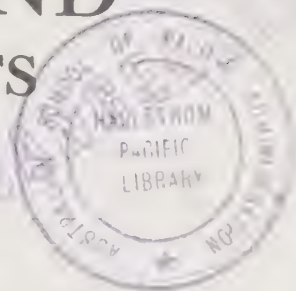
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CORRIGENDA

- [1959] 1 All E.R.
p. 336. GENERAL NURSING COUNCIL FOR ENGLAND AND WALES v. ST. MARYLEBONE CORPN. Lines B.2 and 3: read "three years' training for a general register, for a register of mental nurses and for a register of children's nurses, and for two years' training for a register for fever nurses (S.I. 1951 No. 1372, r. 16). There is a " instead of as printed.
- p. 622. NEVILL v. NEVILL. Solicitors: read "Edward Mackie & Co., Hayes (for the husband); Collyer-Breton & Co., agents for Bird & Lovibond, Uxbridge (for the wife)", instead of as printed.
- [1959] 2 All E.R.
p. 134. DUN v. DUN. Line B.6, and p. 137, line C.1: for "Aug. 18, 1919" read "Aug. 18, 1939".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS



Re BLANKET MANUFACTURERS' ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Devlin and Upjohn, JJ., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), February 23, 24, 25, 26, March 23, 1959.]

Restrictive Trade Practices—Agreement under which restrictions are accepted—Resolution of trade association as to sanctity of contracts—Whether a restriction within Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 6 (1) (a)-(c).

Restrictive Trade Practices—Reference—Blanket Manufacturers' Association—Minimum price scheme—Minimum substance restriction—Restrictions as to terms of sale—Whether removal of restrictions would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b).

The Blanket Manufacturers' Association was formed with the main object of co-operating for the common good, protection and benefit of the members and to safeguard and further their interests. Membership was confined to manufacturers of woven woollen blankets. The members of the Association were gradually producing an increasing proportion of the blankets sold in the United Kingdom, imports of blankets being negligible. There was no evidence of any short time working or of any unreasonable excess capacity among members. The number of employees employed by the members had been remarkably constant, and profits seemed to have been reasonable. A number of resolutions, which were mandatory, were made at general meetings of the Association. Members recognised that they were bound to observe these or to resign from the Association. The resolutions related to minimum prices, minimum qualities, and terms of sale. The resolution on minimum prices (resolution (i)) recommended that no member should offer, sell or supply a white all wool raised blanket (hereinafter called "the specified blanket") at a price per lb. lower than that fixed by the Association's accountants, such price to be the lowest cost price of that member of the Association who produced the cheapest specified blanket plus five per cent. profit. No member was to give any purchaser either directly or indirectly any advantage or benefit which in effect might be equivalent to a reduction in the minimum price. During the years 1955 to 1958 inclusive sales of specified blankets at the minimum price had been negligible, but the Association supported the restriction on the ground that the existence of a minimum price tended to keep down prices of specified

blankets, that it gave confidence to the industry and that it led to modernisation of the plant and equipment in the industry. The resolution relating to minimum qualities (resolution (ii), the "minimum substance" resolution) required the observance of minimum specifications for woven woollen raised blankets which were white or pastel coloured but was not applied in practice to merino or cellular blankets. It was designed to ensure that the public received a certain minimum quality for these blankets, and provided a good practical test, though not a conclusive test, of minimum quality. Resolution (iii) (the "sanctity of contracts" resolution) prohibited manufacturers from agreeing to the breaking or varying of their contracts with other persons. The resolutions relating to terms of sale (resolutions (iv) (a) to (f)) were as follows: (a) one resolution limited the supply of patterns free of charge, and was supported by the Association on the ground that unless this supply were cut down the manufacturer's overheads and, therefore, the cost of his blankets would be increased; (b) the second resolution required charges to be made for carriage and packing of certain small orders and was intended to reduce the cost to the public by discouraging small orders; (c) the next two resolutions related to the giving of discounts and the dating forward of deliveries and were supported by the Association on the ground that, if the manufacturer were free to give bigger discounts for shorter periods, that must be reflected in his gross selling price to which the wholesaler and/or retailer would add their mark up; (d) the next two resolutions prescribed fixed prices for wrapping and for special weaving of stripes or block headings; (e) the next resolution provided that "no contracts be entered into which include delivery at the price ruling at the date of delivery, but all orders be booked at a firm price"; and (f) the last resolution prohibited the supply of goods on sale or return, and was supported by the Association on the ground that such a practice would lead to increased prices, but the evidence showed that a practice of supplying goods on sale or return had never been widespread. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the Association sought to support the restrictions other than resolution (iii) under s. 21 (1) (b)†, and contended that resolution (iii) was not a restriction within s. 6 (1).

* Section 20, so far as relevant, provides:

"(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (5) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing sub-section may be made—
(a) in any case, by the registrar . . .

"(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

† Section 21 (1), so far as relevant, provides:

"For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement . . . resulting or likely to result from the operation of the restriction."

A **Held:** (i) the Association had not established that, in this highly competitive trade operating at prices above the minimum, the removal of the minimum price restriction (resolution (i), ante) would deny to the public benefits that were specific and substantial (see p. 10, letter H, post), and, therefore, the restriction was deemed under s. 21 (1) of the Restrictive Trade Practices Act, 1956, to be contrary to the public interest and was rendered void by s. 20 (3).

B (ii) the removal of the minimum substance restriction (resolution (ii), ante) would deny to the public benefits that were specific and substantial within s. 21 (1) (b) and the benefit to the public outweighed any detriment; therefore the restriction was not rendered void (see p. 11, letters D and E, post).

C (iii) the resolution relating to sanctity of contracts (resolution (iii), ante) was not a restriction within s. 6 (1) (a)-(c)* of the Act of 1956, and, therefore, the court had no jurisdiction to consider its validity (see p. 12, letter B, post).

D (iv) the Association had not established that the removal of the restrictions relating to the terms of sale (resolutions (iv) (a)-(f), ante) would deny to the public benefits that were specific and substantial, and accordingly the restrictions were deemed to be contrary to public interest under s. 21 (1) and were rendered void by s. 20 (3) for the following reasons—

(a) as regards resolutions (iv) (a) (b), ante, because, though reasonable and fair resolutions, the benefits were too small to be substantial (see p. 12, letters F and H, post).

E (b) as regards resolutions (iv) (c), ante, because it was not shown that they conferred any benefit on the public (see p. 13, letter B, post).

(c) as regards resolutions (iv) (d), ante, because, as the minimum price scheme was void, there remained no point in these resolutions, and they contained no element of benefit to the public (see p. 13, letters F and G, post).

F (d) as regards resolution (iv) (e), ante, because, though the resolution was a sensible attempt to secure orderly conditions of sale, the public had no real interest in the matter (see p. 13, letter I, post).

(e) as regards resolution (iv) (f), ante, because, as a practice of supplying blankets on sale or return had not been widespread and was not shown to be likely to become widespread, the resolution conferred no specific and substantial benefit on the public (see p. 14, letter C, post).

G [For the Restrictive Trade Practices Act, 1956, s. 6 and s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 954.]

Reference.

H Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Blanket Manufacturers' Association (hereinafter called "the Association") and consisting of an agreement dated Jan. 8, 1946, the list of members of the Association and all resolutions, decisions and minutes of the Association or its committees which were as such binding on the members as if they were contained in, or formed part of, the agreement, or were otherwise expressly or impliedly deemed for the purpose

* Section 6 (1), so far as relevant, provides:—

I "Subject to the provisions of the two next following sections, this Part of this Act applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods; (b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods; (c) the quantities or description of goods to be produced, supplied or acquired

of the Act of 1956 to be binding on them. By cl. 3 of the agreement, the objects of the Association were (a) to co-operate for the common good, protection and benefit of the members and to safeguard and further their interests; (b) to promote, support or oppose or co-operate with other organisations in promoting, supporting or opposing legislation affecting the interests of members and their work people; (c) to make representations to and have communications with government departments on all matters affecting the business of the members; (d) to minimise unfair competition between members and to combat unfair external competition; (e) to deal with any questions arising out of or having reference to any member's connexion with the Association. By cl. 4, the objects were to be attained by (a) the collection of statistical and other data and the exchange of information between members, provided that both during the continuation and after the determination of the agreement any information disclosed by any member should be treated as confidential; (b) the holding of meetings at which members might be represented by principals and/or accredited representatives; (c) the consideration of conditions of sale; (d) the establishment of a central office so organised as to make possible the rapid exchange of information and the calling together of the members; (e) the appointment of such committees as might be found necessary or desirable; (f) any other means which might be agreed on from time to time.

The following statement of facts is taken from the agreed statement of facts:

1. In the blanket industry white all wool raised blankets are sometimes referred to as white all wool crossbred blankets. These terms are synonymous.

2. Blankets. The various types of blanket differ mainly in the way in which they are woven and finished. The following are seven of the best known types—Yorkshire; Witney; Ayrshire; Bath (or Cheviot); Cellular; Honeycombe, Waffle, etc.; and Merino.

3. Quality. The quality of a blanket depends on the combination of the following—(i) The quality of the raw materials used in the blend. (ii) The fineness and regularity of the warp and weft yarns. (iii) The construction and type of weave of the fabric in the loom. (iv) The treatment given to the fabric after weaving, for example, bleaching, dyeing, raising, etc. There can be many combinations of the above four factors, thus producing a very wide range of qualities. Raw materials may consist of—(a) 100 per cent. merino blends, ranging from 60s to 80s quality; (b) Blends of merino wools and crossbred wools; (c) Blends of a wide range of crossbred wools; (d) Blends of various man-made fibres with or without a wool content. In the case of white all wool raised blankets, the cost of the wool used is normally something in the region of sixty-six per cent. of the total cost of production of the blanket. The main raw material used by manufacturers of blankets is raw wool although cotton warps have been used for many years, and over the last few years synthetic fibres have also been used. Most blanket manufacturers spin the woollen yarns for their own use.

4. Sizes and weights. The stock sizes of blankets are normally 60×80 inches; 70×90 inches; 80×96 inches; 80×100 inches; and 90×100 inches. There is also a range of smaller cot blankets. The weight of raised blankets ranges from approximately 3lb. to 6lb. according to the size and quality although blankets of cellular construction are lighter in weight.

5. The Association was formed in January, 1946, and membership is limited to manufacturers of woven woollen blankets. In the first three years of its existence, the Association was almost exclusively concerned with co-ordinating the industry's approaches to the Board of Trade about the price control and utility schemes. It was not until 1949 that the restrictions contained in the registered agreement commenced to operate.

6. Method of calculating the minimum prices under the agreement. In 1948 the Association's accountants carried out an investigation of the conversion costs of each member of the Association. (The term "conversion costs"

- A includes all the costs of converting raw material into a finished blanket together with the necessary administration and selling expenses except agents' commission and discount.) That investigation provided the basic conversion cost used in the calculation of the minimum price but since that time percentage increases have been made to all the costs to cover increased overhead expenses and wages increases. In addition, since the ascertainment of costs in 1948, certain individual members of the Association have from time to time notified the Association's accountants of their actual current conversion costs and in these cases their current figures were automatically substituted. The yield of yarn, yarn weight per piece and finished blanket weight per piece were also investigated by the Association's accountants in 1948 and unless changes in the type of blanket have been notified by the member concerned those weights are used.
- C The weights are used in calculating raw material costs. The following general principles are used in calculating the minimum prices—(i) Each manufacturer who is making a white all wool raised blanket returns the cost of the blend used for his cheapest white all wool raised blanket based on the prices ruling at the time of the return of the different types of wool to be blended. (ii) To the material cost per lb. of blend ruling at the date of the return a figure is added
- D for the cost of the blending oil applied to the raw material at the blending operation. In determining the price ruling at the date of the return, the manufacturer may have regard to his stock position as well as market prices. (iii) The cost of the blend is then adjusted to account for the loss of fibre which takes place in the processing of greasy wool from the blending stage to the yarn off the spinning spindle; for example, a yield of 88 per cent. on a blend costing
- E 57d. per lb. would give a material content of the resultant yarn of 64.77d. per lb. (iv) The cost of material per lb. of yarn is multiplied by the weight of yarn used to weave a blanket piece and divided by the number of lb. of finished weight of blanket which that piece is known to produce. This calculation gives the material cost per lb. of finished blanket. (v) To the material cost per lb. of finished blanket the cost of conversion ascertained as described above
- F is added. (vi) To the total cost so ascertained, a percentage addition is made to cover the discount and commission chargeable against the blanket. (vii) A profit of five per cent. on cost is added in all cases to calculate the price to be considered for the purpose of the scheme. (viii) The yield of yarn, yarn weight per piece, finished blanket weight per piece are those used at the time of the 1948 investigation unless changes in type of blanket have been notified. When the
- G costs have been calculated by the Association's accountants it is the lowest of these costs which becomes the minimum price at which the white all wool raised blanket can be sold under the terms of the agreement. Since 1952 the minimum price per lb. of white all wool raised blankets has varied from 7s. 2½d. to 10s. 3½d.

- H 7. Sales and deliveries of blankets. In 1955 members of the Association sold fifty-nine per cent. of the total number of blankets sold in the United Kingdom, sixty-four per cent. of blankets other than grey and fifty-one per cent. of all wool blankets. In 1956 the proportions were sixty-seven per cent., seventy per cent., and fifty-nine per cent., and in 1957, seventy per cent., seventy per cent. and sixty-one per cent. respectively.

- I 8. Questionnaire. During the course of the preparation of this case, a form of questionnaire was sent by the Treasury Solicitor with the consent of the Association and its solicitors to each party to the agreement. During the years 1955, 1956, 1957 and 1958, fifteen per cent. of the total sales of woven woollen blankets by parties to the agreement were white all wool raised blankets. The sales of such blankets by members during these years at the minimum prices prescribed under the agreement were negligible. Practically all the sales of these blankets took place at prices considerably higher than the prescribed minimum prices.

9. Imports of blankets. Imports of blankets of all types into the United Kingdom during the years 1952-58 have been negligible.

By para. 1 of its Statement of Case, the Association stated that from time to time it has made specific express recommendations to its members as to the action to be taken or not to be taken by them in relation to particular classes of goods, namely, woven woollen blankets and particular kinds of woven woollen blankets in respect of some of the matters described in s. 6 (1) of the Act of 1956*. Further or alternatively, all members of the Association were parties to agreements under which restrictions were accepted by them in respect of some of the matters described in s. 6 (1). These recommendations were made by means of resolutions made at general meetings of the Association, and are each referred to in the judgment of the court.

B. J. M. MacKenna, Q.C., and W. Gumbel for the Blanket Manufacturers' Association.

John Megaw, Q.C., and Arthur Bagnall for the registrar.

Cur. adv. vult.

Mar. 23. **DEVLIN, J.:** **UPJOHN, J.,** will deliver the judgment of the court.

UPJOHN, J., read the following judgment: The respondent, the Blanket Manufacturers' Association, was formed in January, 1946, with the main object of co-operating for the common good, protection and benefit of the members and to safeguard and further their interests. Membership is confined to manufacturers of woven woollen blankets and consists at the present time of about twenty companies. Members are centred for the most part in the West Riding of Yorkshire or at Witney in Oxfordshire. Originally the main energies of the Association were engaged in co-ordinating the blanket industry's approaches to the Board of Trade about price control and utility schemes. From 1949 onwards, at general meetings of the Association, a number of resolutions relating to minimum prices, terms of sale and minimum qualities were made. These resolutions, with one exception which we shall deal with later, are admittedly restrictions for the purpose of s. 6* of the Restrictive Trade Practices Act, 1956, and are the subject-matter of this reference to us.

According to the Statement of Case, these resolutions were sometimes expressed to be "recommendations" to the members and sometimes to be agreements between the members. But, looking at the substance of the matter, it is clear that each resolution was mandatory in form, and it is not disputed that members recognise that such resolutions are binding (at any rate in honour) on them, and that if a member is not prepared to accept and act on the resolution it is his duty to resign from the Association. We are not concerned in this reference to consider the position under s. 6 (7) of the Act if the recommendations had been phrased as genuine recommendations which in terms the member might accept or reject.

Blankets are manufactured in a great variety of qualities. Raw materials may consist of the following: (a) Pure merino wool blends. These are the highest quality. (b) Blends of merino and cross-bred wools. (c) Blends of a wide range of cross-bred wools. (d) Blends of various man-made fibres with or without a wool content. The agreed figures put before us show that members of the Association are gradually producing an increasing proportion of the blankets sold in the United Kingdom. Thus, of all wool blankets (excluding grey) members sold fifty-one per cent. in 1955, fifty-nine per cent. in 1956 and sixty-one per cent. in 1957. Of all blankets (including all wool, grey and mixtures) the corresponding percentages were fifty-nine per cent., sixty-seven per cent. and seventy per cent.

Fifteen per cent. of the total of woven woollen blankets sold by members in the years 1955-58 inclusive were white all wool raised blankets which are the only blankets subject to a minimum price scheme. The production of such

* For the relevant portions of s. 6 see footnote p. 3, ante.

A blankets expressed as a percentage of total production of each member, however, varies very greatly.

Members of the Association purchase practically the whole of the wool they require for woollen blankets in the form of raw wool which they spin and weave themselves.

B The utilisation of the available production capacity of the members' plant (measured as a percentage of total productive capacity of members) in recent years, seems to have been high over the last three years, eighty-seven per cent. to ninety per cent. There was no evidence before us of any short time working, and the number of employees employed by members has been remarkably constant. There is no evidence of any unreasonable excess capacity among members, though, in this connexion, it must be remembered that they are taking C each year an increasing proportion of the total trade from non-members. Imports of blankets into the United Kingdom are negligible.

On the other hand, from the summary of accounts produced by some of the members, the profits over the last three years (up to the end of 1957) seem to have been reasonable and by no means excessive, whether expressed as a percentage of sales or of capital employed.

D From figures supplied by sixteen members, it appears that £2,142,706 has been expended by them in plant, machinery and buildings over the last ten years. Taking the profits of the last three years as the average for the last ten years, then Mr. Illingworth, the partner in Messrs. Armitage & Norton, chartered accountants, dealing with the Association's affairs, has calculated that this outlay represents fifty-eight per cent. of the profits earned by the sixteen members E after deduction of tax. This may be so, but there is no evidence that the average profits for those three years do represent the average profits for the ten years. Furthermore, the profits in question relate not to the profits of white all wool raised blankets but to the whole of the activities of each of the members, including not only all their blanket products but all their non-blanket activities. While F most of the members concentrate substantially on blanket production, a few have considerable manufacturing activities in other cloths. While the figure of fifty-eight per cent. may be arithmetically accurate, it takes into account neither existing reserves nor income tax allowances over the period nor depreciation allocation nor the amount of any new capital raised for this capital expenditure. In all these circumstances, this figure of £2,142,706 does not seem G to us to have the significance claimed for it or to be of any material assistance to us.

By a resolution made on or about May 17, 1949, set out in para. 2 of the Statement of Case, the Association recommended to its members as follows:

H "A standardised form of costing be adopted by each member of the Association. No member shall offer, sell or supply a white all wool raised blanket at a price per lb. lower than a price fixed by the accountants for the time being of the Association, such price to be calculated ultimately by the above system of costing. It shall be the lowest cost price of that member of the Association who produces the cheapest white all wool raised blanket plus $4\frac{1}{2}$ per cent. profit for members in Yorkshire and $6\frac{1}{2}$ per cent. profit for members in Witney. No member shall give to any purchaser either I directly or indirectly any advantage or benefit which in effect might be equivalent of a reduction in the said minimum price."

In or about June, 1951, the said recommendation was varied, in that the addition to the said lowest cost price was recommended to be five per cent. profit for all members. We shall follow the course adopted in the pleadings and argument and refer to "white all wool raised blankets" as "specified blankets".

This minimum price scheme has been operated as follows: In 1948 and 1949 there was a cost investigation by Messrs. Armitage & Norton of the books of nineteen members of the Association to provide independent evidence of costs

to be presented to the Board of Trade in connexion with prices to be charged for the sale of blankets under the National Price Controlled Blanket Scheme. The information obtained from this investigation was used to ascertain the conversion costs of each member, that is the costs of converting raw wool into a finished blanket, together with the necessary administration and selling expenses except agents' commission and discount. From time to time percentage additions have been made to these figures to cover increased wages and overheads. Where, however, members have notified the accountants of new current conversion costs, those are adopted. It appears, however, that not all members have adopted the standard form of costing as recommended in the resolution, but most do so with modifications to suit themselves.

These conversion costs are returned each quarter to Messrs. Armitage & Norton, together with the raw wool costs. The raw wool cost is the cost to the member of the blend used for his cheapest specified blanket ruling at the date of the return, but, in determining the price ruling at the date of the return, the member may have regard to his stock position as well as market prices. The Association has no rule or recommendation which governs the ascertainment of raw wool costs. Certain adjustments are then made to the cost of the blend of wool to allow for the cost of blending oil and to account for losses during manufacture. The conversion cost and raw wool costs as adjusted are added together, and a percentage addition is then made to cover the discount and commission chargeable against the blanket and finally the five per cent. profit is added. The accountants who make the necessary calculations then declare to a meeting of the Association the six lowest costs so ascertained, but not the names of the six members concerned. The lowest cost of the six becomes the minimum price until revised. These calculations and declarations are made at least four times a year, usually every quarter, and, in addition and since July, 1958, the chairman of the Association has a discretion to order a review of the minimum price on the request of any member at any time.

The extent of the knowledge which a member acquires from this procedure is the minimum cost of each of the six lowest cost members. He does not know, and is not entitled to know, the name of the member unless volunteered, though very often it is the same member who has the lowest cost and he, in fact, frequently volunteers that information. Members are not entitled to know the breakdown between raw wool cost and conversion cost of each of the lowest six cost producers, which is never disclosed. However, the accountants are permitted to supply on demand the average of the six lowest conversion costs. While we are satisfied that the variation in minimum price over the years depends mainly on the cost of raw wool, for that accounts for about two-thirds of the cost of a specified blanket, it has been proved that it by no means follows that, on any given occasion, the lowest cost producer has both the lowest raw wool cost and the lowest conversion cost.

Since 1952 the minimum price per pound of specified blankets has varied from 7s. 2½d. to 10s. 3¾d., and recent minimum prices have been as follows: January, 1958, 9s. 1¾d.; April, 1958, 8s. 8¼d.; June, 1958, 7s. 10d.; October, 1958, 7s. 8¼d.; January, 1959, 7s. 9½d. The average differences between the minimum price and the next five lowest prices from March, 1952, to June, 1958, have been as follows: Minimum price lower than first above by 5.72d. per lb.; lower than second above by 8.70d. per lb.; lower than third above by 10.77d. per lb.; lower than fourth above by 12.53d. per lb.; lower than fifth above by 13.95d. per lb.

It is agreed that, during the years 1955-58 inclusive, sales of specified blankets of members at the minimum price for the time being have been negligible, and that practically all sales of these blankets took place at prices considerably higher than the prescribed minimum price. It appears that the average manufacturer of specified blankets is selling his cheapest quality of specified blankets at a price which is usually somewhere between the second and the third lowest

A cost producer above the minimum price. On the evidence, the top qualities have always been several shillings per lb. higher. All the witnesses regarded the minimum price as extremely low and even uneconomic, and it seems reasonably clear that very few members would be able to sell their cheapest quality specified blanket at the minimum price at a profit. It may, we think, be fairly described as an approximation to a stop-loss minimum price. It is common ground, although the minimum price is not operating at the present time and has seldom (if ever) operated, that conditions in the blanket industry are, and at all material times have been, extremely competitive both in quality and price.

The evidence before us established that, to some extent even when the cheapest quality of specified blanket is selling well above the minimum price, the existence of a minimum price does tend to keep down prices of specified blankets. It was not, however, claimed to depend on more than the result of a psychological feeling in the minds of members that it is reasonable to keep near to the minimum in the low qualities, at the same time keeping far enough away from the danger zone of trading represented by the minimum price. But it comes to no more than this, that it is helpful for a member to know his competitors' minimum prices when making a quotation. In short, in a highly competitive trade operating at prices well above the minimum, the actual effect of a minimum price scheme on the level of prices during times of prosperity seems conjectural, and the same result could be achieved by informing members of lowest costs at intervals without creating a minimum price.

There was some evidence that a minimum price for specified blankets might have some effect on stabilising at lower prices non-specified blankets of lower quality, such as union blankets, but on balance we are satisfied that the connexion is too vague and remote to affect the issues we have to consider.

It was also said that the existence of a minimum price gave confidence as to the future of the industry, and tended to promote re-investment in the modernisation of plant and buildings. We accept at once that there is a greater feeling of confidence in the industry than before the war. One element in promoting that feeling of confidence may well be the existence of the minimum price scheme, although it is in respect of such a small proportion of the total production of members. Another (and, in the opinion of Mr. Priestley, the chairman of the Association, more important) element is the minimum substance resolution which we deal with later. Another element in giving this confidence is the better climate in the trade itself since the war. This is due in part to the very existence of the Association which gives confidence because, as Sir Ronald Walker (a very prominent member of the Association) told us, the members have, as a result, met one another more often and got to know one another much better and have established standard terms of sale. However, whatever be the beliefs of members as to the reason for confidence which was lacking before the war, and we accept them as honestly held, in our opinion, the expenditure of money on modernisation is due only to a very small extent to the existence of this minimum price scheme, seldom operative. We also accept it that there has been some improvement in quality since the war, but that is, in our view, due to keen competition between members and to the minimum substance resolution and very little, if at all, to the existence of this minimum price scheme.

We are not called on to say whether a stop-loss scheme such as this is fair and reasonable, nor whether it is likely to be for the general economic advantage of the community. The legislature has performed that task, and has decided that, in general, such schemes are to be deemed to be contrary to the public interest unless they satisfy certain stated conditions.

The Association relies on para. (b) of s. 21 (1) of the Act, and contends that the removal of this restriction on the price at which members may sell specified blankets would deny to the public as purchasers and users of woven woollen blankets and, in particular, of specified blankets, specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such whether by virtue

of the restriction itself or of arrangements or operations resulting therefrom. A
To pass the test there laid down, the benefits or advantages must be both specific
and substantial.

Counsel for the Association in the first place invited us in effect to consider
as a whole the restrictions imposed on members and to say that they promoted
confidence and led members to invest in new and improved machinery and to B
adopt new processes. This in turn led to cheaper and improved blankets.
Though some of the resolutions were passed on the same day, it was never in
pleading or argument suggested that they were all part and parcel of one agree-
ment which stood or fell as a whole. Each resolution could, if the majority
of the members so desired, be rescinded, leaving the rest standing. The validity
of each resolution must, in our opinion, be considered separately.

We turn, then, to his submissions on the minimum price scheme. First he C
says that, in times of prosperity, the scheme tends to keep down prices and to
improve quality; that promotes confidence and, accordingly, leads to modernisa-
tion of the plant and equipment of the industry. Secondly he says that,
without the scheme, in times of deep depression there would be a serious debase-
ment of quality and weight of blanket as sometimes happened in the 1930's.

With regard to his first point, we have already reviewed the facts and set out D
some of the considerations to be borne in mind in considering the test. In
regard to the second point, the first question is whether there is likely to be a
depression so deep that, apart from the minimum price scheme, there would be
cut-throat competition and a virtual disruption of the industry (for the disappear-
ance of some of the weaker members would not be a disadvantage). Mr.
Silberston, the registrar's economist, has produced some figures to show that E
variations in trade were smaller in the 1930's than in the 1950's. The last two
years, 1957 and 1958, have been years of recession, yet the minimum price has
hardly ever been reached. Since 1949 there have been recessions, Mr. Priestley
told us, sharper than before the war, though not so prolonged. Another matter
for consideration is that this particular minimum price scheme does not prevent F
debasement of quality, for debasement of quality at any time is limited only by
the cheapest blend of wool which members can persuade buyers to accept for a
specified blanket. Debasement is to some extent prevented by the minimum
substance resolution of the Association which we have already mentioned.

It is only fair to say that no detriment to the public is alleged in respect of
this stop-loss scheme, and we think rightly, for, since it was instituted in 1949,
its effect on the public has been negligible. But it is not sufficient to prove G
that it is harmless or may only do good. In the end we have to satisfy ourselves
that the minimum price scheme passes the test of s. 21 (1) (b). That, essentially,
is a question of degree in the light of all the evidence and arguments presented
to us. Each case must depend on its own facts. We reach the conclusion
that the benefits and advantages alleged cannot be described as specific and H
substantial. The real difficulties in the way of the Association on the particular
facts before us are first those that flow from the basic fact that the stop-loss
scheme applies to so small a proportion of the total blanket production of the
Association which itself produces only some seventy per cent. of the total pro-
duction of the industry; secondly, in establishing any likelihood of a recession
sufficiently severe to bring it into really effective operation.

The remaining resolutions of the Association relate to what have been des- I
cribed as general restrictions. The first one relates to "minimum substance"
and the relevant resolution, which was made on or about May 17, 1949, is set
out in para. 7 of the Statement of Case:

"Members would not make pastel coloured blankets or white blankets
with or without headings of a specification thinner in substance than is
represented by a blanket 60 x 80 2½lb. for the home trade and other sizes
in proportion."

A Two and a half pounds for a blanket of 60×80 inches is 10.8 ozs. per square yard. This resolution, as we understand it, is confined to woven woollen raised blankets which are white or pastel coloured, but is not applied in practice to merino or cellular blankets. This is the resolution that we have already mentioned, and it is intended to prevent the debasement which, as the result of pressure from customers, used to take place before the war, and to ensure that

B the general public receive a certain minimum quality for these blankets. It is possible to make a lighter woven woollen fabric, but it will not have the proper characteristics of a blanket because the "raising" process on these blankets will make it very thin and flimsy. The result is a most unsatisfactory blanket, the texture is weakened and its qualities both for warmth and durability are greatly impaired. These defects would be unlikely to be discovered by the

C housewife on inspection of a new blanket. Witnesses for the Association freely admitted that it is possible to make an unsatisfactory blanket of the type described in the resolution which would weigh more than 10.8 ozs. per square yard by using very cheap wool. They also admitted that other tests to maintain a minimum quality could be devised, but insisted that the weight ratio was a vital element.

D We accept the view that the specification laid down on the whole provides a good practical, though by no means conclusive, test of minimum quality to be desired in the type of blankets covered by it. The Association contend that this restriction falls within s. 21 (1) (b), the terms of which we need not repeat. In our judgment, this contention succeeds and the benefits or advantages to the public may properly be described as specific and substantial. We are further

E satisfied that the benefit to the general public outweighs any detriment to the public in finding lighter weight blankets at cheaper prices either not available or not so readily available in the shops. The Association, on behalf of its members, must, however, give an undertaking that, in accordance with the actual practice, the specification is not applied to cellular or merino blankets.

The remaining restrictions set out in the Statement of Case all relate to

F terms of sale and broadly cover all types of blankets. They were made to implement the report of the Wool Working Party to the President of the Board of Trade in 1947, to the effect that it was most desirable that the terms of sale should be standardised, and partly to support the minimum price scheme. In that context they may, for the most part, be regarded as reasonable and fair both to seller and buyer, but we have to be satisfied that the restrictions

G satisfy s. 21 of the Act, in light of the fact that the minimum price scheme has gone. In every case the Association relies on s. 21 (1) (b), and in some cases on s. 21 (1) (g), as being necessary to support the minimum price scheme, but, in the circumstances, it is unnecessary to consider this alternative plea further.

We propose to consider first the restriction set out in para. 31 of the Statement of Case relating to sanctity of contracts, as it has been called in argument. The

H resolution was made on or about June 19, 1951, to the following effect:

I "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure. Should any attempt be made to break or vary the contract the manufacturer shall refuse to accept cancellation or variation and endeavour to obtain completion of the contract. If this should fail the member must send all correspondence to the secretary without informing the customer that he is doing so. The secretary should then forthwith write the customer to the effect that the correspondence had been handed to him and asking for the customer's explanation for his attempt to break the contract in order that he may advise the manufacturer concerned. If a manufacturer has good reason to agree a request for the cancellation or variation of a contract he shall not so agree until approval is given by the reference committee which reference committee shall consist of the chairman, Mr. Illingworth and the secretary."

The first question is whether such a resolution is a restriction within s. 6 (1) of the Act, the registrar acceding to the view, that, if it is not within the section, we have no jurisdiction to consider it. We have not found this an easy question to answer. The real question is whether an agreement between two or more persons, being manufacturers of the same type of goods, not to cancel or vary any contract of sale of goods made or to be made in the future by any of those persons with their customers without the consent of some third party, is the acceptance of a restriction which falls within any one or more of paras. (a) to (c) of s. 6 (1). This is a question of construction, and we have reached the conclusion that, giving the words used in the section their natural and ordinary meaning, such an agreement cannot be fitted into any of the paragraphs. Accordingly, in our judgment, we have no jurisdiction to consider the validity of this resolution. We may add that, had we reached a contrary conclusion, we should have held that the resolution, though highly beneficial to the members of the Association, was not for the benefit of the general public or to wholesalers or retailers dealing with members of the Association and was, therefore, contrary to the public interest.

The next resolution which we propose to consider was made on or about June 29, 1956, and is set out in para. 11 of the Statement of Case:

"Patterns for the home trade may be met by the supply of not more than 2,000 square inches free of charge. If more than 2,000 square inches are asked for in any one request the whole will be charged for at half-price of the total net weight involved. These patterns may be supplied on request to any particular branch of a concern."

The argument on behalf of the Association on this resolution is that some wholesalers make quite unreasonable demands for patterns and this is intended to discourage such unreasonable demands. These patterns are costly to produce, and, if the manufacturer is to meet such unreasonable demands, it will increase his overheads and, therefore, the cost of his blankets to the wholesaler or retailer. This increased cost is again increased when the wholesaler and then retailer adds his trade commission or "mark up" to the manufacturer's price. We were told, taking wholesaler and retailer together, that this might amount to as much as fifty per cent. The resolution appears to us reasonable and fair, but, in our judgment, the benefit to the public is too small to be described as "substantial" for the purposes of s. 21 (1) (b).

The next resolution was made on or about Dec. 5, 1950, and is set out in para. 14 of the Statement of Case:

"Carriage be charged on all parcels weighing under 30 lb. and that under 15 lb. the customer should pay for packing as well as carriage."

This resolution, like the last, is a reasonable attempt to reduce the cost to the public by discouraging small orders which are proportionately more costly in carriage than larger orders. It is open to question whether the retailer would be likely to recover such costs from the public in any event; but, in our judgment, it must suffer the same fate as the last mentioned resolution, for the same reason.

The next two resolutions relate to discounts and we propose to consider them together. The first is a resolution made on or about Dec. 28, 1950, and set out in para. 18 of the Statement of Case:

"The discount terms be that 2½ per cent. of the gross price be allowed for payment on or before the 10th of the month immediately succeeding the consignment to the buyer."

The second is a resolution made on or about Dec. 5, 1950, and amended in 1955, and set out in para. 22 of the Statement of Case:

"In no circumstances should goods be dated forward more than fourteen days, and the secretary should be notified at once of any infringement, i.e. in cases where goods were dated forward more than fourteen days. Goods

- A sold for delivery on or before the first working day in one month but despatched within five days of the end of the previous month should be invoiced on the date on which delivery was promised."

These resolutions are sought to be justified on the ground that, if the manufacturer is free to give bigger discounts for shorter periods, for example, 3 $\frac{3}{4}$ per cent. for payment in seven days or by extending the period by some artificial means as dating forward, that must be reflected in his gross selling price to which the wholesaler and/or retailer will add their "mark up". On the other hand, this overlooks the fact that, in the absence of restrictions, a retailer getting a better discount for very prompt payment may be able to offer the public more favourable terms and sell at lower prices than his competitors. We are not satisfied that these restrictions confer any benefit on the public.

- C The next two resolutions relate to fixed prices for wrapping and blankets woven with stripes or block headings, and we propose to consider them together; first, a resolution made on or about Dec. 14, 1949, and set out in para. 27 of the Statement of Case:

- D "Transparent wrapping must be in addition to the agreed minimum price and the minimum charges for such transparent wrapping shall be 6d. per blanket for cot sizes and 9d. per blanket for other sizes. This may be charged separately or otherwise, but in the latter case a note shall be inserted on the invoice to the effect that the blanket price is inclusive of the charge for transparent wrapping."

- E On or about Dec. 19, 1955, these charges were varied by substituting 8d. for 6d. and 1s. for 9d. Secondly, a resolution made on or about June 11, 1952, and set out in para. 37 of the Statement of Case:

"2d. per lb. for ordinary stripes and 3d. per lb. for block headings be added to the manufacturers' price for plain blankets."

- F A minimum price scheme being out of the way, there seems no point in these resolutions. If the price of the blanket is a matter for free negotiation, there seems no possible ground for fixing an additional minimum price for wrapping or an additional fixed price for a special weaving. Further, the costs of these wrappings were shown to vary greatly, and in 1957 it appeared from returns made by fourteen members that the cost (but without any element of profit) of the 1s. size, varied from 7.80d. to 25d. It cannot be to the benefit of the public to establish a minimum price at 1s. We had no costs figures in relation to special weaving. If the public want specially woven blankets or special wrapping, they must in the long run, either directly by individual additional charges or indirectly by a general increase of costs, pay for them, and any regulation on those matters seems unnecessary. These resolutions contain no element of benefit to the public.

- G The next resolution was made on or about Sept. 21, 1951, and is set out in para. 34 of the Statement of Case:

- H "No contracts be entered into which include delivery at the price ruling at the date of delivery, but all orders be booked at a firm price."

- I We appreciate that it may be difficult to trade on the terms of prices ruling at the date of delivery owing to the difficulty of ascertaining that price. This is another example of a sensible attempt to have orderly conditions of sale. But it seems to us essentially a matter for negotiation between manufacturer and wholesaler or retailer, and the public has no real interest in this matter. It certainly cannot be to any benefit of the general public that a manufacturer and the wholesaler or retailer should be precluded from negotiating a contract based on forward prices if a satisfactory means of doing so can be found.

The last resolution we have to consider is a resolution made on or about Mar. 30, 1954, and set out in para. 41 of the Statement of Case:

"It is not permissible to supply goods on sale or return."

When a blanket is returned, there may be a certain amount of spoilage in the way of soiling or damage in transit and shop soiling. This may happen even when the blanket is wrapped in a transparent wrapping which may burst. Double transport charges will be incurred, and such blankets have to be sold as "seconds" at a lower price. There is the further danger that some buyers may be tempted to overbuy, relying on a contract for sale or return to throw back their purchases on a falling market. These losses have to be taken into account in the manufacturer's costing and, if the practice becomes widespread, the price of new blankets may be substantially increased. We think there is much substance in this, but the difficulty in the way of the Association is that, on the evidence, such a practice has never been widespread, and there is no evidence of any pressure on the part of wholesalers and retailers to try to obtain this service. In the circumstances, we are not satisfied that it can properly be said that the removal of this restriction would deny to the public specific and substantial benefits and advantages.

We desire to conclude by saying that, as in the case of the minimum price scheme, our judgment on the "general restrictions" depends on the particular facts of this particular case and does not necessarily afford a guide to other cases where different circumstances exist.

On the whole, therefore, we must declare that the resolutions set out in para. 2, para. 11, para. 14, para. 18, para. 22, para. 27, para. 34, para. 37 and para. 41 are contrary to the public interest.

Declarations accordingly.

[Discussion ensued on the formal application of counsel for the registrar for an injunction under s. 20 (3) (a) of the Restrictive Trade Practices Act, 1956, coupled with a suggestion that the matter should be adjourned with a view to an undertaking being agreed in lieu of the injunction. The court having intimated that the matter might be mentioned at an early date, counsel raised the question of the present effect of the judgment.]

John Megaw, Q.C.: I apprehend that, the court having given judgment, the restrictions which are deemed contrary to public interest are contrary thereto from this day forward, irrespective of whether an injunction is granted or an undertaking is given.

DEVLIN, J.: I think that they are void from the date of the declaration.]

Solicitors: *Brooke, Dyer & Goodwin*, Leeds (for the Blanket Manufacturers' Association); *Treasury Solicitor*.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

SEABROOK v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Havers, J.), July 3, 8, 1958.]

Discovery—Production of documents—Privilege—Accident reports—Reports obtained for the purpose of advice from solicitor concerning anticipated litigation, and for other purposes—Whether reports privileged.

In an action for damages brought against the British Transport Commission by the widow of an employee who had been killed in the course of his employment, the commission claimed privilege from producing the correspondence between and reports made by the commission's officers and servants on their inquiries into the accident. Privilege was claimed on the ground that these "came into existence and were made by the commission or their officers after this litigation was in contemplation and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the commission's solicitor evidence, and information as to the evidence, which will be obtained, or otherwise for the use of the solicitor to enable him to conduct the defence in the action and to advise the commission." The documents were described as "correspondence between and reports made by the [commission's] officers and servants". As a customary practice accident returns had been rendered by local officers in charge after the amalgamation of the railway companies in 1924. These accident reports and statements were prepared and taken for the purposes of workmen's compensation or common law claims, of returns which had now to be made to the Minister of Transport and Civil Aviation, and of reports to factory inspectors where appropriate; they were also for submission to the companies' solicitors, now the solicitor to the commission, to enable them to advise as to legal liability or to conduct anticipated proceedings.

Held: (i) the documents were privileged because they had bona fide been obtained for the purpose of taking professional advice from the commission's solicitor in view of anticipated proceedings, and the fact that these documents also served other purposes did not place them outside the scope of the privilege.

Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co. ([1913] 3 K.B. 850), *Adam S.S. Co., Ltd. v. London Assurance Corpn.* ([1914] 3 K.B. 1256), *The Hopper No. 13* ([1925] P. 52), *Ogden v. London Electric Ry. Co.* ([1933] All E.R. Rep. 896) and *Smith v. British Transport Commission* (unreported) followed.

(ii) the documents were sufficiently identified by the description of them quoted above and the court would not inspect them (see p. 19, letters B and C, and p. 31, letters B and C, post).

Dictum of JENKINS, L.J., in *Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd.* ([1950] 2 All E.R. at p. 603) applied.

[**Editorial Note.** The decision in this case should be considered with that in *Longthorn v. British Transport Commission*, p. 32, post, where the report of the private inquiry into an accident was held not to be privileged.

As to the privilege of documents prepared with a view to litigation, see 12 HALSBURY'S LAWS (3rd Edn.) 46, para. 63; and for cases on the subject, see 18 DIGEST 137-141, 876-905.]

Cases referred to:

- (1) *Woolley v. North London Ry. Co.*, (1869), L.R. 4 C.P. 602; 38 L.J.C.P. 317; 20 L.T. 613; 18 Digest 139, 893.
- (2) *Chartered Bank of India, etc. v. Rich.*, (1863), 4 B. & S. 73; 32 L.J.Q.B. 300; 8 L.T. 454; 122 E.R. 387; 18 Digest 137, 877.
- (3) *Parr v. London, Chatham & Dover Ry. Co.*, (1871), 24 L.T. 558; 18 Digest 140, 895.

- (4) *Fenner v. London & South Eastern Ry. Co.*, (1872), L.R. 7 Q.B. 757; 41 A L.J.Q.B. 313; 26 L.T. 971; 37 J.P. 182; 18 Digest 140, 896.
- (5) *Anderson v. Bank of British Columbia*, (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 18 Digest 131, 823.
- (6) *Southwark Water Co. v. Quick*, (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 18 Digest 121, 714.
- (7) *Collins v. London General Omnibus Co.*, (1893), 63 L.J.Q.B. 428; 68 L.T. B 831; 57 J.P. 678; 18 Digest 141, 905.
- (8) *Jones v. Great Central Ry. Co.*, [1910] A.C. 4; 79 L.J.K.B. 191; 100 L.T. 710; 18 Digest 137, 875.
- (9) *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 18 Digest 87, 394. C
- (10) *London & Tilbury Ry. Co. v. Kirk & Randall*, (1884), 28 Sol. Jo. 688; 18 Digest 138, 887.
- (11) *Adam S.S. Co., Ltd. v. London Assurance Corpn.*, [1914] 3 K.B. 1256; 83 L.J.K.B. 1861; 111 L.T. 1031; 18 Digest 138, 890.
- (12) *The Hopper No. 13*, [1925] P. 52; 94 L.J.P. 45; 132 L.T. 736; Digest Supp. D
- (13) *The City of Baroda*, (1926), 134 L.T. 576; Digest Supp.
- (14) *Ogden v. London Electric Ry. Co.*, [1933] All E.R. Rep. 896; 149 L.T. 476; Digest Supp.
- (15) *Feuerheerd v. London General Omnibus Co.*, [1918] 2 K.B. 565; 88 L.J.K.B. 15; 119 L.T. 711; 18 Digest 143, 925.
- (16) *Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd.*, [1950] 2 All E.R. 596; E [1951] 1 K.B. 134; 2nd Digest Supp.
- (17) *Smith v. British Transport Commission* (unreported).

Appeal.

This was an appeal by the plaintiff, Mrs. Grace Annie Seabrook, the widow and administratrix of William Cyril Seabrook deceased, in an action brought by her against the British Transport Commission as his employers for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for their negligence or breach of statutory duty. The plaintiff's appeal was against an order, dated June 6, 1958, of Master CLAYTON refusing to order the production of accident reports referred to in Part 2 of Sch. 1 to the list of documents filed on behalf of the commission. The facts are fully stated in the judgment. G

W. G. Wingate for the plaintiff.

Marven Everett, Q.C., and *Tudor Evans* for the defendants.

H **HAVERS, J.:** The action arises out of a fatal accident which occurred to the plaintiff's husband, in the course of his employment by the British Transport Commission during a temporary interruption of his work in drilling holes in the running rail and check rail of the cross-over from the sidings to the main line between two stations. Unfortunately, he was knocked down and killed by a train passing along the line. The action is for damages under the Fatal Accidents Act, 1846, and for the benefit of the deceased man's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, on the footing that the defendants were guilty of negligence and breach of statutory duty or failure in their common law duty as employers. The defendants, by their defence, put all those matters in issue. I

An order was made under a summons for directions for a list of documents, and not an affidavit of documents. Accordingly, the defendants filed a list of documents, and in para. 2 of that list they say:

"The defendants object to produce the documents in the second part of the first schedule on the grounds that they are privileged from production

- A either from their nature as disclosed or as being documents which came into existence and were made by the defendants or their officers after this litigation was in contemplation and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the defendants evidence and information as to the evidence which will be obtained or otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants."
- B

In the first schedule, Part 2, there is contained this description: "correspondence between and reports made by the defendants' officers and servants." That is the only material part of the schedule to which I need refer. It is in respect of those documents that this application arises.

- C The defendants having filed that list, the question arose as to the production and inspection of those documents, and certain correspondence passed between the parties which has been put before me. The plaintiff's solicitors wrote to the chief solicitor of the British Transport Commission saying in the second paragraph:

- D "With reference to Part 2 of the first schedule, will you please let us know the nature of the 'reports' to which you refer and particularly state whether or not they include a report relating to the accident furnished by James Munro with whom the deceased was working."

The reply to that letter is dated Dec. 20, 1957, and it reads:

- E "With reference to Part 2 of the first schedule of the defendants' list of documents, the 'reports' are accident reports and reports by the defendants' officers and servants on their inquiries into this accident, which reports include a statement of James Munro, with whom the deceased was working."

- F Those are the particular documents which the plaintiff's advisers are anxious to see, and one can well understand their anxiety because James Munro was a man who was working with him at the time of his fatal accident. The plaintiff's solicitors write again on Jan. 8, 1958, to the chief solicitor, British Transport Commission:

- G "With further reference to the second paragraph of your letter of Dec. 20 last, in view of the fact that the chief witness for the plaintiff is dead, we feel that we ought to have the opportunity of seeing the reports referred to in Part 2 of the first schedule and shall be glad to know as soon as possible if you are now willing to disclose them."

- H To that letter the chief solicitor for the British Transport Commission replied on Jan. 10, that he was unable to do other than reiterate the last paragraph of his letter of Dec. 20, 1957. This dispute having arisen, the defendants thought it better to claim privilege on oath in the usual customary manner by affidavit, and accordingly Mr. Sayers, the assistant general manager of the London Midland Region of the defendant commission, swore an affidavit dated Feb. 4, 1958*, in which the description of the documents for which privilege was claimed was "correspondence between and reports made by the defendants' officers and servants".

- I The master was in some doubt whether or not he should look at the documents, and he adjourned the application to enable the defendants to file a further affidavit giving some explanation as to the way in which the documents came into existence. Accordingly Mr. Sayers swore a further affidavit on Apr. 25, 1958, and in that affidavit he says this in the second paragraph:

"I am assistant general manager of the London Midland Region of the above-named defendants and am duly authorised by them to make this

* This affidavit of documents contained a claim of privilege in substantially the same form as the claim in para. 2 of the list of documents, which is quoted at p. 16, letter I, ante and supra, letter A.

affidavit and the facts herein deposed to are true to the best of my knowledge information and belief. 2. I have been the assistant general manager of the London Midland Region of the British Transport Commission (which I shall hereinafter refer to as 'the commission') since 1957. 3. I was in the service of the London Midland & Scottish Railway Co. from 1927 until Dec. 31, 1947, and thereafter I have been and I am in the service of the commission. 4. After the amalgamation of the railway companies in 1924, instructions were issued that when accidents occurred to members of the railway company's staff, accident returns were to be filled up by the local officer in charge who would forward copies to the district officer, the divisional officer and the head of department. These returns were inter alia for the purposes of considering claims for payment of workmen's compensation under the Workmen's Compensation Acts, 1897-1925 or anticipated common law claims when workmen elected not to take workmen's compensation, and for submission if necessary to the company's solicitors to enable them to advise as to legal liability or conduct any legal proceedings which may arise. 5. This system of reporting accidents and the instructions to the relevant staff to submit reports and returns of accidents for the purposes aforesaid has continued since 1924 and exists today."

Instead of "Workmen's Compensation Acts", one has now to read "Claims under the Factory Act", and so on. Then in para. 6 he goes on:

"The general manager of the London Midland Region is required by statute to report to the Minister of Transport details of all accidents to the commission's servants where such servants as a result thereof are off duty for more than three days, reports have also to be made to the inspector of factories where the commission's servants are injured on premises to which the provisions of the Factories Acts apply. 7. Such reports and the statements of witnesses to such accidents to servants of the commission are made for the purposes mentioned in para. 6 of this affidavit and also for the purpose of being submitted to the commission's solicitor as material on which such solicitor can advise the commission on its legal liability and for the purposes of conducting on behalf of the commission any proceedings arising out of such accidents. It is commonly anticipated by the commission that where a servant of the commission suffers personal injury or death at work, a claim for damages will be made and that proceedings will ensue if liability is repudiated. 8. The documents in this action, namely, the correspondence between and reports made by the defendants' officers and servants for which the defendants have claimed privilege in the first schedule Part 2 of the affidavit sworn to by me on Feb. 4, 1958, came into existence by reason of the fact that the appropriate officer, in this case the district engineer, in accordance with long standing practice was required to and did so call for such reports and statements for submission through the chief civil engineer at Euston to the general manager in order that, amongst other things, in the event of a claim for damages being received, they could be passed to the commission's solicitor to enable him to advise the commission on their legal liability and if necessary to conduct their defence to these proceedings. 9. This action is the result of a fatal accident at work to the husband of the plaintiff and it was anticipated that a claim for damages might ensue."

Counsel for the plaintiff has contended, first of all, that these documents are not sufficiently identified. When one looks, as one must, at the list of documents and the original affidavit, and then at the further affidavit of Mr. Sayers, counsel for the plaintiff contends that the description which is given there is not sufficient to identify these documents with any degree of precision. Alternatively, he says that any claim for privilege is so dubious that I ought to look at the documents myself in order to see whether the claim has been properly

A established. It is now clear from the authorities that although one party may ask the judge to look at the documents, there is no compulsion on him to do so if he is satisfied that they are sufficiently identified and that the claim is made in respect of documents which come within the privilege principle and that the affidavit is in proper form. On the other hand, it is entirely a matter for the judge to exercise his discretion on the facts of any particular case.

B I did at one time think that the description which was given in this case of these documents was rather meagre, and that perhaps it might be that on looking at all the documents together I should be more certain as to what their actual identity was. But I have had the advantage, through the industry of both learned counsel, of examining a considerable number of authorities and seeing the description which has been given in the affidavits in those particular cases. I have come to the conclusion, bearing in mind the descriptions in those cases which satisfied the court, and looking at the facts of those cases, that these documents are sufficiently identified. It is clear that there is never any necessity for the deponent to the affidavit to set out in detail each item with its date; it is sufficient to put them into their proper class of document, provided that the description is sufficient to identify them with reasonable certainty. I think this description does sufficiently identify the documents, which are *prima facie* within the privileged area.

The remaining contention of counsel for the plaintiff was that this affidavit does not establish a claim for privilege with regard to these documents. His contention is that all that the defendants have done is to show that they have had for many years a well-established system of inquiry and report in respect of accidents, that this system comes into operation whenever an accident occurs, and is irrespective of the question whether or not a claim is made. He invites me to say, looking at the affidavit in this case, that all that the defendants have shown is that these documents came into existence as the result of and in the course of this well-established system, and that there might well have been a subsidiary purpose for which the defendants would use the reports and statements if and when litigation was anticipated or threatened; but he contends that it is not enough for the defendants to show that the documents merely came into existence as a result of the system with the addition that they might be usefully utilised if and when litigation was threatened. He contends that the defendants, in order to establish privilege, must show that the documents came into existence for the dominant or at any rate the substantial purpose of being placed before the solicitor for the purpose of advising or conducting the possible defence of the defendants against any claim which might arise.

The practice with regard to discovery and the production and inspection of documents, and the objections which can be made on the ground of privilege, are really a reconciliation between two principles. The first principle is that professional legal advice and assistance is at times essential in the interests of justice, and without the assistance of some protection it could not be obtained safely or effectually. Accordingly, the principle has become established that confidential communications passing between a person and his legal advisers are absolutely privileged. On the other hand, there is another principle of law that it is in the interests of justice that all material and relevant documents should be before the court to enable it to arrive at a true and proper conclusion, and also in order that the parties should not be taken by surprise. The practice which has developed is, as I have said, a reconciliation between those two principles.

I Counsel for the plaintiff has called my attention to a number of authorities going back as far as 1869. On looking at those authorities, I think that the earlier ones do seem to lay great emphasis on the principle to which I have already referred, namely, that it is highly desirable that all material and relevant documents should be at the disposal of the court. That trend seems to have

continued more or less until about 1913, and then the trend from that date onwards appears to be rather in the opposite direction and to have had greater emphasis on the claim for privilege, provided that the deponent to the affidavit can bona fide claim that the documents came into existence for the purpose of being laid before his solicitor and in anticipation of litigation. The earliest case to which I have been referred is *Woolley v. North London Ry. Co.* (1) ((1869), L.R. 4 C.P. 602). It is interesting to see that the documents in that case are very similar to the documents for which inspection is sought in this case. The headnote of the report reads:

"In an action against a railway company for a personal injury sustained by a passenger on their railway, the court allowed inspection of the following documents:— 1. A report of one of the defendants' inspectors to the general manager, as to the accident in respect of which the action was brought. 2. A report of the guard of the train to which the accident happened. 3. A report of the defendants' locomotive superintendent, to the general manager, as to the accident—upon the ground that they were reports or communications made by agents of the company in the ordinary course of their duty, for the purpose of conveying to the company information upon the subject, and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation . . ."

BOVILL, C.J., says in his judgment (L.R. 4 C.P. at p. 608):

"It is extremely difficult to lay down in precise terms a rule which will meet every case that may be brought under our consideration; but I will endeavour so to deal with the matter as to make this decision some guide for future applications of the like kind . . . I am of opinion that where a report is made by an officer of a company to the manager for the purpose of conveying information to him upon the subject to which it relates, it is not privileged, whether made before or after litigation has been commenced or threatened, and whether it contains matters of fact or of mere opinion: and that applies to all three of these reports. If opinions are obtained confidentially with a view to litigation, they are privileged on the ground laid down by the Court of Queen's Bench in *Chartered Bank of India, etc. v. Rich* (2) ((1863), 4 B. & S. 73) . . . I think, therefore, we may safely lay it down that, where information and opinions are obtained with a view to litigation, they are to be considered as privileged. It is not necessary to go through all the cases which have been decided in the equity courts upon this subject. It is clear there are many cases where it has been held that information, which may have been obtained in the ordinary course in apprehension of litigation, must be disclosed . . ."

BYLES, J., says (L.R. 4 C.P. at p. 611):

"I entirely concur in the general principles stated by my Lord. The result is that, where reports of this kind are made in the course and as part of the duty of the officer, whether an action is pending or not, and whether it contains facts or opinions, they must be produced; but, if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged."

MONTAGUE SMITH, J., said that he was of the same opinion and BRETT, J., said (*ibid.*, at p. 613):

"The question before us is, what is the general rule which is to regulate our discretion as to granting inspection of a certain class of documents, viz., reports and communications made by agents or servants, in the ordinary course of their duty, to their principals. It seems to me that the rule may be thus stated:— Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish,

A his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation. The documents numbered 1, 2 and 3 in this case are reports made by officers or servants of the company to the manager in the ordinary course of their duty; therefore, whether litigation had begun or was contemplated or not, they must be produced."

C That case is relied on very strongly by counsel for the plaintiff, and he suggests that in this case these reports were made in the ordinary course of this system which the railway company had established. The next case to which my attention was directed was *Parr v. London, Chatham & Dover Ry. Co.* (3) ((1871), 24 L.T. 558). The headnote reads:

D "In an action against a railway company for injuries to a passenger from an accident, the court made an order for the plaintiffs to have liberty to inspect reports as to the accident made by servants and officers of the company to their employers shortly after it took place; although the defendants stated, in their affidavit, that the documents contained statements made by various persons for the purpose of giving the defendants such information as would enable them to judge whether or not they could be made responsible to the plaintiffs or any other persons by reason of the matters stated therein, and were made in consequence of a custom requiring such statements to be made in all cases of any accident causing or being likely to cause personal injury to any passenger, and that the same constituted the instructions to the defendants' advisers, as to defending the action, and could not be produced to the plaintiffs without disclosing the grounds of their defence."

F KELLY, C.B., when dealing with the documents says (*ibid.*, at p. 559):

G "They consist of statements of the engine-driver, a guard, porter, a signalman, and a station master, and two reports made by the station master to the defendants' superintendent and general manager, and a statement by the guard of another company's train for the information of the defendants. The affidavit states the grounds on which the defendants object to the production of these documents, but what is stated amounts to little more than this, that they contain matters which may affect the defence, and that is insufficient. It is impossible that inspection could ever be allowed if we were to hold that this was a good ground of privilege. I do not say that particular parts of these documents might not be privileged from inspection, but these exceptional parts, if such there be, have not been pointed out in the affidavit. I am clearly of opinion that the rule should be made absolute."

H CHANNELL, B., in agreeing, adds (*ibid.*):

I "The principle is one and the same throughout. In the present case the plaintiffs have obtained the ordinary rule, calling upon the defendants to state what documents they have in their possession relating to the matters in dispute in the action, and whether they object to their production, and, if so, on what grounds. As to certain specified documents, an objection is offered on the ground that they contain statements, etc. made for the purpose of giving to the directors and managers of the defendants such information as would enable them to judge whether or not they could be made responsible to the plaintiffs or any other persons by reason of the matters

stated therein, and made in consequence of a custom or practice requiring such statements to be made in all cases of any accident causing or being likely to cause personal injury to any passenger, and that they constituted the instructions to the defendants' advisers as to defending the action, and could not be produced to the plaintiffs without disclosing the grounds of the defence'. But this is very different from the principles on which such reports have been held privileged. We must do the defendants the justice to suppose that the documents comprise a reference to some statements made to the company by strangers or others which the officers of the company might or might not have incorporated in their report. But the defendants have not limited their objection to such part of the statements as were made by various persons, not officers of the company, but have objected wholesale. We must therefore take it, that these were not reports made in consequence of any special application by the company."

PIGOTT, B., agreed. It will be noticed there that the effect of the affidavit was merely to say that the documents in question contained "matters which may affect the defence", and that was held by the court not to be sufficient.

The next case to be cited was *Fenner v. London & South Eastern Ry. Co.* (4) ((1872), L.R. 7 Q.B. 767), the headnote of which says:

"Communications between a person and his solicitor or counsel, or any person acting as their deputy, with a view to obtain legal assistance and advice, are privileged, and the court cannot compel them to be disclosed. Communications with any other person, although taking place after litigation is contemplated, are not necessarily privileged; but it is in the discretion of the court to compel or abstain from compelling their production. If such communications are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the court ought as a general rule to be to refuse inspection. Where they fall short of this, it should, as a general rule, be granted."

I need not go into that decision in further detail, in view of the later decisions on inspection.

In 1876 there was the decision in *Anderson v. Bank of British Columbia* (5) ((1876), 2 Ch.D. 644), which I think does fairly represent the high water mark to which the courts have gone in favour of those who seek to obtain inspection of documents of this character. The headnote in the report reads:

"A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:—Held (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced."

JESSEL, M.R., says (2 Ch.D. at p. 648):

"Now, there is not a syllable there which shows that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man—that is, the solicitor—for advice. If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. Nor is it suggested or alleged that, without being requested, the

A agent did make the communication with the object of its being laid before the solicitor for advice. He therefore did not make it as a confidential communication in any other sense than that in which every communication from an agent to his principal, or from a sub-agent to the chief agent of the principal, is confidential. Every such communication, no doubt, is in a sense confidential, but not in the sense in which we call a communication to a professional man confidential. This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication. All that you have got is a statement of the person who sent the telegram as to the state of his feelings at a particular time, which is not sufficient for the purpose of the point I have to determine. I therefore feel no difficulty whatever in saying that this clearly was not a confidential communication made within the rule which protects confidential communications from discovery as regards the other side . . . The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

F The matter then went to the Court of Appeal, and there JAMES, L.J., says (*ibid.*, at p. 656), after dealing with the practice in Chancery:

G "As to the cases at law, it is not necessary to go through them, as they seem to have been brought, apparently now at least, very much into conformity with the principle of the cases in equity, and it is needless to go through them for the purpose of seeing whether in each of them, if the same state of circumstances came before the court, the same decision would be arrived at. Looking at the dicta and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. But that seems to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. Such a communication is, above all others, the very thing which ought to be produced."

H MELLISH, L.J. (*ibid.*, at p. 658), agrees and says:

I "To be privileged it must come within one of two classes of privilege, namely, that a man is not bound to disclose confidential communications made between him and his solicitor, directly, or through an agent who is to communicate them to the solicitor; or, secondly, that he is not bound to communicate evidence which he has obtained for the purpose of litigation."

On the other side of the line, in 1878 there was *Southwark Water Co. v. Quick* (6) ((1878), 3 Q.B.D. 315), the headnote to which reads:

"Documents prepared in relation to an intended action, whether at the

request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a bona fide intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced."

A

COCKBURN, C.J., says (3 Q.B.D. at p. 317):

"The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk."

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C

MELLOR, J., agrees, and BRETT, L.J., says (*ibid.*, at p. 320):

"Now reading that passage [that is the passage to which I have already referred in the judgment of MELLISH, L.J., in *Anderson v. Bank of British Columbia* (5)] with what was said by MELLISH, L.J., in the course of the argument, it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged. It has been urged that the materials, or the information obtained for the brief, should have been obtained 'at the instance' or 'at the request' of the solicitor; but I think it is enough if they come into existence merely as the materials for the brief, and I think that phrase may be enlarged into 'merely for the purpose of being laid before the solicitor for his advice or for his consideration'."

D

E

Those words "merely for the purpose of being laid before the solicitor for his advice" were referred to by SCRUTTON, L.J., in another case to which I will refer later. BRETT, L.J., goes on (*ibid.*):

"If this is the correct rule, the only question is whether the affidavits in the present case bring the documents under discussion within that rule. . . . The object for which the notes were taken, and the transcript made, was that they might be furnished to the solicitor for his advice. If that is so, then it stands on the same footing as the others, except that it was not sent to the solicitor; that cannot make any difference. If at the time the document is brought into existence its purpose is that it should be laid before the solicitor, if that purpose is true and clearly appears upon the affidavit, it is not taken out of the privilege merely because afterwards it was not laid before the solicitor."

F

G

COTTON, L.J., agreed, and says (*ibid.*, at p. 322):

"That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor."

H

The next case cited was *Collins v. London General Omnibus Co.* (7) ((1893), 68 L.T. 831). The headnote reads:

"An accident, upon which the plaintiff subsequently founded an action for negligence against the defendants, occurred about six o'clock in the evening, and on the following day a written report thereof was made by the defendants' servant, at a time when no action had been commenced or even threatened. Privilege from inspection was claimed for this report, on the ground that it had been made or had come into existence solely for the use of the defendant company's solicitor, in anticipation of this action, to advise the company in reference thereto. Held, that, though there was at the time

I

A of the making of the report no action begun or even threatened, the circumstances of the case were such as to raise a high probability, amounting almost to a certainty, that litigation would ensue, and that the report, having come into existence, in view of litigation reasonably apprehended, for the purpose of being laid before the defendants' professional adviser, was privileged from inspection by the other side."

B WILLIS, J., when dealing with the affidavit says—and I merely pick out the salient words from his judgment (*ibid.*, at p. 832):

"There was [abundant evidence] in the present case to indicate that this document came into existence for no purpose other than for the use of the solicitor, in anticipation of this action . . ."

C In another passage he says (*ibid.*):

"If the circumstances were such that no reasonable person could doubt that an action would follow, they might lay the foundation of privilege for such a document as this."

CHARLES, J., agreed and says (*ibid.*, at p. 833):

D "The affidavit says that the report was made 'for no purpose other than for the use of the defendants' solicitor in anticipation of litigation', and that is a most important allegation."

The next case cited was *Jones v. Great Central Ry. Co.* (8) ([1910] A.C. 4), in which case the rule stated by JESSEL, M.R., in *Anderson v. Bank of British Columbia* (5) is cited with approval. The headnote reads:

E "A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants:—Held, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced."

G LORD LOREBURN, L.C., says (*ibid.*, at p. 5):

H "My Lords, the rule on this branch of the law of discovery is that, in order to enable a man to confide unreservedly in his legal adviser, all communications between client and solicitor are protected. The rule is expressed by JAMES, L.J., in the case of *Anderson v. Bank of British Columbia* (5) as follows. He says: 'The old rule'—meaning the ancient and venerable rule which still exists—'was that every document in the possession of a party must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. It was established that communications that had passed directly or indirectly between a man and his solicitor were privileged, and the privilege extended no further'. Both client and solicitor may act through an agent, and therefore communications to or through the agent are within the privilege. But if communications are made to him as a person who has himself to consider and act upon them, then the privilege is gone; and this is because the principle which protects communications only between solicitor and client no longer applies. Here documents are in existence relating to the matter in dispute which were communicated to someone who was not a solicitor, nor the mere alter ego of a solicitor. Disclosure is constantly required of letters between partners or between a firm and its agents. It is rare in litigation when communications are confined to letters passing between solicitor and client. And every

large concern, whether a railway company or a trade union or whatever it be, that must needs conduct its business by correspondence is amenable to the same rule—a rule in itself wholesome, for it favours the placing before a court of justice of all material circumstances that may lead to a just decision.”

So as late as 1910 the principle established in *Anderson v. Bank of British Columbia* (5) was being cited with approval by the House of Lords.

Then there came a case to which great importance is attached by both parties: *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9) ([1913] 3 K.B. 850). In this case the judge in chambers did actually inspect the documents, and the affidavit contained this passage:

“The documents came into existence and were made after this litigation was in contemplation and in view of such litigation for the purpose of obtaining for and furnishing to the solicitor of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants.”

That is language very similar, although not identical, with the language used in the affidavit in this case. The headnote says:

“Held, first, that the judge at chambers and the Court of Appeal were entitled under Order 31, Rule 19A (2), to inspect the documents for the purpose of deciding on the validity of the claim of privilege . . . It is not necessary that the affidavit should state that the information was obtained ‘solely’ or ‘merely’ or ‘primarily’ for the solicitor, if it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated.”

This case is of considerable importance when applied to the facts of the present case, because it is contended by the defendants that the documents in question were obtained for two purposes, one of which was for the purpose of placing them before the solicitor in order to take his professional advice in view of “proceedings pending, or threatened, or anticipated”. All three of the lords justices agreed in the result, but VAUGHAN WILLIAMS, L.J., said that in dealing with the details he preferred the judgment of BUCKLEY, L.J., to that of HAMILTON, L.J. BUCKLEY, L.J., says (*ibid.*, at p. 855):

“An affidavit of documents is sworn testimony which stands in a position which is in certain respects unique. The opposite party cannot cross-examine upon it and cannot read a contentious affidavit to contradict it. He is entitled to ask the court to look at the affidavit and all the documents produced under the affidavit, and from those materials to reach the conclusion that the affidavit does not disclose all that it ought to disclose.”

Then he goes on to deal with what can be done by way of obtaining a further affidavit of documents, and says (*ibid.*, at p. 856):

“The question for determination here is I think whether the documents in question fall within the principle of *Anderson v. Bank of British Columbia* (5) or within that of *Southwark Water Co. v. Quick* (6) . . . The language in which the affidavit in the present case is framed is, in my opinion, such as to bring the case outside *Anderson v. Bank of British Columbia* (5) and within *Southwark Water Co. v. Quick* (6). It is not I think necessary [and this is an important passage in his judgment] that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above

A stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all."

HAMILTON, L.J., although he concurred in the result, put his judgment in a slightly different form. He says ([1913] 3 K.B. at p. 859):

"It has been argued for the respondents that the claim of privilege is bad in form, because, when stating that the documents came into existence for the purpose of being submitted to the defendants' legal advisers, it does not say that they did so 'primarily' or 'substantially' or 'specially'. It is not contended that the affidavit must state that they did so 'solely'. The contention in reply that 'for the purpose' means in itself as a matter of construction that such purpose is the principal if not the only purpose is, I think, unsound. The affidavit as sworn in my opinion makes the purpose of submission to the solicitor equally one of many purposes, and is consistent with that purpose being the least important and the most unusual of them all. It is then argued by the appellants that even so the claim is good in form, but upon this argument every document that ever comes into existence in the ordinary course of business would be effectually covered by the claim. The larger the business and the better its organisation the more necessary it is that written records should be regularly made of every detail and every occurrence, common and uncommon. In a sense not altogether illusory every one of these records, from the office boy's postage book to the chief cashier's ledger, comes into existence for the purpose, if peradventure there should be litigation or fear of it, of putting the legal advisers in a position to advise fully and to conduct the case successfully, though in nine hundred and ninety-nine cases out of a thousand no such use of the entries will ever be made. To hold such documents privileged merely because it can be shown of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice."

Counsel for the plaintiff relies very strongly on that passage. HAMILTON, L.J., continues (*ibid.*, at p. 860):

"... I think it a dangerous proposition that any particular formula must as such be conclusive even against the evidence of the scheduled documents themselves. The clause of the affidavit is a hybrid, made up by combining a variety of phrases which have passed muster in decided cases. It is dangerous to rely on these artificial creations. Claiming privilege in an affidavit of documents is not like pronouncing a spell, which, once uttered, makes all the documents taboo. The draftsman should draw each affidavit with reference to the actual facts of the case and bearing them in mind. The selection of well-tried formulae from a precedent book only leads to that inconsiderate swearing which is the bane of the practice as to discovery. The only authority cited to us for the proposition that the formula need not contain the statement that submission to the solicitor was the primary or the substantial purpose with which the document was brought into existence, and may even negative it, is *London & Tilbury Ry. Co. v. Kirk & Randall* (10) (1884), 28 Sol. Jo. 688, a decision which, if correctly reported, I think is wrong."

My attention was directed to one further passage where HAMILTON, L.J., says ([1913] 1 K.B. at p. 861):

"Hence I should not have been disposed to interfere with the order which BUCKNELL, J., in his discretion made as to particular documents, but on examining them I think he has proceeded on a wrong principle. He has drawn his distinguishing line by the date at which the defendants first

received a letter of claim from the plaintiffs, a test which, though often unexceptionable, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins v. London General Omnibus Co.* (7), at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably ensue."

The next case which has been cited is *Adam S.S. Co., Ltd. v. London Assurance Corpn.* (11) ([1914] 3 K.B. 1256). BUCKLEY, L.J., having referred to the description of the documents in the affidavit, says (*ibid.*, at p. 1259):

"... now come the relevant words—'such cables and correspondence being with regard to the subject matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf'. To my mind that is a complete and satisfactory claim of privilege based upon the grounds recognised in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9). The question to be answered is this: Is the judge satisfied that the documents, which are sought to be protected, were bona fide obtained for the solicitor, though not actually by him?"

That is the question to which I have to direct my mind. KENNEDY, L.J., agreed and he said that it seemed to him that the *Birmingham* case (9) was directly in point.

The Hopper No. 13 (12) ([1925] P. 52) was of some special interest because the party who was seeking to obtain the privilege had a regular system under which it received reports of collisions. The headnote reads:

"In obedience to general instructions issued by the Port of London Authority to the masters of their vessels that, in the event of a casualty, the circumstances of the occurrence were to be reported on a printed form supplied for the purpose, the master of one of the authority's dredgers reported the details of a collision with a sailing barge belonging to the plaintiffs. The form was headed, 'Confidential report for the information of the authority's solicitor . . .' The report was sent to the master's superior officers, who passed it on to the manager of the authority's insurance department, and he in turn sent it to the solicitors who acted for the authority's underwriters. The plaintiffs contended that the report must be produced:—Held, that there having been a collision it was to be anticipated that there would be litigation, and that, although the report went through various hands, it was made for the purpose of being put before the solicitors: that the report therefore complied with the tests laid down by BUCKLEY, L.J., in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9) and was privileged from production."

It is not necessary for me to refer in detail to the system which was adopted in that case, but the decision is of special interest when dealing with the present case because the British Transport Commission have a system of inquiry and reports in cases of accidents to their employees. SIR HENRY DUKE, P., refers in detail to the system adopted by the Port of London Authority, and says (*ibid.*, at p. 57):

"I take those to be the facts; and it seems to me that when the facts are ascertained the case clearly comes within the principle which is enunciated by BUCKLEY, L.J., in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9)."

Then he refers to the test to which I have already drawn attention, namely, by asking those two questions: "Was the document obtained for the solicitors in the sense of being procured as materials upon which professional advice should be given in proceedings pending, or threatened or anticipated? Was this report obtained for the solicitors?" HORRIDGE, J., concurred. This case was

A followed by *The City of Baroda* (13) ((1926), 134 L.T. 576). LORD MERRIVALE, P., says (*ibid.*, at p. 577):

B “ [The defendants’] prima facie obligation is to disclose those documents with such particularity that an order for production and inspection can be made. But the prima facie obligation which exists is limited by a principle of law which does not need to be expounded today, which is summed up in the judgment of COTTON, L.J., in the case of *Southwark Water Co. v. Quick* (6) in these words (3 Q.B.D. at p. 322): ‘ That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged ’. That is the broad principle upon which exemption from a prima facie right is allowed in the case of communications with solicitors. The matter has been expounded often at great length . . . If I could come to the conclusion that the affidavit here was a mere routine mode of stating the conclusions upon which privilege is properly founded, and if the correspondence provided support for a conclusion to that effect, I might see my way to sustain the decision of the learned deputy registrar. But I have read the correspondence which has been produced. The documents in question, naturally enough, have properly not been produced, but the correspondence which has been produced seems to me to show that the documents in question are not within the privilege when it is properly understood. There are no documents which came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or enabling him either to prosecute or defend an action, and they do not come within the description of documents obtained for the solicitor.”

In *Ogden v. London Electric Ry. Co.* (14) ([1933] All E.R. Rep. 896), SCRUTTON, L.J., reviewed a great many of the authorities. It is interesting to observe that the claim for privilege was made in respect of:

F “ Reports by servants of a railway company made for the information of the railway company’s solicitors and in anticipation of litigation.”

At the commencement of his judgment SCRUTTON, L.J., says (*ibid.*, at p. 897):

C “ The appeal here is in a class of case which I have long thought had been laid to rest, because the law had been settled, but apparently this may not be a case of the class which I had thought was settled.”

G That was in 1933, and we are now in 1958 with this question still in dispute. SCRUTTON, L.J., goes on (*ibid.*, at p. 899):

H “ Some trouble was caused about fifty years ago by *Anderson v. Bank of British Columbia* (5), in which case a principal writing to his agent, not a solicitor, said: ‘ Tell me what has happened ’—with no statement at all by either side—‘ this is for the purpose of consulting my solicitors ’. The facts are quite simple, but, unfortunately, in the judgments, language was used which went far beyond those facts. The difficulty occasioned by *Anderson v. Bank of British Columbia* (5) was met by the judgments in *Southwark Water Co. v. Quick* (6), which dealt with statements taken for the purpose of submission to a party’s own solicitor, before a writ has been issued. Even that case raised some difficulties, because while the judgment of COTTON, L.J., showed that it was not necessary that the only purpose of taking the statements should be for submission to the solicitor, LORD ESHER, in at least three sentences, said that the statements should be taken merely for the purpose of submission to the solicitor. That difficulty was resolved and settled in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9), where BUCKLEY, L.J.—in whose judgment VAUGHAN WILLIAMS, L.J., concurred, preferring BUCKLEY, L.J.’s way of expressing the matter to that of HAMILTON, L.J., who concurred in

the result—said ([1913] 3 K.B. at p. 856): ‘It is not, I think, necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all’ . . . In my view, this case comes exactly within the principles stated by BUCKLEY, L.J., in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9). Consequently, it being agreed that the claim for privilege . . . goes too far, in my opinion the first heading, heading (a), requiring the reports of the accident to the plaintiff to be produced, was erroneous, and the order of the master should be restored also on that issue.”

GREER, L.J., and ROMER, L.J., concurred.

Counsel for the defendants also called my attention to *Feuerheerd v. London General Omnibus Co.* (15) ([1918] 2 K.B. 565). He says that the important principle to be extracted from that case is that it is quite immaterial what was the intention or what was in the mind of the person who made the statement; the important question is what was the purpose for which the statement was made. The headnote there reads:

“In an action claiming damages for negligence the defendants by their affidavit of documents claimed privilege in respect of a certain statement which they said was obtained for the purpose of being laid before their solicitors for the defence of the action. The document in question was a joint statement made and signed by the plaintiff and her sister-in-law, both of whom, in making it, were under the impression that the person to whom they made it was the representative of the plaintiff’s solicitor. In fact the person to whom they made the statement was the defendants’ claims inspector, but the misapprehension in the minds of the plaintiff and her sister-in-law was not induced by any deceit on his part:—Held, that the statement was privileged from discovery.”

PICKFORD, L.J., says (*ibid.*, at p. 568):

“It has been contended that a statement of this kind is privileged only if it was intended to be made by the person making it for the benefit of the principal of the person to whom it was made. I cannot accept that as the ground of the privilege. In BRAY ON DISCOVERY (p. 406) under the heading ‘As to distinguishing between the protection attaching to materials for evidence and the doctrine of professional privilege’, the learned author correctly states the principles underlying these questions, but I cannot find there or elsewhere anything suggesting that protection depends upon the intention of the person making a statement. The privilege is that of the litigant, and, whether it is sought on the ground that it is something communicated to his solicitor or as materials of his evidence, the privilege is quite independent of the intention of the person making the statement.”

Then there was *Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd.* (16) ([1959] 2 All E.R. 596). The important part of that decision for my present purpose is that there it was held that, *prima facie*, the correspondence was of a character in respect of which the claim to privilege was justified. That the insurers were concerned in the matter only because they had agreed to indemnify the defendants against a claim in the nature of that which the plaintiffs were making, and, that being so, the fact that the defendants had communicated with the insurers indicated that a claim was anticipated. That in such circumstances, a communication between the defendants and their insurers, whether directly or through their brokers, would be directed to whether the claim should be disputed or

A admitted, and, if disputed, how best to conduct the defence. That the communications, being of that character, were well within the privileged area; the affidavit on its face made out a *prima facie* case of privilege; and in the circumstances the court would not look at the correspondence. Then there was this passage in the judgment of JENKINS, L.J. (*ibid.*, at p. 603):

B "The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances, but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, *prima facie*, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents."

C That is the view which I take on the facts of the present case.

D There has also been called to my attention an unreported decision by McNAIR, J., in *Smith v. British Transport Commission* (17), in which the documents for which privilege was claimed were: "(1) File of papers marked 'B' of the British Transport Commission Police, York, containing reports and statements and correspondence subsequent thereto, and (2) Notebook of P.C. Moss, British Transport Commission Police". That, of course, was quite a short description of the documents, which is certainly not more precise than in this case. In the course of his judgment McNAIR, J., said "today it is almost invariable that when personal injury occurs on the docks a claim may be made and the reasonable anticipation of the commission is of the probability or possibility of a claim being made"—and I think that is equally true of the railways; one has only to sit in these courts for a comparatively short time to find out that that is the position. McNAIR, J., went on to deal with the system which was referred to in that case, and said that no doubt those reports were prepared for other purposes as well. That is equally true in this case; these reports and statements are prepared for other purposes as well, they are prepared because the commission is under a statutory duty to make a report to the authorities, and they are also produced partly for their own purpose. McNAIR, J., continued:

E "No doubt these reports are prepared for other purposes as well in order that the commission can see that their employees are carrying out their work satisfactorily, or for statistics. The only question on these affidavits is whether (I being satisfied that the affidavits set out the true position) it is sufficient to obtain protection to say that the documents were made for the purpose '*inter alia*' of being sent to the commission's solicitor."

G Then he pointed out that that precise point was involved in *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (9), and he concluded his judgment by saying "If the affidavit honestly says that the purpose of submission to the solicitor is one of the purposes, that is sufficient". That seems to me to cover this case, where it is said that the documents in this action

I "came into existence and were made by the defendants or their officers after this litigation was in contemplation and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the defendants evidence and information as to the evidence which will be obtained or otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants."*

If I apply the two tests which the Court of Appeal have said should be applied, I think those two questions must be answered in the affirmative. These documents did come into existence for the purpose of being put before the solicitor,

* Compare footnote p. 17, ante, and the passage there referred to.

and for the purpose of being used not necessarily in existing litigation, but in anticipated litigation. I think that in these days the British Transport Commission are entitled to say that, whenever a man is fatally injured in the course of his work on the railway line, there is at least a possibility that litigation will ensue. In those circumstances, there is no material on which I can come to the conclusion that there is any ground for challenging the correctness or conclusiveness of the affidavit, and I feel constrained to hold that the claim for privilege has been established, and this appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

LONGTHORN v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Diplock, J.), October 3, 1958.]

Discovery—Production of documents—Privilege—Accident reports—Report of private inquiry held by British Transport Commission into cause of accident—Privilege claimed in affidavit on ground that purpose of report “inter alia” to furnish evidence and information to commission’s solicitor—Statement in report that plaintiff told purpose of inquiry not to establish guilt but cause of accident—Whether claim of privilege established by affidavit—Whether report itself privileged.

In March, 1955, shortly after an accident in respect of which the plaintiff brought this action for damages from the British Transport Commission, his employer, the commission held a private inquiry into the cause of the accident, in which the plaintiff took part. At the time of the inquiry, the commission did not know that the plaintiff intended to bring the action and first became aware of this from a letter dated July 5, 1955. The writ commencing the action was issued by the plaintiff on Feb. 29, 1956. In a list of documents filed by the commission, the commission claimed privilege from production for inspection in respect of documents set out in the first schedule to the list, which included the report of the private inquiry, on the ground that the documents came into existence “wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the [commission] evidence and information . . . for the use of the said solicitor” to enable him to conduct the defence or to advise the commission. Subsequently the commission filed an affidavit in which privilege was claimed on the ground that the documents came into existence “for the purposes, inter alia, of obtaining for and furnishing to the solicitor . . .” The report stated that at the inquiry it was explained to the plaintiff that the purpose of the inquiry was to ascertain the cause of the accident with a view to safeguarding against future accidents, rather than to establish guilt. On appeal from the order of a master requiring the commission to produce the report for inspection by the plaintiff,

Held: (i) the claim of privilege was not established by the ground put forward in the affidavit, viz., that the documents including the report were made for the purposes “inter alia” of furnishing evidence or information to the solicitor, without stating that that was the main purpose, since privilege was not established by the mere fact that one of the purposes

A of a document, however improbable, might be to furnish evidence to the party's solicitor; accordingly the court was entitled to and would look at the report itself.

Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co. ([1913] 3 K.B. 850); *Ogden v. London Electric Ry. Co.* ([1933] All E.R. Rep. 896) considered.

B (ii) the report showed that the inquiry was not convened for the purpose of furnishing evidence or information to the commission's solicitor, and therefore the report was not privileged.

Appeal dismissed.

[Editorial Note. The decision in this case should be considered with that in *Seabrook v. British Transport Commission* (p. 15, ante), to which reference is made at p. 34, letters G to I, post.

C As to privilege in respect of documents prepared in relation to an intended action, see 12 HALSBURY'S LAWS (3rd Edn.) 46, para. 63; and for cases on the subject, see 18 DIGEST (Repl.) 111, 112, 936-952.

As to claiming privilege from production for inspection, see 12 HALSBURY'S LAWS (3rd Edn.) 37, 38, para. 53.]

D Cases referred to:

(1) *Smith v. British Transport Commission* (Mar. 7, 1956) unreported.

(2) *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 18 Digest (Repl.) 53, 409.

E (3) *Ogden v. London Electric Ry. Co.*, [1933] All E.R. Rep. 896; 149 L.T. 476; 18 Digest (Repl.) 112, 951.

(4) *Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd.*, [1950] 2 All E.R. 596; [1951] 1 K.B. 134; 18 Digest (Repl.) 107, 918.

Interlocutory appeal.

F This was an appeal by the defendants, British Transport Commission, from an order, dated June 20, 1958, made by Master DIAMOND under which the defendants were ordered, within twenty-one days, to produce for inspection by the plaintiff in the action, Raymond Stephen Longthorn, reports of a private inquiry held by the defendants shortly after Mar. 19, 1955, and referred to in their letter of that date, including the statements of witnesses made in and for the inquiry. The reports were included in part 2 of the first schedule to the

G defendants' affidavit of documents, and were documents for which privilege from production was claimed by the defendants in their affidavit. The inquiry, in which the plaintiff had taken part, took place shortly after an accident in respect of which the plaintiff was claiming damages against the defendants in the action. The writ commencing the action was issued on Feb. 29, 1956, and the plaintiff's claim was first intimated to the defendants by a letter dated July 5, 1955.

H Originally, the defendants had filed a list of documents (instead of an affidavit) dated Nov. 4, 1957; in para. 2 of the list they had claimed privilege in respect of documents described in part 2 of the first schedule to the list as "correspondence between and reports made by the defendants' officers and servants and correspondence between the defendants and their solicitor . . ." on the ground that

I "they are privileged from production . . . as being documents which came into existence and were made by the defendants or their officers after this litigation was in contemplation and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the defendants evidence and information . . . for the use of the said solicitor."

This was an adequate claim for privilege in a well known form. Subsequently, however, the list of documents was replaced by an affidavit of documents, filed on Apr. 25, 1958, in which privilege for the documents described in part 2 of

the first schedule to the affidavit was claimed on the grounds that the documents came into existence A

"for the purposes, inter alia, of obtaining for and furnishing to the solicitor of the defendants evidence and information . . . for the use of the said solicitor."

The documents in part 2 of the first schedule of the affidavit were described as B

"correspondence between and reports made by the defendants' officers and servants and correspondence between the defendants and their solicitor which came into existence after this claim was anticipated and for the purposes, inter alia, of obtaining and furnishing to the solicitor of the defendants evidence and information for the use of the said solicitor."

The appeal was in chambers but judgment was delivered in open court. C

Marren Everett, Q.C., and *Tudor Evans* for the defendants, the appellants.
J. R. Macgregor for the plaintiff, the respondent.

DIPLOCK, J., having referred to the course of proceedings for production, to the list of documents originally filed by the defendants and to the affidavit of documents subsequently filed by them, continued: There have been within the last six or eight months other cases regarding the question of the right of the British Transport Commission to claim privilege for reports in respect of accidents about which civil litigation has subsequently arisen; there was the decision of McNAIR, J., in an unreported case, *Smith v. British Transport Commission* (1) (Mar. 7, 1956), in which on the evidence before him he held that a right to privilege existed in respect of reports made by the railway police on an accident which occurred on railway premises. In that case there was a detailed affidavit as to the circumstances in which such reports are made and an affidavit to say that in cases where a legal claim may be made against the commission in respect of such accident, the notes and reports are for the purpose, inter alia, of instructing the commission's solicitor as to the circumstances to enable him to advise the commission. McNAIR, J., in that case held that privilege applied to the reports with which he was concerned. In the course of his judgment, of which I have got a note, he examined certain of the authorities and in particular *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (2) ([1913] 3 K.B. 850). A little later, in July, 1958, HAVERS, J., had a similar point in relation to a report on an accident which had occurred to a platelayer. In that case* the affidavit† claimed that the reports of which inspection was sought had been made by the defendants or their officers E

"after this litigation was in contemplation and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the defendants evidence and information" etc. F

HAVERS, J., adjourned the matter into open court to deliver his judgment, of which I have a shorthand note, in which he considered in detail many of the authorities in the long string of authorities on this subject dating from some ninety odd years ago, and the decision is a valuable authority on this branch of the law of procedure. Although I am not bound by the judgment of another judge of *nisi prius* I have no hesitation in saying that I agree with every word that HAVERS, J., said in his judgment. G

That does not dispose of this case, because in that case there was an affidavit‡, which HAVERS, J., accepted, that the documents were prepared wholly or mainly for the purpose of being furnished to the solicitor. In this case there is no such claim on affidavit and indeed there was a change from that claim, which was H

* *Seabrook v. British Transport Commission* reported p. 15, ante. I

† That is, an affidavit filed subsequently to the list of documents claiming privilege in the same terms as the claim in the list of documents, which terms are stated at p. 16, letter I, to p. 17, letter A, ante. The affidavit referred to is that dated Feb. 4, 1958, to which reference is made at p. 17, letter H, ante.

A made in the list of documents, to a claim that the reports were prepared "inter alia" for the appropriate purpose. Counsel for the defendants has urged that it is sufficient if one of the purposes of the preparation of the report, even though it were a minor purpose—even though, I think, it were a very minor purpose—is that it is to be shown to the solicitors if litigation follows, that that is sufficient to establish the claim of privilege, and that an affidavit in that form is one

B behind which I ought not to go, and that I ought not to look at the document itself.

I do not think that the cases go so far as to establish that. Counsel for the defendants relies on *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (2), and *Ogden v. London Electric Ry. Co.* (3) ([1933] All E.R. Rep. 896). *Birmingham & Midland Motor Omnibus Co., Ltd. v. London & North Western Ry. Co.* (2) was a case in which the form of the affidavit was that the documents came into existence and were made after litigation was in contemplation, and in view of such litigation, for the purpose of obtaining for and furnishing to the solicitor for the defendant company evidence and information, etc. It was argued in that case that the failure to put in the affidavit the words "wholly or mainly" entitled the plaintiff to inspection of the documents.

D The Court of Appeal held that that was not so, that the matter did not depend on the exact form of the affidavit, and having looked at the documents, held that that was a case in which privilege was properly claimed.

I do not think that I need read any more of the case than this. In his judgment, which was preferred by VAUGHAN WILLIAMS, L.J., BUCKLEY, L.J., said this ([1913] 3 K.B. at p. 856):

E "It is not I think necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above

F stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all. Having inspected the documents, as I think we are entitled to do, I am satisfied that this affidavit has not been made with a view to sheltering under a form of words, which in itself covers the ground, documents which ought to be produced. Were I of a contrary opinion I should not hesitate to make

G an order to defeat that intention."

I do not read BUCKLEY, L.J., in that case as laying down any rule that if one of the purposes, however insubstantial, is that it may be shown to the solicitor if litigation ensues, that in itself gives a right to claim privilege. HAMILTON, L.J., whose judgments are always entitled to the greatest possible respect, expressly disclaimed any such view ([1913] 3 K.B. at p. 859) where he says:

H "In a sense not altogether illusory every one of these records, from the office boy's postage book to the chief cashier's ledger, comes into existence for the purpose, if peradventure there should be litigation or fear of it, of putting the legal advisers in a position to advise fully and to conduct the case successfully, though in nine hundred and ninety-nine cases out of a thousand no such use of the entries will ever be made. To hold such documents

I privileged merely because it can be shown of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice."

In *Ogden v. London Electric Ry. Co.* (3) ([1933] All E.R. Rep. 896) the passage on which counsel for the defendants relies is a passage in the judgment of SCRUTTON, L.J., in which the other members of the court concurred, of which

I think I must read the whole paragraph because the context of the particular words on which counsel relies throws, I think, some light on the true meaning of those words. I should add that the reports were very similar to the sort of report which is described in the affidavit of documents in this case. SCRUTTON, L.J., said this ([1933] All E.R. Rep., at p. 900):

"Counsel for the plaintiff argues that the facts here should be distinguished, because these reports are made to a company to enable it to conduct its own business, namely, to carry on its business without accidents, without any regard to litigation. That may be so. It may be that that is part of the purpose of making the reports, but there is also the substantial purpose that if a writ is issued these are the materials that will be wanted by the solicitor conducting the litigation, and they are obtained for that purpose, among others, and as appears from the form at which we look—because the judge below has looked at these documents—the reports are made on a form headed: 'For the information of the company's solicitors only.' That is a most important heading, because if a man knows that he is making a confidential report to the solicitor he is much more likely to state accurately what has happened than if he is afraid that somebody presently seeing that report may take proceedings against him in respect of the statements that he has made, which may be defamatory."

I do not think that it is necessary in this case for me to seek to lay down to what extent the purpose of furnishing the documents to the solicitors must be a main or substantial purpose, and at what point it becomes so subsidiary to other purposes that privilege cannot be claimed in respect of the documents. I am not satisfied on the authorities that the mere fact that it may be one of the purposes, however insubstantial and however improbable, is a ground for a claim of privilege.

I think, therefore, that whereas the form in which privilege was claimed in the list of documents would have been sufficient of itself to claim privilege, the form in which it was claimed in the affidavit, merely that it was for the purpose inter alia, is insufficient, of itself, to establish conclusively a claim for privilege. I accordingly have to look at the nature of the documents in respect of which privilege was claimed, in the first instance, I think, to see whether they are documents which in their nature are likely to be documents prepared or obtained for the purpose of showing to solicitors, such as the correspondence between the company and its insurers in *Westminster Airways, Ltd. v. Kuwait Oil Co., Ltd.* (4) ([1950] 2 All E.R. 596). When I looked at the affidavit, and saw the description of "correspondence between and reports made by the defendants' officers and servants and correspondence between the defendants and their solicitor which came into existence after this claim was anticipated and for the purposes, inter alia, of obtaining and furnishing to the solicitor of the defendants evidence and information" it seemed to me that the description "Correspondence between and reports made" was too wide to assist me to say whether the nature of the documents was such that a sufficiently substantial purpose would be that of showing to the solicitor. The actual document of which inspection is sought is described as "The report of the private inquiry held by the defendants shortly after Mar. 19, 1955 . . . including statements of witnesses made in and for the said inquiry". I must say that the nature of the document very nearly persuaded me that it was such that it was likely to fall within privilege without the necessity for my looking at it. But I decided in my discretion that I ought to look at it* because there may be different reasons for an inquiry to be made after an accident, and accordingly it was produced. It is the report

* Where privilege is claimed for any document the court may inspect it for the purpose of deciding the validity of the claim, see R.S.C., Ord. 31, r. 19A (2). In *Stoddart v. British Transport Commission*, p. 15, ante, the court declined to inspect the document under this power.

A of "a court of inquiry set up to investigate the circumstances of an accident to R. S. Longthorn [the plaintiff], Capstanman, Aston Goods Station, Jan. 21, 1955". After two preliminary paragraphs it goes on as follows:

B "It was then explained to the injured man the purpose of the inquiry, that it was not so much convened to establish guilt or attach blame to either himself or any other person who may have been concerned, but rather to ascertain the cause of the accident with a view to safeguarding against any possible similar happening in the future. Longthorn's co-operation was invited to this end, this being willingly promised by him."

C Counsel for the defendants has argued that that is not only consistent with but shows that the inquiry and the report was for the purpose of being furnished to the defendant's solicitor in the event of litigation, relying on the words that it was not so much convened to establish guilt but rather to ascertain the cause of the accident. I asked him if those words could properly be construed as meaning it was partly convened to establish guilt and attach blame and partly to ascertain the cause of the accident with a view of safeguarding against any possible similar happening in the future. I think that counsel was inclined to say that it was. I do not accept that; on the face of this document it shows that the purpose of the inquiry was not for the purpose of furnishing to the solicitor, and I read it as an express disclaimer by the chairman of the inquiry that that was its purpose. Whether they had at the back of their minds that it could be furnished to the solicitors at that time I do not know. I hope not, because if they had it seems to me a most deceptive way of describing the purpose of an inquiry at which the plaintiff was being asked to give evidence how the accident happened in order to protect his workmates in the future.

E I hold, therefore, that on the facts of this case neither this document nor any part of it is privileged, because the inquiry was not to any appreciable extent for the purpose of obtaining for or furnishing to the solicitor to the commission evidence and information as to the evidence which will be obtained.

F I would add one other matter. If I am wrong as to that it seems to me that the plaintiff was misled into giving the evidence that he did, and I would hold even if I were wrong on the main ground of my decision, that the commission was estopped from claiming privilege in respect of that part of the document which contains the plaintiff's evidence. This appeal is dismissed with costs.

Appeal of defendants dismissed.

Solicitors: *M. H. B. Gilmour* (for the defendants, British Transport Commission); *Tuck & Mann*, agents for *David G. Barnett & Co.*, Birmingham (for the plaintiff).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

QUALCAST (WOLVERHAMPTON), LTD. v. HAYNES.

[HOUSE OF LORDS (Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), February 23, 24, 25, March 25, 1959.]

Safe System of Working—Extent of master's duty—Duty to give information or advice—Availability of protective clothing insufficient—Foundry—Injury to experienced moulder.

Judgment—Judicial decision as authority—Negligence—Reasons given by judge for coming to conclusions of fact not to be regarded as law.

The respondent was employed at the appellants' foundry as a moulder. He was thirty-eight years old and had been a moulder all his working life. While he was casting at the moulding boxes, the ladle of molten metal which he was holding slipped, and some of the metal splashed on to his left foot and, as he was not wearing protective spats or special boots, his foot was injured. The appellants kept in their stores spats which could be had by any workman for the asking, and strong boots which could be had on payment. The respondent knew that the spats and boots were available. The appellants had not ordered or advised the respondent to wear protective clothing, as he was an experienced worker, and he knew and appreciated the risks of the metal splashing which attached to his work. In an action for damages against the appellants, the respondent alleged negligence on their part in failing to provide any or any proper spats or other sufficient protective clothing, and in failing to provide a safe system of work and safe and proper plant and equipment. The county court judge found that there had been a breach of duty at common law by the appellants to the respondent, but that the respondent was guilty of contributory negligence, and that his share of the responsibility was seventy-five per cent. He expressed the view that, had he not been bound by authority, he would have decided that the respondent was so experienced that he needed no warning, that what he did was with the full knowledge of all the risks involved, and that there was no negligence on the part of the appellants.

Held (LORD COHEN dissenting): a failure of duty on the part of the appellants, as employers of the respondent, had not been established, because the respondent was an experienced moulder and by making protective spats available to him, to his knowledge, the appellants had on the facts of this case sufficiently provided proper protective clothing and had fulfilled their duty to take reasonable care for his safety, despite the fact that they had not brought pressure to bear on him to wear the spats.

Per LORD SOMERVELL OF HARROW and LORD DENNING (LORD COHEN concurring): reasons given by a judge for reaching conclusions on a question of negligence which, if the trial were with a jury, the jury would decide, were not propositions of law and authorities should not be cited for them (see p. 43, letters F to I, and p. 45, letter G to p. 46, letter B, post; cf. p. 42, letter B, post).

Per LORD SOMERVELL OF HARROW: when a point that has not been pleaded is allowed to be taken in the Court of Appeal, an amendment should be drafted whether or not the case seems likely to reach the House of Lords (see p. 44, letter G, post).

Decision of the COURT OF APPEAL (sub nom. *Haynes v. Qualcast (Wolverhampton), Ltd.*) ([1958] 1 All E.R. 441) reversed.

[Editorial Note. LORD RADCLIFFE and LORD KEITH OF AVONHOLM draw attention to the absence of any requirement of providing protective spats in recent regulations (see p. 40, letter D, and p. 42, letter I, post); in relation to the use of regulations as indicating the scope of reasonable safety measures, cf. *Chapelase v. British Titan Products Co., Ltd.* ([1956] 1 All E.R. 613). LORD

A RADCLIFFE also indicates the need for caution in applying to employers such considerations as the existence of an obligation to exhort workmen (see p. 40, letters B and C, post; cf., e.g., *Crookall v. Vickers-Armstrong, Ltd.* ([1955] 2 All E.R. 12), which, however, was concerned with a different type of risk).

As to a master's duty to provide effective supervision and take reasonable safety precautions, see 25 HALSBURY'S LAWS (3rd Edn.) 513, para. 980; and

B for cases on the subject, see 34 DIGEST 194, 195, 1580-1595.]

Cases referred to:

- (1) *Wilson & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (2) *Latimer v. A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; 24 Digest (Repl.) 1065, 267.
- C** (3) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (4) *Woods v. Durable Suites, Ltd.*, [1953] 2 All E.R. 391; 3rd Digest Supp.
- (5) *Easson v. London & North Eastern Ry. Co.*, [1944] 2 All E.R. 425; [1944] K.B. 421; 113 L.J.K.B. 449; 170 L.T. 234; 2nd Digest Supp.
- (6) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; Digest Supp.
- D** (7) *Baker v. Longhurst (E.) & Sons, Ltd.*, [1932] All E.R. Rep. 102; [1933] 2 K.B. 461; 102 L.J.K.B. 573; 149 L.T. 264; 36 Digest (Repl.) 93, 505.
- (8) *Tidy v. Battman*, [1933] All E.R. Rep. 259; [1934] 1 K.B. 319; 103 L.J.K.B. 158; 150 L.T. 90; 36 Digest (Repl.) 93, 506.
- E** (9) *Morris v. Luton Corpn.*, [1946] 1 All E.R. 1; [1946] K.B. 114; 115 L.J.K.B. 202; 174 L.T. 26; 110 J.P. 102; 36 Digest (Repl.) 94, 509.
- (10) *Clifford v. Charles H. Challen & Son, Ltd.*, [1951] 1 All E.R. 72; [1951] 1 K.B. 495; 2nd Digest Supp.
- (11) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1938] 4 All E.R. 831; [1939] A.C. 71; 108 L.J.K.B. 145; 160 L.T. 187; Digest Supp.
- F** (12) *Benmax v. Austin Motor Co., Ltd.*, [1955] 1 All E.R. 326; [1955] A.C. 370; 3rd Digest Supp.
- (13) *Roberts v. Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428; 3rd Digest Supp.

Appeal.

G Appeal by Qualcast (Wolverhampton), Ltd. from an order of the Court of Appeal (LORD EVERSHED, M.R., PARKER and SELLERS, L.J.J.), dated Jan. 24, 1958, and reported sub nom. *Haynes v. Qualcast (Wolverhampton), Ltd.* ([1958] 1 All E.R. 441), affirming a decision of His Honour JUDGE NORRIS at Wolverhampton County Court, dated Aug. 16, 1957, whereby he held that the appellants were liable in damages to the respondent, John Henry Haynes, to the extent of twenty-five per cent. in respect of injuries suffered by the respondent in the course of his employment by the appellants. The respondent had cross-appealed to the Court of Appeal against the decision of the county court judge that he was guilty of contributory negligence and that his share of the blame was seventy-five per cent. The facts are set out in the opinion of LORD KEITH OF AVONHOLM, p. 40, letter I, et. seq., post.

H *Marven Everett, Q.C.*, and *H. J. Garrard* for the appellants.

I *John Thompson, Q.C.*, and *G. F. I. Sunderland* for the respondent.

Their Lordships took time for consideration.

Mar. 25. The following opinions were read.

LORD RADCLIFFE: My Lords, I have had the opportunity of reading in advance the opinion that is about to be delivered by my noble and learned friend, LORD KEITH OF AVONHOLM. I agree with his conclusions and with the reasons which he gives for arriving at them. I do not think that I need say more, therefore, than that I think that the appeal must be allowed. I am satisfied that

the careful judgment of the learned county court judge is vitiated by the fact that he treated the law as compelling him to attribute a breach of duty to the appellants solely because they had not urged or instructed the respondent to wear protective spats while engaged in the work of moulding. Had he not believed himself to be under this legal compulsion he would, as he says, have found that there was no negligence on the part of the appellants. In my opinion, the law cannot be expressed in any such absolute or simplified form as he supposed.

There are only two words of caution which I would add to what will be said by others of your Lordships. One is that, though, indeed, there may be cases in which an employer does not discharge his duty of care towards his workmen merely by providing an article of safety equipment, the courts should be circumspect in filling out that duty with the much vaguer obligation of encouraging, exhorting or instructing workmen, or a particular workman, to make regular use of what is provided. Properly to measure that obligation as a legal duty requires a fuller knowledge of the circumstances of the factory and of the relations between employers and workmen and their representatives than was available at any rate in the present case. Particularly would that be so, I think, when, as here, there had only just come into force an enactment, the Iron and Steel Foundries Regulations, 1953*, which, though containing a regulation expressly devoted to the subject of "Protective Equipment", included no reference at all to the provision or use of protective spats.

The second point is that, however much attention is concentrated in these cases on the adequacy of the system of working at the place of work, actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition. Here, no doubt, the question of delimiting the duty merges with the question of causation.

I would allow the appeal.

LORD COHEN: My Lords, I have had the opportunity of reading in print the speech which will shortly be delivered by my noble and learned friends, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING. I respectfully agree with the observations they make as to the proper use of authorities in cases such as the present, and I cannot usefully add anything to what they say on that subject. I have, however, the misfortune to differ from them as to the proper application of those principles to the present case. Since this is really a question of fact and I find myself in complete agreement with what was said thereon in the Court of Appeal by the Master of the Rolls (LORD EVERSHED) and PARKER, L.J., I do not think I can usefully add anything to the reasons they give for their conclusion.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, this case comes to your Lordships' House on appeal from a judgment of the Court of Appeal (LORD EVERSHED, M.R., PARKER, L.J., and SELLERS, L.J.) affirming a judgment of the county court judge, His Honour JUDGE NORRIS.

The facts of the case are simple and can be shortly stated. The respondent, whom I shall call the plaintiff, is a moulder, some thirty-eight years of age, and has been a moulder all his working life. He had been employed as such by the appellants for some twelve or thirteen weeks, at their foundry at Wolverhampton, when the accident which gave rise to this action happened, on Sept. 16, 1954. As found by the learned county court judge, the plaintiff was casting at the moulding boxes, when the ladle of molten metal which he was holding slipped, and some of the metal splashed on to his left foot causing him some injury from

* S.I. 1953 No. 1464.

A which, after a few months' disability, he has entirely recovered. This, it may be observed, is not the case that was made by the plaintiff, but it is the way in which the learned judge has held that the accident happened and he found himself able to deal with the case on that footing. The plaintiff's case was that he was carrying a ladle of molten metal along a gangway in the foundry when he stumbled over an obstacle whereby the metal splashed over his foot. The learned judge disbelieved
B this account of the accident, and much of the plaintiff's case founded on alleged breaches of s. 26 of the Factories Act, 1937, and certain regulations of the Iron and Steel Foundries Regulations, 1953, accordingly disappeared. The case came to centre on two alleged grounds of negligence, that the appellants (i) failed to provide any or any proper spats or other sufficient protective clothing; and (ii) failed to provide a safe system of work and safe and proper plant and equipment.
C These resolved themselves in the end into the question of the duty of the employers to provide the plaintiff with protective clothing.

The course which the case took in the county court may account for an absence of evidence with regard to the practice of wearing spats or other protective clothing in foundries generally, and to a concentration on the plaintiff's own practice in the matter of wearing spats. It only remains to notice, before parting
D from these preliminary matters, that the appellants, as well as denying the allegations that they were negligent, took the defence that, in any event, the accident resulted from the plaintiff's own negligence. In the result, the county court judge apportioned three-quarters of the negligence causing the accident to the plaintiff and one-quarter to the appellants. The Court of Appeal affirmed this judgment. No cross-appeal has been taken to this House by the plaintiff.

E The material facts on which the case turns are contained in a short passage in the judgment of the learned judge which, in my opinion, is fully supported by the evidence. I quote the passage in full:

" Now when the accident happened the plaintiff was wearing ordinary boots which he had bought for the work. They were strong working boots with a leather tongue inside, part of which was sewn up to some distance,
F but they were ordinary boots. I find that there were spats in the stores which could be had for the asking, and that there were also strong boots in the stores which could be had on payment. The plaintiff was not ordered or advised by the defendants to wear protective clothing, and I think that was because he was an experienced moulder. The foreman, who gave evidence,
G have advised him about wearing protective clothing, but as he was an experienced man he considered that he did not need any warning: he knew and appreciated the risks of the metal splashing attaching to his work. I believe that if he had wanted spats he could have had them for the asking. I think he knew of all the risks involved and quite voluntarily decided to wear the boots which he was wearing, and I believe that since the accident
H and since his return to work as a moulder he has not worn any protective clothing. Since the accident he has done as he did before."

He returns to the matter later when he says:

" In the present case, the spats and boots were there, and the plaintiff knew they were there, but he was never told that they must be worn. He
I decided the matter himself."

On this view of the facts the learned judge expressed himself as follows:

" Now if I were not bound by authority I should decide that the plaintiff was so experienced that he needed no warning and that what he did was with the full knowledge of all the risks involved, and that there was no negligence on the part of the defendants."

It seems clear what he was here saying. The plaintiff " needed no warning ", that is against the danger of splashing from molten metal and on the advisability of

wearing protective clothing. "What he [the plaintiff] did" was, in the knowledge of the risk, to wear no protective clothing other than his own boots. The learned judge then proceeds: A

"But I feel in view of the authorities cited to me that such a decision would be wrong and I feel compelled to come to a different conclusion."

My Lords, in my opinion, the learned judge has here misdirected himself. The cases referred to, which I do not find it necessary to examine in detail, differed in material respects from the facts of the present case. In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another. A case may announce a principle which may be capable of application in other cases, but I know of no principle that, in all cases and all circumstances, an employer is liable for failing to see that a foundry man is supplied or supplies himself with spats or boots, or, at the lowest, is "exhorted or pressed with ardour" to avail himself of such protection. It is in this last phrase alone that I can discover in the judge's judgment any principle by which he professes to have guided himself. But these words were used in a very different kind of case, a case of pneumoconiosis where the risk, the nature of the risk, the workman's appreciation of the risk and the consequences of falling a victim to the risk were on an entirely different plane. It is clear to my mind that, if the learned judge had not thought, wrongly, in my opinion, that he was bound by the authorities which he cites, he would have found that there was no negligence on the part of the appellants. If he had done so his judgment would, in my opinion, have been unassailable. B
C
D

The duty owed by the employers was a duty owed to the plaintiff. This is not necessarily the same as the duty owed to others of the workers. The duty may vary with the worker's knowledge and experience. The learned Master of the Rolls and PARKER, L.J., correctly state the duty generally as the duty of an employer to take reasonable care for the safety of his workmen. But, in the present case, the Master of the Rolls regards the appellants as owing to all their workmen an identical standard of care and goes on to say that ([1958] 1 All E.R. at p. 444): E
F

"Since, on the judge's finding, the defendants in the present case did nothing at all other than have the gaiters ready for those that asked, I think that they fell short of their duty."

With all respect to the learned Master of the Rolls, this is hardly in accordance with the evidence or with the judge's findings. It is clear on the evidence that the employers did advise inexperienced men to wear spats, and possibly others as well. The Master of the Rolls treats the judge's conclusion as being a conclusion of fact which he is unwilling to disturb. But, in my opinion, as expressed, the judge's conclusion is not a conclusion of fact but a conclusion of law reached on an erroneous assumption that he was bound by a series of inapplicable authorities. SELLERS, L.J., takes the view (*ibid.*, at p. 448), with which I agree, that the plaintiff's attitude, as revealed in his evidence, was that he did not think it necessary to wear spats for his protection, and that is why he did not wear them. But he reluctantly feels himself bound to support the learned judge and dismiss the appeal. G
H

As I have already said, the course that the case took in the county court may have prevented sufficient attention being paid to practice in the matter of the wearing of spats or other protective wear in foundries. There is a suggestion in the evidence that the majority of the men in the appellants' foundry disliked wearing spats, and for all I know there may be reasons for not wearing spats. It is not insignificant that reg. 8 of the Iron and Steel Foundries Regulations, 1953, while requiring the provision of suitable gloves or other protection for the hands, approved respirators for men working in heavy dust concentrations, and suitable goggles or other eye protection for men working in certain conditions, requires I

A no provision of boots, spats or other protective foot or leg equipment. This is in no sense conclusive of the scope of an employer's duty, but it has some evidential value in a case otherwise lacking in evidence of practice in this direction. We listened to some argument on the meaning of the word "provide". Apart from use in statute or statutory regulation, where the word may call for a definite meaning, the word as expressive of a duty can have but an ambulatory connotation.

B In considering whether there is a common law duty on an employer to provide something, the scope of the obligation must vary with the particular circumstances of the case. This case is but one illustration of the limit of the nature of the provision in relation to the plaintiff on the assumption that there was a duty to provide spats for him. Spats were provided for him in the sense that they were available for him if he wished to use them and he knew they were available. He decided for himself that he did not wish to use them. In the

C circumstances of this case, I cannot hold that the employers had a further duty to bring pressure to bear on him to use them, a pressure which, on the evidence, he would have ignored and might have resented. The spats being available, there was, in my opinion, no failure of duty on the part of the employers to provide spats for this workman.

D A separate argument was advanced for the appellants on the point of causation. The two questions to some extent run into one another. If, as I think, there was no negligence here on the part of the appellants in relation to the plaintiff there could be no negligence causing the accident. I find it unnecessary to consider causation on the opposite assumption.

I would allow the appeal.

E **LORD SOMERVELL OF HARROW:** My Lords, I also would allow the appeal. In the present case, the county court judge, after having found the facts, had to decide whether there was, in relation to this respondent, a failure by the appellants to take reasonable care for his safety. It is, I think, clear from the passage cited by my noble and learned friend that he would have found for the appellants but for some principle laid down, as he thought, by the authorities, to which he referred.

F I hope it may be worth while to make one or two general observations on the effect on the precedent system of the virtual abolition of juries in negligence actions. Whether a duty of reasonable care is owed by A to B is a question of law. In a special relationship such as that of employer to employee the law may go further, and define the heads and scope of the duty. There are cases in your

G Lordships' House which have covered this ground, I would have thought by now, exhaustively: *Wilson & Clyde Coal Co., Ltd. v. English* (1) ([1937] 3 All E.R. 628); *Latimer v. A.E.C., Ltd.* (2) ([1953] 2 All E.R. 449); *General Cleaning Contractors, Ltd. v. Christmas* (3) ([1952] 2 All E.R. 1110), and there are, of course, others. There would seem to be little, if anything, that can be added to the law. Its application in borderline cases may, of course, still come before appellate tribunals. When negligence cases were tried with juries, the judge would direct them as to the law as above. The question whether, on the facts in that particular case, there was or was not a failure to take reasonable care was a question for the jury. There was not, and could not be, complete uniformity of standard. One jury would attribute to the reasonable man a greater degree of

H prescience than would another. The jury's decision did not become part of our law citable as a precedent. In those days it would only be in very exceptional circumstances that a judge's direction would be reported or be citable. So far as the law is concerned they would all be the same. Now that negligence cases are mostly tried without juries, the distinction between the functions of judge and jury is blurred. A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system

will die from a surfeit of authorities. In *Woods v. Durable Suites, Ltd.* (4) ([1953] 2 All E.R. 391), counsel for the plaintiff was seeking to rely on a previous decision in a negligence action. SINGLETON, L.J., said this (*ibid.*, at p. 393):

"That was a case of the same nature as this, but it is of the greatest importance to note that, though the nature of the illness and the nature of the work were the same, the facts were quite different. Counsel claims that it lays down a standard to be adopted in a case of this kind. In other words, he seeks to treat that decision as deciding a question of law rather than as being a decision on the facts of that particular case."

In the present case, and I am not criticising him, the learned county court judge felt himself bound by certain observations in different cases which were not, I think, probably intended by the learned judges to enunciate any new principles or gloss on the familiar standard of reasonable care. It must be a question on the evidence in each case whether, assuming a duty to provide some safety equipment, there is a duty to advise everyone whether experienced or inexperienced as to its use.

Whether or not the learned judge was misled by authorities, there remains the question whether the appellants failed in their duty in not advising or seeking to educate the respondent in the use of spats. The point on which the respondent succeeded was not pleaded. The respondent's main case was that a gangway was obstructed. He was not believed on that. He alleged a failure to provide spats. They were provided, as the judge found, to the respondent's knowledge. If the respondent had alleged in his particulars of negligence a failure to advise him or educate him in their use, it may well be that this would have been gone into more fully in the examination and cross-examination of the witnesses. The point not having been pleaded, it would be wrong to draw inferences adverse to the appellants which might well have been answered in evidence if the point had been pleaded. PARKER, L.J., for example, assumed that the respondent was not told when he entered the appellants' employment that spats were available. This would suggest that there was no general practice in other foundries of providing spats, or the respondent would have assumed their provision. This would be a point in the appellants' favour. It may have been obvious at once from the number of men wearing spats, as stated by Mr. Darby, that spats were there for the asking. I would like to suggest that, when a point not pleaded is allowed to be taken in the Court of Appeal, an amendment should be drafted whether or not the case seems likely to reach this House. To see the allegation in terms often assists.

I have come to the conclusion that the learned judge's first impulse was the right conclusion on the facts as he found them, and for the reasons which he gives. I will not elaborate these reasons or someone might cite my observations as part of the law of negligence.

LORD DENNING: My Lords, in 1944, DU PARCQ, L.J., gave a warning which is worth repeating today:

"There is a great deal of danger, if I may say so, particularly in these days when very few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense."

See *Easson v. London & North Eastern Ry. Co.* (5) ([1944] 2 All E.R. 425 at p. 430).

In the present case, the only proposition of law that was relevant was the well-known proposition — with its threefold subdivision — that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it, the tribunal of fact — be it judge or jury —

A can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law. Applying this to the present case: You start with the fact

B that, when a moulder in an iron foundry carries a ladle full of hot molten metal and pours it into the moulding box, there is a danger that the hot metal may splash over on to his feet. In order to safeguard him from injury, the employers ought, I should have thought, to provide protective footwear for him. But in saying so, I speak as a jurymen, for it is not a proposition of law at all, only a proposition of good sense. If the employers fail to provide protective footwear,

C the tribunal of fact can take it into account in deciding whether the employers took reasonable care for the safety of their men: and it was so taken into account by GERRARD, J., GORMAN, J., and STABLE, J., in the three cases* of which transcripts were provided. In each case the employers were held at fault.

But the question here is not whether the employers ought to provide protective footwear for the men—for they clearly did so. The question is whether, having

D provided spats and boots, they ought to go further and *urge* the men to wear them. Here, too, I should have thought that the employers ought to advise and encourage the men to wear protective footwear. But again I speak as a jurymen and not as a judge; because it is not a proposition of law at all, but a proposition of good sense. And that is the very point where the county court judge fell into error. He treated it as a matter of strict law. He thought that, as the respondent

E “was never told that they must be worn”, he was *bound by authority* to find that the appellants were negligent. He treated it almost as on a par with a statutory regulation; whereas it was nothing of the kind. The distinction was taken by LORD WRIGHT twenty-five years ago:

“whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute.”

F See *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (6) ([1934] A.C. 1 at p. 23). So, here, this being a case governed by the common law and not by any statute or regulation, the standard of care must be fixed by the judge as if he were a jury, without being rigidly bound by authorities. What is “a proper system of work” is a matter for evidence, not for law books. It changes as the conditions of work

G change. The standard goes up as men become wiser. It does not stand still as the law sometimes does.

I can well see how it came about that the county court judge made this mistake. He was presented with a number of cases in which judges of the High Court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in point of law; whereas they were,

H in truth, nothing more than propositions of good sense. This is not the first time this sort of thing has happened. Take accidents on the road. I remember well that, in several cases, SCRUTTON, L.J., said that “If you ride in the dark you must ride at such a pace that you can pull up within your limits of vision” (*Baker v. E. Loughurst & Sons, Ltd.* (7) ([1932] All E.R. Rep. 102 at p. 105)). That was treated as a proposition of law until the Court of Appeal firmly ruled that it was not (*Tidy v. Battman* (8) ([1933] All E.R. Rep. 259); *Morris v. Luton Corp.* (9) ([1946] 1 All E.R. 1)). So, also, with accidents in factories. I myself once said that an employer must, by his foreman, “do his best to keep them up to the mark” (*Clifford v. Charles H. Challen & Son, Ltd.* (10) ([1951] 1 All E.R. 72 at p. 74)). Someone shortly afterwards sought to treat me as having laid down a new proposition of law, but the Court of Appeal, I am glad to say, corrected

* *Balsbury v. Harrison, McGregor & Guest, Ltd.* (1955), *Brooker v. Jenkins Bros. Proprietors Ocean S.S. Co., Ltd.* (1956), and *Webb v. Smith, Bingley & Evans, Ltd.* (1956) respectively.

the error (*Woods v. Durable Suites Ltd.* (4) ([1953] 2 All E.R. 391)). Such cases all serve to bear out the warning which has been given in this House before*: A

“we ought to beware of allowing tests or guides which have been suggested by the court in one state of circumstances, or in one class of cases, to be applied to other surroundings . . .”,

and thus by degrees to turn that which is at bottom a question of fact into a proposition of law. That is what happened in the cases under the Workmen's Compensation Act and it led to a “wagon-load of cases”: see *Harris v. Associated Portland Cement Manufacturers, Ltd.* (11) ([1938] 4 All E.R. 831 at p. 835, per LORD ATKIN.) Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports. B

Seeing, then, that the county court judge fell into error, what should the Court of Appeal have done? The answer seems to me this: the Court of Appeal should have done as the judge would have done if he had not felt bound by authority. He would have found that the employers had not been guilty of negligence. True it is that, by the time the case reached the Court of Appeal, the primary facts were all ascertained, and the only issue was what was the proper conclusion from those facts. So the court was right to review it, but still it should give proper weight to the judge's view. Since *Bennet v. Austin Motor Co., Ltd.* (12) ([1955] 1 All E.R. 326), the Court of Appeal no longer takes refuge in that most unsatisfactory formula: C

“Although we should not have come to the same conclusion ourselves, we do not think we can interfere.” D

If the Court of Appeal would not have come to the same conclusion themselves, it does what the Court of Appeal ought to do—what it is there for—it overrules the decision. But, short of that, it should accept the conclusions of fact of the tribunal of fact. In this case, I would not myself be prepared to differ from the judge's view that there was no negligence on the part of the employers in regard to this particular workman. He knew all there was to know, without being told; and he voluntarily decided to wear his own boots, which he had bought for the purpose. E

Only one word more. It is on causation. Even if it had been the duty of the employers to urge this workman to wear spats, I do not think that their omission should be taken to be one of the causes of the accident. It is often said that a person who omits to do his duty “cannot be heard to say” that it would have made no difference even if he had done it: see *Roberts v. Dorman Long & Co., Ltd.* (13) ([1953] 2 All E.R. 428 at p. 432). But this is an over-statement. The judge *may* infer the omission to be a cause, but he is not bound to do so. If, at the end of the day, he thinks that, whether the duty was omitted or fulfilled, the result would have been the same, he is at liberty to say so. So, here, the respondent, after he recovered from the injury, went back to work and did the same as before. He never wore spats. If the warning given by the accident made no difference, we may safely infer that no advice beforehand would have had any effect. F

I would allow the appeal. G

Appeal allowed. H

Solicitors: *Berryman's* (for the appellants); *W. H. Thompson* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* Per EARL LOREBURN in *Blair & Co., Ltd. v. Chilton* (1915), 84 L.J.K.B. 1147 at p. 1148.

NOTE

Re CHAPMAN'S SETTLEMENT TRUSTS (No. 2).

Re ROUSE'S WILL TRUSTS.

Re COATES' WILL TRUSTS.

Re BYNG'S WILL TRUSTS.

Re OAKES' SETTLEMENT TRUSTS.

Settlement—Variation of trusts—Practice under the Variation of Trusts Act, 1958
(6 & 7 Eliz. 2 c. 53), s. 1.

Trust and Trustee—Variation of trusts by the court—Practice under the Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

The following is a summary of points of practice in relation to applications under the Variation of Trusts Act, 1958*, shown by the notes of cases following after this summary—

(1) Applications to enlarge investment powers of trustees should be made under the jurisdiction conferred by the Variation of Trusts Act, 1958, rather than in reliance on s. 57 of the Trustee Act, 1925. The application may be either to add a few words or to substitute a new investment clause.

Re Coates' Will Trusts, see p. 54, letter C, post; *Re Byng's Will Trusts*, see p. 55, letter H, and p. 57, letter C, post.

(2) Reasons for the applicant's requesting that trusts be varied should be given in an affidavit.

Re Oakes' Settlement Trusts, see p. 59, letter C, post.

(3) Cases under the Variation of Trusts Act, 1958, should be heard in open court and all interests which it is sought to bind and on whose behalf the approval of the court is asked should be represented by counsel.

Re Chapman's Settlement Trusts (No. 2), see p. 49, letter F, post; *Re Rouse's Will Trusts*, see p. 51, letter C, post; *Re Byng's Will Trusts*, see p. 57, letter A, post.

(4) The order should be so expressed as to show that it was made under the Variation of Trusts Act, 1958, and normally takes the form of approving an arrangement set out in a schedule.

Re Chapman's Settlement Trusts (No. 2), see p. 49, letters H and I, post; *Re Byng's Will Trusts*, see p. 57, letter I, post; *Re Coates' Will Trusts*, see p. 54, letter F, post; cf., *Re Rouse's Will Trusts*, p. 51, letter E, post.

(5) A representation order in respect of unborn issue who might become beneficially interested has been refused.

Re Byng's Will Trusts, see p. 57, letter E, post.

(6) Where the trust varied was declared by will the order should be indorsed on the probate.

Re Rouse's Will Trusts, see p. 51, letter F, post; *Re Byng's Will Trusts*, see p. 57, letter E, post.

* Relevant forms of s. 1 of the Variation of Trusts Act, 1958, are printed in the foot-note on p. 55, post.

Re CHAPMAN'S SETTLEMENT TRUSTS (No. 2).

[CHANCERY DIVISION (Vaisey, J.), February 12, 1959.]

Settlement—Variation of trusts—Jurisdiction of court to vary trusts where infants are beneficially interested—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

This was an application by Sir Robert Chapman, Bart., and his wife, Dame Helene Paris Chapman (who are called herein "the settlors"), and a third applicant, who were the trustees of settlements dated Mar. 15, 1944 (called "the 1944 settlement") and Feb. 8, 1950 (called "the 1950 voluntary settlement"), and of whom the settlors jointly with two respondents were also trustees of a third settlement, dated Feb. 10, 1950 (called "the 1950 marriage settlement"), for the following relief under s. 1 of the Variation of Trusts Act, 1958, namely—(i) that an arrangement varying the trusts of the three settlements might be approved on behalf of infant respondents and any child of the respondent Robert Macgowan Chapman who might thereafter be born, and that the applicants and the two respondent trustees might be authorised and directed to carry the arrangement into effect, and (ii) an order that the arrangement should be binding on all persons being or becoming interested in the property subject to the trusts of the settlements.

The 1944 settlement declared beneficial trusts of capital in favour of all or any child or children of the settlors' son, Robert Macgowan Chapman, on attaining twenty-one years of age or dying under that age leaving issue, if more than one in equal shares. These trusts were subject to the following proviso (cl. 3):

"Provided always that until the youngest child of the said Robert Macgowan Chapman shall have attained the age of twenty-five years if that event shall happen within twenty-one years from the date hereof or until the expiration of twenty-one years from the death of the survivor of the settlors if the youngest surviving child . . . shall not then have attained the age of twenty-five years the trustees shall retain the trust premises and shall apply such part as they in their discretion shall think fit of the income thereof for or toward the common maintenance education or other benefit of the children . . . for the time being living whether minors or adults or for or towards the maintenance education or other benefit of any one or more of them to the exclusion of the other or others and shall (subject as hereinafter mentioned) accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof in any investments hereby authorised in augmentation of the capital of the trust premises . . . Provided always that after each child . . . has attained his or her majority the surplus income of his share in the trust premises not expended by virtue of the foregoing powers of this clause shall not be accumulated but shall be paid to such child."

Clause 4 enabled the trustees to advance up to one half of each child's expectant presumptive or vested share. At the time of these proceedings the settlors were upwards of seventy-eight and seventy-one years of age respectively. The three infant respondents were the children, born in 1941, 1944 and 1946, of Robert Macgowan Chapman.

Similar provisions to those of cl. 3 were contained in the 1950 voluntary settlement and, by reference, in the 1950 marriage settlement, of which settlements Dame Helene Paris Chapman was settlor. The 1950 marriage settlement was made on the marriage of the settlors' son Henry James Nicholas Chapman

A and, so far as is material, declared, in the event of none of the spouses' children attaining a vested interest, ultimate trusts by reference to the 1944 settlement. There was an infant child of this marriage, who was living but who was not a respondent to the summons. By reason of cl. 3 of the 1944 settlement liability to estate duty might arise on the death of the survivor of the settlors or, in the relation to property comprised in the two settlements of 1950, on the death of Dame Helene Paris Chapman. In the years 1952 to 1954 application to the court for approval of a family arrangement extinguishing the discretionary trusts had been made and had failed for lack of jurisdiction in the court (*Re Chapman's Settlement Trusts*, [1953] 1 All E.R. 103, C.A.; on appeal sub nom. *Chapman v. Chapman*, [1954] 1 All E.R. 798, H.L.). The arrangement for which the court's approval was now sought under the jurisdiction conferred by s. 1 of the Variation of Trusts Act, 1958, provided for the extinguishment of the discretionary trusts for the common maintenance of the children and accumulation of income contained in cl. 3 of the 1944 settlement and a corresponding cl. 4 of the 1950 voluntary settlement, and the adoption in their place of the statutory power of maintenance and accumulation under s. 31 of the Trustee Act, 1925. A secondary purpose was to remove doubts as to the effect of an ultimate trust in cl. 4 of the 1950 marriage settlement. There was evidence that the statutory powers of maintenance would, having regard to other settled property and the means of the children's parents, enable the trustees to provide for the maintenance and education of the infant respondents, or any other child of the respondent Robert Macgowan Chapman. Evidence was filed on his behalf, as father of the infant respondents and as their guardian ad litem, that the arrangement would be for the benefit of the infants and that counsel had so advised. The minute of the proposed order provided that the court being satisfied that the carrying out of the arrangement set forth in the schedule thereto would be for the benefit of the infant respondents and of any child or children thereafter to be born to the respondent Robert Macgowan Chapman did approve the arrangement on behalf of the infant respondents and such after born child or children of the respondent Robert Macgowan Chapman, and the proposed minute further provided that the court did authorise and direct the applicants as trustees to carry the arrangement into effect. The summons was adjourned for hearing in open court, and at the hearing VAISEY, J., stated that it was important that all cases under the Variation of Trusts Act, 1958, should be heard in open court, so that there could be uniformity of practice, and that all interests which it was sought to bind and on behalf of which the approval of the court was sought might be represented by counsel*.

Geoffrey Cross, Q.C., and *J. A. Armstrong* for the trustees.

J. Bradburn (J. A. Wolfe with him) for the infant respondents and unborn grandchildren of the settlors, supported the application.

H VAISEY, J.: I am quite satisfied that this arrangement is for the benefit of the grandchildren. The form of the order should show that it is made "under the powers conferred by the " Variation of Trusts Act, 1958.

[The order, so far as is material, was as follows—

I THE APPLICATION by originating summons . . . UPON HEARING . . . and UPON READING . . .

THE COURT BEING SATISFIED that the carrying out of the arrangement set forth in the schedule hereto will be for the benefit of [the infant respondents] and of any child or children hereafter to be born to the respondent Robert Macgowan Chapman DOth under the powers conferred by the above mentioned Act† APPROVE the said arrangement on behalf of the said infant respondents

* Compare *Re Byng's Will Trusts*, p. 57, letter A, post.

† I.e., the Variation of Trusts Act, 1958.

and such after born child or children of the respondent Robert Macgowan Chapman A

AND the respondents Robert Macgowan Chapman and Henry James Nicholas Chapman by their counsel consenting to this arrangement

THIS COURT DOTH AUTHORISE AND DIRECT the applicants . . . as the trustees of [the 1944 settlement and the 1950 voluntary settlement] and the . . . as [the trustees of the 1950 marriage settlement] or other the trustees or trustee for the time being of the said settlements respectively to carry the said arrangement into effect B

AND IT IS ORDERED . . . (order for taxation of costs).

SCHEDULE

(The terms of the arrangement were set out in the schedule)] C

Order accordingly.

Solicitors: *Blundell, Baker & Co.*, agents for *Wheldon, Houlshy, Moore & Armstrongs* and *J. H. & H. F. Rennoldson*, South Shields (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*] D

Re ROUSE'S WILL TRUSTS.

[CHANCERY DIVISION (Vaisey, J.), February 18, 1959.]

Trust and Trustee—Variation of trusts by the court—Practice—Hearing in open court—Representation by counsel—Order to be indorsed on probate—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1. E

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

The applicant, Kathleen Dorothy Rouse, issued this originating summons for an order pursuant to s. 1 of the Variation of Trusts Act, 1958, approving, on behalf of the persons (other than those who were respondents to the summons) who would constitute the class of the applicant's next of kin at her death (ascertained as if she had died a spinster), an arrangement varying the trusts of the wills of the applicant's parents. F

In the events which had happened, the whole of the trust funds settled by the wills of the applicant's parents were held on trust to pay the income thereof to the applicant during her life, and, subject thereto, as she should by will or codicil appoint, and, in default of appointment, for her next of kin. The applicant, who was fifty-three years old and a spinster, desired to be able to resort to capital from time to time and was prepared to confer benefits on her next of kin in return for a release of some part of her capital. The main terms of the proposed arrangement, which was set out in a document exhibited to the affidavit of one of the trustees of the will of the applicant's father, were, in effect, (a) that two funds of similar amount (referred to as the A share and the B share) were to be created out of the funds settled by the wills of the applicant's parents; (b) that the applicant would release her power of appointment over the A share and the share would pass on her death to her next of kin; and (c) that the applicant might, by deed or will, revoke the subsisting trusts in respect of the B share or any part thereof and appoint the same for such purposes and to such persons as she might think fit. In regard to investments the variation proposed was that: G

“Notwithstanding the [trusts of the parents' wills] any moneys forming part of [the funds subject to these trusts of which funds the applicant was entitled to the income for life] hereafter requiring investment may be invested in the purchase of or at interest upon the security of such stocks funds H

I

A shares securities or other investments or property of whatsoever nature and wheresoever and whether authorised by law for the investment of trust funds or not as the trustees thereof shall in their absolute discretion think fit."

All the persons who would be the applicant's next of kin if she had died at the date of the application had consented to the proposed arrangement and were respondents to the summons.

F. E. Skone James for the applicant.

G. C. Raffety for the trustees of the wills of the applicant's parents and the persons who would be the applicant's next of kin if she had died at the date of the application.

C VAISEY, J.: I have to do two things—approve the proposed arrangement and make an order for costs. I think that, on an application of this kind, the trustees and the next of kin should be separately represented. The variation of trusts is a serious matter, and all the parties should be represented. When there is no conflict of interest, the trustees should represent those who are not able to be before the court. I also think it important that these cases should be heard in open court, so that everybody is represented by counsel and not merely by solicitors, and that counsel should appear before the court in critical mood. I am not suggesting that solicitors cannot do this, but the procedure should be such that, if any question in regard to the trusts should arise, say, twenty years hence, it could be said that the whole matter had been before the court. If there is any good reason (as, for example, to avoid unnecessary publicity), an application can always be made for the matter to be heard in chambers. In the present case there is no such reason.

I approve the arrangement. The order should be:

"The court doth hereby approve the arrangement set out in the schedule hereto on behalf of the respondents who shall constitute the class of next of kin of [the applicant] at her death . . ."

F The order must be indorsed on the probates of both wills by reference to the letter, number and short title of the case, and the date of the order. Records of variations of trusts should always be indorsed on probates so that the order may not be overlooked or lost sight of.

Order accordingly.

Solicitors: *Lethbridges* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re DAME EDITH COATES' WILL TRUSTS.

Re SIR E. F. COATES' WILL TRUSTS.

Re COATES' SETTLEMENT TRUSTS.

Re HARRIS' MARRIAGE SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Harman, J.), February 20, 1959.]

Trust and Trustee—Variation of trusts by the court—Investment—Extension of power of investment—Jurisdiction of court—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 57—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

I [As to special statutory jurisdiction of the court in relation to the administration of trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 298, para. 521.

For the Trustee Act, 1925, s. 57, see 26 HALSBURY'S STATUTES (2nd Edn.) 138; and for the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Cases referred to:

(1) *Re Royal Society's Charitable Trusts, Royal Society v. A.G.* [1955] 3 All E.R. 14; [1956] Ch. 87; 3rd Digest Supp.

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- (2) *Re Shipwrecked Fishermen & Mariners' Royal Benevolent Society Charity*, A
[1958] 3 All E.R. 465.

Adjourned Summonses.

Each of these four applications was made by originating summons by trustees for authority to invest in a wider range of investments than was permitted by the relevant trust instrument. In each summons, other than that in *Re Harris' Marriage Settlement Trusts*, an order was sought that the trustees be authorised to invest any part or parts not exceeding at the time of investment one half in value of the trust fund in or on any investments of the nature specified in the schedule to the summons, and to vary or transpose such investments for or into other investments of a like nature or authorised by law. The schedule in each of three of the summonses was as follows:

"(1) The stocks funds debentures or securities of any public authority in the United Kingdom.

"(2) The bonds mortgages obligations debentures or debenture stock or preference or ordinary or common but not deferred stock or shares officially quoted or in respect of which there is permission to deal on the London Stock Exchange of any public company or corporation incorporated in the United Kingdom or elsewhere which at the time of investment shall have a paid up capital of or equivalent at the current rate of exchange to at least £350,000 sterling and shall have paid a dividend on its ordinary stock or shares in each of the four years immediately prior to the date of investment at the rate of at least five per cent. per annum on the nominal value of its ordinary stock or shares or in the case of stock or shares having no par value on the value of its capital and surplus for the year in question.

"(3) The units of any authorised unit trust scheme."

In *Re Harris' Marriage Settlement Trusts* the summons was similar in form to the summonses in the other three applications but the schedule specified only items (2) and (3) of the schedules to the other summonses.

The application in *Re Dame Edith Coates' Will Trusts* related to the will dated Dec. 1, 1921, and two codicils thereto (dated respectively Jan. 29, 1922, and March, 1922) of Dame Edith Coates, which contained the following investment clause:

"I also declare that all moneys liable to be invested under my will may be invested in any stocks funds or securities for the time being authorised by law for trust money or on mortgage of any real or leasehold houses or land in England or Wales held for any term having forty years to run at the time of the investment."

The testatrix died on Jan. 7, 1930, and probate was granted on May 17, 1930.

The application in *Re Sir E. F. Coates' Will Trusts* related to the will dated Aug. 10, 1921, of Sir Edward Feetham Coates, Baronet, who died on Aug. 14, 1921. By his said will (probate of which was granted on Nov. 24, 1921) Sir Edward Coates gave his freehold, leasehold and chattel real property in certain counties and his residuary estate to his trustees to settle the same to the use of his son for life with divers remainders. On Mar. 16, 1948, a settlement was executed in accordance with the said will. The trustees' powers of investment under this will and the settlement were limited to investing in trustee securities.

Re Coates' Settlement Trusts related to a settlement dated Apr. 25, 1924, made by Dorothy Anne Coates in performance of a condition imposed on a gift to her by the will of the said Sir Edward Coates. The settlement provided:

"The trustees or trustee may invest in any investments which by or pursuant to any public general Act of Parliament for the time being in force are authorised as investments of trust money."

A The settlement further provided that the trustees or trustee might invest in the said investments notwithstanding that they were redeemable and that the price exceeded the redemption value, and might retain them until redemption; and also that the trustees or trustee might join with others in lending money on contributory mortgage and might lend money on mortgage for a fixed term not exceeding five years or on mortgage of property with less than a marketable title. *Re Harris' Marriage Settlement Trusts* related to a settlement dated July 14, 1937, made on the marriage of Elizabeth Hermione Coates and William Barclay Harris, which settlement contained an investment clause under which the following investments were permitted:

C "(i) the public stocks funds or government securities of the United Kingdom of Great Britain and Northern Ireland or India or any colony (which expression shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any province or state having a separate local legislature and forming part thereof respectively except the Irish Free State and Northern Ireland) or of any foreign government or state or any securities the interest on which is or shall be guaranteed by Parliament

D "(ii) mortgages (including first charges registered under the Land Registration Act, 1925) of freehold property in England or Wales

"(iii) stock of the Bank of England Metropolitan Stock or London County Stock

E "(iv) the debentures debenture stock obligations or securities of any company incorporated by special Act or by or under any public general Act or Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland or the legislature of any colony or by royal charter

F "(v) any of the stock or shares of any of the following companies namely Westcotes Estate, Ltd. Rowton Houses, Ltd. Improved Industrial Dwellings Co., Ltd. White Heather Laundry (London), Ltd. Davies & Sons, Ltd. Dyers and Cleaners Thurrock Chalk and Whiting Co., Ltd. Artizan General Dwellings Co., Ltd. and East End Dwellings Co., Ltd. or any company with which any of the before mentioned companies shall have been amalgamated or by which the assets or any part of the assets of any of the before mentioned companies shall have been acquired

G "(vi) the stocks funds bonds debentures or other securities of any public municipal or local body or authority in Great Britain or any colony

"(vii) any other stocks funds or securities for the time being authorised by law for the investment of trust funds Provided that no investment hereby authorised shall be held in bearer form or in such a form as to be negotiable by delivery either with or without indorsement "

H All four summonses were heard together and were originally intituled "In the matter of the Trustee Act, 1925", invoking the court's jurisdiction under s. 57 of that Act. In each case, by an amendment, the summons was intituled, in addition, "In the matter of the Variation of Trusts Act, 1958."*

H. E. Francis for the trustees in each case.

P. J. Millett for the adult beneficiaries in each case.

J. P. Brookes for the infant beneficiaries in each case.

I **HARMAN, J.:** The trusts in each of these four cases are not quite the same, but the beneficial interests, subject to a power of appointment in one case, will come either by appointment or in default of appointment, to the descendants of Sir Edward Clive Milnes-Coates. The investment clauses in three cases are very narrow and are virtually confined to trustee securities, while in the fourth, the marriage settlement, an eccentric range was inserted

* The relevant terms of s. 1 of the Variation of Trusts Act, 1958, are printed in the footnote on p. 55, post.

for a special purpose. The trustees, although not identical in each case, are closely linked and, having taken the advice of stockbrokers, wish to invest in equities. [His Lordship read the proposed new clause and continued:] The court has in recent years exercised a jurisdiction similar to that which it is now sought to invoke where large charitable funds are concerned by way of scheme under the Charitable Trusts Acts: see the judgment of VAISEY, J., in *Re Royal Society's Charitable Trusts, Royal Society v. A.-G.* (1) ([1955] 3 All E.R. 141). There has, however, always been a doubt whether the like could be done under s. 57 of the Trustee Act, 1925, although there is no doubt that the court can authorise under that Act the sale of existing securities and investment in specified new ones. In *Re Shipwrecked Fishermen & Mariners' Royal Benevolent Society Charity* (2) ([1958] 3 All E.R. 465) DANCKWERTS, J., held that s. 57 empowered the court to give trustees a general power of investment.

When application was first made to me, I invited counsel for the trustees to amend the summonses by entitling them also "In the matter of the Variation of Trusts Act, 1958" and it seems to me to be a happy solution of the doubt, since the court has power under that Act, where trustees desire a change of investment, to approve an arrangement on behalf of persons under an incapacity, or unborn, or unascertained, or potentially interested under a discretionary trust.

In three of the present cases, that is, in the case of the wills of Dame Edith Coates and Sir Edward Feetham Coates, and the settlement made by Dorothy Anne Coates, it will be sufficient merely to enlarge the investment powers by authorising the trustees to invest within the limits specified. In the fourth case, that of the marriage settlement, it would be better to revoke the existing investment powers and to substitute the new clause, but without prejudice to the rights of the trustees to retain investments hitherto authorised.

The orders in the three similar cases should read:

"The court in pursuance of the power conferred by the above mentioned Act, doth hereby approve the arrangement set forth in the schedule hereto . . ."

In the case of the marriage settlement there will be a similar order, but it must state that the old clause has been revoked and the new clause substituted. In each case there will be a direction that the investments be reviewed by the trustees' stockbrokers at least once a year.

Orders accordingly.

Solicitors: *Hunters* (for all parties to each summons).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

Re BYNG'S WILL TRUSTS.

[CHANCERY DIVISION (Vaisey, J.), February 24, March 10, 1959.]

*Trust and Trustee—Variation of trusts by the court—Investment clause—Enlarge-
ment to include power to invest in equities—Variation of Trusts Act, 1958*
(6 & 7 Eliz. 2 c. 53), s. 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

By their originating summons, the applicants, Midland Bank Executor and Trustee Company, Ltd. and Ralph William Cornell as trustees of the trusts of the will and codicils of the testator, Ernest Gustav Byng, deceased, applied for relief pursuant to s. 57 of the Trustee Act, 1925, and under s. 1 of the Variation of

A Trusts Act, 1958*. The adult respondents to the summons were, first, Robert Byng (the testator's son), second, Christopher Robert Simpson (the testator's son-in-law), and third, Jane Simpson (the testator's daughter), each of whom was interested in the income of the trust funds. The infant respondents, who were interested in the capital, were two children of the first respondent and a child of the second and third respondents.

B By his will dated Nov. 23, 1938, the testator, after appointing executors and trustees and giving certain legacies, devised and bequeathed his residuary estate to his trustees on the usual trusts for sale and conversion and payment of his funeral and testamentary expenses and debts and legacies, and directed his trustees to invest his residuary estate in or on any investments authorised by his will or any codicil thereto. The testator directed his trustees to divide his

C residuary estate into two equal moieties, and to hold the income of one moiety on protective trusts for the benefit of his son (the first respondent) with remainder to such of the children or remoter issue of the son as the son should appoint, and, in default of appointment, to the son's children at twenty-one or, if daughters, on marriage under that age, in equal shares. The other moiety was to be held on similar trusts for the testator's daughter (the third respondent) and her issue.

D The investment clause, cl. 25, was in the following terms:

"I Declare that any moneys subject to the trusts of this my will may be invested in or upon any of the public stocks funds or government securities of the United Kingdom or India or any British dominion colony or dependency or any foreign government or state or any securities the interest on which is or shall be guaranteed by Parliament or upon mortgage of freehold copyhold leasehold or chattel real securities in Great Britain but not in Ireland (such leaseholds or chattels real having not less than sixty years to run at the time of such investment being made) or on the security of any interest for a life or lives or determinable on a life or lives in real or personal property together with a policy of assurance on such life or in the purchase of freehold ground rents or in the purchase of freehold copyhold or leasehold or chattel real property in Great Britain but not in Ireland (such leasehold or chattel real property having at least sixty years to run at the time of such investment) or in stock of the Bank of England or the Bank of Ireland (or Metropolitan Stock or London County Stock) or in or upon the debentures debenture stock or rent charge guaranteed or preference stock or shares of any company incorporated by special Act or by or under any public general Act or Acts of the Imperial Parliament or the legislature of any British dominion colony or dependency or royal charter or in or upon the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the government of the United Kingdom or India or any British dominion colony or dependency or any foreign government or state

H * In the course of argument VAISEY, J., intimated that under s. 57 of the Trustee Act, 1925, an order might be made if in the opinion of the court the transaction was "expedient" but that under s. 1 (1) of the Variation of Trusts Act, 1958, the court had to be satisfied, except where the approval was under para. (d) of s. 1 (1), that the proposed arrangement was "for the benefit" of the person in respect of whose interest under a protective trust the arrangement was to be approved. It was safer, therefore, to proceed under s. 1 of the Act of 1958. Section 1 (1) of the Variation of Trusts Act, 1958, so far as material provides: "Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will . . . the court may if it thinks fit by order approve on behalf of— (a) any person having . . . an interest . . . under the trusts who by reason of infancy . . . is incapable of assenting . . . (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, any arrangement . . . varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts. Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person".

or in or upon the ordinary preferred stock or shares but not in deferred stock or shares of any such company or in or upon the debentures debenture stock obligations or securities of any foreign railway company or in or upon the stocks funds debentures or securities of any public municipal or local body or authority in the United Kingdom or India or any British dominion colony or dependency or any foreign country and in particular but without restricting in any way the generality of the foregoing I expressly declare that any moneys subject to the trusts of this my Will may be invested in or upon the debentures or debenture stock preference ordinary or deferred or other shares or securities of and in any limited company in which either of my said children may be actively interested or as a loan to any such company or to any partnership business in which either of my said children may be actively engaged as a partner or otherwise upon such security as my trustees may think fit or without security upon such terms or conditions at such rate of interest and for such period as my trustees may in their absolute discretion think fit."

The testator, having made three codicils to his will not affecting the relevant beneficial and investment trusts previously mentioned, died on Feb. 18, 1944, and the administration of his estate had long since been completed. In accordance with the directions in the will, the residuary estate (with the exception of certain freehold properties the values of which probably substantially exceeded £35,000) had been divided into two equal moieties, which had been appropriated to the settled shares of the first and third respondents. In exercise of a power of appointment conferred on her by the will, the third respondent had appointed to her husband, the second respondent, one third of the income of her settled moiety for his life. The trustees had been advised that the investment provisions in cl. 25 of the will did not include power to invest in the ordinary stock or shares of any company other than the ordinary stock or shares of a company on which a fixed or minimum rate of interest or dividend was guaranteed by the government of the United Kingdom, or of India, or of any British dominion, colony or dependency, or by any foreign government or state, and other than in a company or firm in which one of the testator's children was actively interested. The stock-brokers by whom the trustees were advised, whose report was exhibited to an affidavit of the plaintiff bank in support of the summons, took the view that, when trust moneys had been invested or had had to remain invested in gilt edged securities, there had been a depreciation in the capital value of the investments, whereas trust moneys invested in carefully selected ordinary stock or shares outside the trustee range had, in general, appreciated in value.

In these circumstances, the trustees, by their originating summons, sought the following relief:—that, notwithstanding the absence of any such power in the will and codicils, the trustees might be authorised (1) from time to time to invest moneys subject to the trusts in or upon the ordinary or deferred shares or stock of any company quoted or dealt in on the stock exchange of London, New York, Montreal, Melbourne or Johannesburg, such company having an issued and paid up capital of not less than £500,000 or the equivalent thereof; alternatively (2) from time to time to invest not more than three-quarters of the moneys subject to the trusts in or upon the purchase of ordinary or deferred shares or stock in any such company as aforesaid (other than a company whose principal object was the ownership or working of minerals or the ownership of wasting assets) provided that such company shall have paid a dividend on its ordinary shares or stock of not less than five per cent. in each of the ten years preceding such investment and provided that not more than five per cent. of such moneys shall be invested in the ordinary or deferred stock or shares of any one such company. The summons also asked that, if necessary, the infant respondents might be appointed to represent any unborn children and remoter issue of the first and third respondents who might become beneficially interested under the trusts. The first, second and third respondents, by their counsel, agreed to the proposed arrangement.

A The originating summons was adjourned into open court for argument. VAISEY, J., stating at the hearing in open court that the judges had made a rule that all cases for the variation of investment clauses were to be heard in open court unless there was special reason to avoid publicity.

D. A. Thomas for the applicants, the trustees.

T. P. E. Curry for the first, second and third respondents, interested in income.

B J. Monckton for the fourth, fifth and sixth respondents (infants), interested in capital.

C Feb. 24. VAISEY, J.: I wish it to be known that, in applications of this sort to vary investment clauses, one or two possible courses may be followed. One is to add a few words to the existing clause, and the other is to redraft the whole investment clause, embracing the existing clause but excluding all dead wood, and adding the new powers. I think that in the great majority of cases, of which this is one, the more convenient course is to produce a new clause containing the appropriate enlargement, and incorporating all that is worth saving of the existing range of choice. In my view, this case can be dealt with in that way because I should think it would be more helpful to the trustees to find their range of choice all set out in one clause. In this case, I will declare that a new clause, cl. 25, can be approved on behalf of the infants and all children hereafter to be born who are interested in the capital of the trust fund. I do not think that I need send the matter back to chambers. It can be mentioned to me at any time, and it need not go back to the master. I will ask counsel to draw a minute incorporating the new clause, and to support it by a further affidavit by the stockbroker showing that the clause as it now stands meets with his approval. The order can then go in the way in which I have suggested.

E Mar. 10. A draft minute was submitted for the approval of the court. VAISEY, J., approved the body of the minute, but not a proposed representation order therein, which he ordered to be struck out. HIS LORDSHIP directed that the memorandum of the order was to be indorsed on the probate of the will, and that this direction was to be included in the order. HIS LORDSHIP said that the order should include (a) a statement that the persons entitled under the discretionary trusts of income (the first, second and third respondents) had agreed to the arrangement, and (b) a statement that the court was satisfied that the arrangement would be for the benefit of the infant respondents and all persons unborn who might thereafter become entitled in remainder, and that the court approved the arrangement on their behalf. HIS LORDSHIP went on to say that the court need not necessarily be satisfied that the arrangement was for the benefit of the persons entitled to income.

G The minute as approved was entitled in the matter of the trusts of the testator's will and codicils, and of the Variation of Trusts Act, 1958, and was as follows:

H "And the [first, second and third respondents] by their counsel agreeing to the arrangement hereinafter mentioned

"And the court being of opinion that such arrangement will be for the benefit of the infant respondents and all persons unborn who may hereafter become entitled (otherwise than under the protective trusts hereinafter mentioned) to a beneficial interest in the residuary estate of the above-named testator

I "The court doth in pursuance of the powers conferred upon it by the Variation of Trusts Act, 1958, approve the arrangement specified in the schedule hereto on behalf of the infant respondents the said persons unborn and any person who is or may hereafter become entitled to any discretionary interest under the protective trusts upon which the life interests of the [first and third respondents] in the said residuary estate are held

"And it is ordered that the applicants do indorse a note or memorandum of this order on the probate of the said will and codicils."

[There followed directions for taxation and payment of costs.]

THE SCHEDULE

"The powers of investment conferred on the applicants or other the trustees for the time being of the said will and codicils of the said testator by cl. 25 of the will in respect of his residuary estate are hereby revoked and in place thereof there shall be substituted the following:—

"25. Trust moneys may be invested

"(1) In or upon any of the public stocks funds bonds mortgages or securities of or guaranteed by the government or any public municipal or local body or authority of the United Kingdom of Great Britain and Northern Ireland or any British State (which expression shall mean any country Republic Dominion Commonwealth Union Dependency or Colony forming part of the British Empire or Commonwealth of Nations or any province or state having a separate local legislature and forming part thereof respectively) or any foreign government or state

"(2) Upon mortgage of freehold leasehold or chattel real securities in Great Britain but not in Ireland (such leaseholds or chattels real having not less than sixty years to run at the time of such investment being made)

"(3) In the purchase of freehold ground rents or in the purchase of freehold or leasehold or chattel real property in Great Britain but not in Ireland (such leasehold or chattel real property having at least sixty years to run at the time of such investment being made)

"(4) On the security of any interest for a life or lives or determinable on a life or lives in real or personal property together with a policy or policies of assurance on such life or lives

"(5) In or upon the debentures (as defined by the Companies Act, 1948) or preferred or preference or ordinary or deferred shares or stock of any company dealt in or quoted on the Stock Exchange of London New York Montreal Melbourne or Johannesburg such company having a paid up capital of not less than £500,000 or its equivalent at the current rate of exchange and so that in the case of a company having shares of no par value such paid up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the company's published accounts in respect of such shares.

"(6) In or upon the debentures (as so defined) preference ordinary or deferred or other shares or securities of and in any limited company in which either [the first or third respondent] may be actively interested or as a loan to any such company or to any partnership business in which either of them may be actively engaged as a partner or otherwise upon such security as the trustees for the time being of the said will and codicils may think fit or without security upon such terms or conditions at such rate of interest and for such period as the said trustees may in their absolute discretion think fit."

The proposed arrangement was contained in para. (5) of the new cl. 25, the investments mentioned in the other paragraphs having been authorised by the will.

Solicitors: *Denton, Hall & Burgin* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re OAKES' SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Vaisey, J.), February 20, March 20, 1959.]

Settlement—Variations of trusts—Discretionary power of court—Reasons for variation to be stated in affidavit—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

A **Adjourned Summons.**

This was an application by originating summons for the variation of the trusts of a settlement under the powers conferred by the Variation of Trusts Act, 1958, s. 1.

B The application came on for hearing on Feb. 20, 1959, before VAISEY, J., when he adjourned it in order that an affidavit might be filed showing why the applicant asked that the trusts should be varied. An affidavit having been filed on behalf of the applicant, the summons again came on for hearing.

P. R. Oliver for the applicant.

G. B. H. Dillon for the trustees.

C Mar. 20. VAISEY, J.: The Variation of Trusts Act, 1958, s. 1, provides that "... the court may if it thinks fit by order approve . . ." That is a discretionary power. Those who want to vary trusts should state briefly in an affidavit why they want now to vary the trust. It is not enough simply to say that the applicant desires certain restrictions to be removed, but the reasons for wanting them removed should be stated. In *Re Chapman's Settlement Trusts (No. 2)* (p. 48, ante) it was obvious why it was desired that trusts should be varied; claims for duty were anticipated. In an ordinary case such as this the court will exercise its discretion. I will make the order.

Order accordingly.

Solicitors: *Iliffe, Sweet & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

E

F

**ALLOTT v. WAGON REPAIRS LTD.
RUTHERFORD v. BRITISH OVERSEAS AIRWAYS
CORPORATION.**

[COURT OF APPEAL (Hodson, Morris and Willmer, L.J.J.), February 26, 1959.]

G

County Court—Costs—Fixed costs—Claim for damages for personal injury—Payment in by defendant of lesser sum with denial of liability—Acceptance by plaintiff of sum paid in—Whether plaintiff entitled to tax his costs or only to fixed costs—County Court Rules, Ord. 11, r. 1.

H

A defendant who pays a sum of money less than that claimed by the plaintiff into court with a denial of liability does not admit that sum to be due and so does not pay into court "so much of the claim as he admits to be due from him to the plaintiff" within C.C.R., Ord. 11, r. 1 (1) (b)*; a plaintiff who takes out a sum so paid in is therefore entitled to tax his costs under C.C.R., Ord. 11, r. 9 (c) down to the date of notice of the payment in and is not limited to the fixed costs for which C.C.R., Ord. 11, r. 1 (1) (b) and App. D. thereto provide.

I

Appeal in *Allott v. Wagon Repairs Ltd.* allowed.

Appeal in *Rutherford v. British Overseas Airways Corpn.* dismissed.

[As to county court fixed costs, see 9 HALSBURY'S LAWS (3rd Edn.) 315, para. 764.]

Case referred to:

(1) *Reid v. Thomas Bolton & Sons, Ltd.*, [1958] 1 All E.R. 465.

* Order 11, r. 1 (1) is printed at p. 61, letters A and B, post.

Appeals.

These were two appeals from county courts raising the same point of law and heard together by agreement. The facts are stated in the judgment of HODSON, L.J.

John Thompson, Q.C., and D. J. Turner-Samuels for the plaintiffs.

Stephen Chapman, Q.C., and R. I. Kidwell for the defendants.

HODSON, L.J.: These are two appeals from county court judges, the first is an appeal of the plaintiff, Mr. Allott, from the order of His Honour JUDGE STEEL in Ashton-under-Lyne County Court on July 11, 1958, and the second appeal is of the defendants, British Overseas Airways Corporation, from the order of His Honour JUDGE BLAGDEN sitting at Westminster County Court on July 29, 1958. Both appeals raise the same point, and they have been heard together, the position being that in each case the plaintiff brought an action for damages in the county court against the defendants for personal injuries, and in each case the claim was for £400 damages. In one case it was stated to be for £400 damages in those words, and in the other the claim was stated to be limited to £400, that being the limit of jurisdiction in the county court. In each case the defendants, in order to obtain the advantages which defendants achieve under Ord. 11, r. 1, of the County Court Rules, paid into court within eight days a sum of money, in each case £120, plus in one case £7, and in the other £7 2s., which sums are called "fixed costs." C.C.R., Ord. 11, r. 1, is the fixed costs rule, which enables costs to be kept down to a very low figure where the defendants close with their adversaries quickly and make an adequate payment into court which the plaintiff accepts. In each case the plaintiff here accepted the payment, and the only question which has arisen for this court's determination is whether the fixed costs rule applies, or, if it does not apply, whether C.C.R., Ord. 11, r. 2, which also deals with payment into court, applies. Under r. 2 (1):

"A defendant in an action may at any time before judgment pay money into court—(a) in satisfaction of the claim . . ."

By r. 2 (3) it is provided that any payment made under this rule "shall be deemed to be made" with an admission of liability, unless accompanied by a notice that liability is denied. The defendants in each case paid in with a denial of liability. The contest between the parties is whether the plaintiffs are limited to the costs under the fixed costs rule, or whether, there being a denial of liability, the fixed costs rule does not apply and they are entitled to tax their costs under r. 9. Rule 9 provides:

"Where in any case to which r. 1 (1) (b) of this order does* not apply, the amount paid into court is less than the amount of the claim, or where the whole amount of the claim is paid into court . . . and the plaintiff elects to accept the sum or any one or more of specified sums paid into court in satisfaction of his claim, or of the cause or causes of action to which the specified sum or sums relate, the following provisions shall apply . . ."

The effect of this provision is that the plaintiff is entitled to tax his bill of costs in the ordinary way and obtain a sum which the taxing officer deems to be reasonable.

It has been determined by this court in *Reid v. Thomas Bolton & Sons, Ltd.* ([1958] 1 All E.R. 465) that Ord. 11, r. 1, which begins "Where the only relief claimed . . . is the payment of money", applies not only to claims for liquidated sums of money but also to claims for unliquidated sums, such as the claim in this case.

* Order 11, r. 1 (1) (b) is printed at p. 61, letter B, post.

A This is a very short question of construction of C.C.R., Ord. 11, r. 1 (1) (b); but it is necessary to read the whole of r. 1 (1):

B "Where the only relief claimed . . . is the payment of money, a defendant may, within eight days of the service of the summons on him inclusive of the day of service, pay into court in satisfaction of the claim—(a) the whole amount of the claim and the costs stated on the summons; or (b) so much of the claim as he admits to be due from him to the plaintiff, together with the costs (including court fees) which would be entered on a summons for that amount under Part 1 of Appendix D."

That is the fixed rate of costs. The rule goes on to provide for the staying of the action, but I need not read anything further.

C The contention of the defendants is that this is one of those cases where money has been paid into court representing "so much of the claim as he admits to be due from him to the plaintiff", the £120 being part of the claim. The contention was answered very shortly in the second case under appeal by His Honour JUDGE BLAGDEN in Westminster County Court, who pointed out that the words "as he admits" in the paragraph can hardly include an express denial. The learned judge accepted the submission of counsel for the plaintiffs on the construction of the rule that it contemplated an admission of liability and could not apply when the liability was expressly denied. I confess I find it rather difficult to elaborate on that. It is "so much of the claim as he admits to be due", and what happens is that when the notice of the particulars of summons is issued by the county court, the defendant is asked how much, if any, of the claim "he admits to be due", and it is only on that footing that a payment in is accepted by the court.

E The argument on the other side is that all that is involved here is an admission of a formal nature which is not an admission of liability at all, merely an admission that the defendant will pay a certain sum, say £120, for the purpose of disposing of the case. I confess that I have been unable, in the course of reading the judgment of the learned county court judge of Ashton-under-Lyne, who accepted an argument which we heard in this court from counsel for the defendants, to follow that reasoning. The argument is designed to make a distinction between admitting a sum to be due and admitting liability. It is quite true, as counsel for the defendants pointed out, that neither the word "liability" nor the words "denial of liability or admission of liability" appear in the rule we are construing; but the word "liability" does appear, for example, in C.C.R., Ord. 9, r. 1, which deals with admissions by defendants who wish to admit liability. But whether the word "liability" is present or not, an admission of a sum being due appears to me to be clearly an admission of liability. In my opinion, the judgment of the learned county court judge at Westminster was plainly right and should be upheld, with the consequence that, in the first case, which has been considered at the same time, the judgment of the learned county court judge at Ashton-under-Lyne should be reversed.

G There is another matter that I should perhaps mention. Although leading counsel for the defendants took the point simply and solely under r. 1 (1) (b), which he claimed to be a protection for his clients on this matter of costs, junior counsel for the defendants did seek to advance a further argument based on r. 1 (1) (a) which deals with "the whole amount of the claim". That argument is inconsistent with his leader's argument, and he has not, I think, raised this matter by cross-notice in the appeal to which it relates. Rule 1 (1) (a) is inapplicable in any event. The only figure which one could appropriate to (a) would be the sum of £400, which, although put in merely for jurisdictional reasons, is the only figure which appears in an unliquidated claim in the county court; otherwise there is no ascertainable sum involved.

For these reasons, I would allow the appeal in the first case, and dismiss the appeal in the second case. A

MORRIS, L.J.: I am entirely of the same opinion. In the course of the submissions made to us there has been some discussion as to the policy of the rules in question. Our task, however, is merely to construe the words of the rules and to apply them to the facts which are before us. The first question which arises in each case is whether there was a payment into court in satisfaction of the whole amount of the claim. It appears to me to be quite clear that there was not. The whole amount of the claim in each case was the sum of £400. There were claims for those amounts of money. In my judgment, therefore, C.C.R., Ord. 11, r. 1 (1) (a) did not come into operation in these cases. B

The question which has primarily been debated in the two cases is whether there were payments into court in satisfaction of so much of the claims as were admitted to be due. But in each case there was a denial of liability. It has been urged before us that we should not give a strictly limited meaning to the words in r. 1 (1) (b), but our task is simply to give an ordinary meaning to the words as they are used in their context. The words "so much of the claim as he admits" point, in my judgment, quite clearly to an admission of a part of a claim. Where there is an express denial, it is very difficult to see that anybody can assert that there has been an admission of part of a claim. It was urged that we must judge by what the defendants did, and say that the defendants by making their payments into court in effect made admissions of parts of the plaintiffs' claims, but I find it impossible to construe an express denial as an implied admission. The defendants here can bring themselves within r. 2, but having regard to the words used in r. 1 (1) (b), they do not, in my judgment, come within that part of the rule. C D E

I therefore concur that the result is that in the one case the appeal succeeds, and that in the other it fails.

WILLMER, L.J.: I agree. One thing which the argument in these cases has brought to light is that Ord. 11 of the County Court Rules does not deal very happily with claims for unliquidated damages. That is not a matter of concern to us, except in so far as it increases the difficulty of construction for us. The question whether some amendment of the rules might be desirable will no doubt be considered by the appropriate authority. F

On the question which falls for decision here, I am left in no doubt, having heard the arguments on both sides, that r. 1 of Ord. 11 applies, and can only apply, where there is an admission either in whole or in part. I should have thought that r. 1 (1) (a), as a matter of ordinary common sense, could only be applied to a case where the whole of the claim is admitted. This conclusion also seems to follow from the fact that para. (a) is immediately followed by para. (b), which deals with the case where only part of the claim is admitted. Clearly that is what para. (b) of r. 1 (1) is dealing with. In those circumstances, I share the difficulty expressed by my brethren of seeing how you can combine a denial of liability with the application of a rule which specifically deals with a case where so much of the claim is admitted. The two things seem to me to involve a contradiction in terms. G H

In those circumstances, therefore, my conclusion is that a defendant who seeks to deny liability is not entitled, as the rule stands at present, to rely on r. 1 of Ord. 11. I

I might perhaps add a further argument in support of that conclusion, which seems to me to arise from a consideration of the wording of r. 2. In r. 2 (3) express reference is made to admission or denial of liability when payment is made under the rule; and it is provided that such a payment is "deemed to be made with an admission of liability, unless accompanied by a notice stating

A that liability is denied." The fact that no similar provision has been incorporated anywhere within r. 1 suggests to my mind that it was thought to go without saying that a payment in under that rule must necessarily involve an admission.

For these reasons, I agree with the conclusion stated by my Lords.

Appeal in the Allott case allowed : and appeal in the Rutherford case dismissed.

B Solicitors: *W. H. Thompson* (for both plaintiffs); *Hewitt, Woollacott & Chown*, agents for *James Chapman & Co.*, Manchester (for the defendants *Wagon Repairs Ltd.*); *Goldingham, Wellington & Co.* (for the defendants *British Overseas Airways Corporation*).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

C

D

COMMISSIONER FOR RAILWAYS v. AVROM INVESTMENTS PROPRIETARY, LTD. AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Somervell of Harrow and Lord Denning), January 13, 14, 15, 19, 20, 29, February 2, 3, 4, March 19, 1959.]

E

Privy Council—Australia—New South Wales—Landlord and tenant—Building lease—Plans approved by lessor—Later application by lessee for approval of new plans—Refusal of approval by lessor—Whether discretion to withhold approval absolute—Whether lessee bound to build in accordance with approved plans.

F

The appellant, a body corporate charged with the duty of administering the railway system of the State of New South Wales, owned certain land in Sydney. The appellant called for tenders for a lease of the land for a term of sixty years, the successful tenderer to build a hotel. The prospective lessee was to have vested in him a liquor licence, which the appellant held for certain premises on the land. G. was the successful tenderer, but he died in February, 1941, and in June, 1941, the lease was granted to his executors. By cl. 4* of the lease, the lessees covenanted to expend (within a stated period which, owing to the supervening of building control rendering building in accordance with this covenant impracticable from November, 1940, to September, 1952, is immaterial) not less than £150,000 in erecting, constructing and completing to the satisfaction of the appropriate authorities and the appellant a new building on the demised land which should be erected and completed and should at all times be in accordance with such plans and specifications as the authority (viz., any civic licensing local public or statutory authority) or the appellant might "in their absolute discretion" approve. A subsequent provision of cl. 4 provided that notwithstanding anything thereinbefore contained the building and plan of the said building should be subject "to the reasonable requirements" of the appellant. In 1942, during the currency of building control, accommodation additional to the existing licensed premises and costing about £10,000 was erected by the lessees. In February, 1943, the lease was, with the appellant's consent, transferred to the respondent corporation which expressly covenanted with the appellant to observe the covenants in the lease. In 1953, in consequence of notice from a licensing inspector of intention to apply under the New South Wales Liquor Act, 1912, s. 40A (1)†, as amended,

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* The terms of cl. 4 are set out at p. 66, letter D, to p. 67, letter G, post.

† The terms of s. 40A (1) are set out at p. 67, letter I, to p. 68, letter B, post.

to the Licensing Court for an order on the defendant corporation to carry out work of construction of, inter alia, two hundred bedrooms, the respondent corporation agreed to consent to an order for the construction of one hundred bedrooms with ancillary sitting-rooms and bath and toilet facilities. In April, 1954, the plans (hereinafter called "the 1954 plans") were sent to the appellant. They did not cover the whole site but only about two-thirds of it. On May 21, 1954, the appellant wrote approving the plans in general, but insisting on particular modifications. On May 26, 1954, the Licensing Court approved plans providing for sixty-two bedrooms with lounges and ancillary accommodation. There was no evidence that the 1954 plans were approved by the city council or other statutory authority. After discussions the respondent corporation applied to the Licensing Court in September, 1955, for an extension of time within which to comply with the order, but this was refused. The respondent corporation called for tenders for the construction of the work but the lowest tender was for more than it was prepared to spend. It put forward various proposals, but in May, 1956, the appellant required the respondent corporation to construct a building in accordance with the 1954 plans within eighteen months or to be treated as having broken its contract. The licence was cancelled by the Licensing Court as from June 21, 1956, the respondent corporation making it clear that, for financial reasons, it did not propose to build in accordance with the 1954 plans. In June, 1956, the respondent corporation put forward new plans (hereinafter called "the 1956 plans") which provided for seventy-six bedrooms with a public bar lounge and a coffee lounge, and a shopping court at an estimated cost of £420,000. In July, 1956, the appellant served a notice on the respondent corporation under the New South Wales Conveyancing Act, 1919-1943, s. 129, in respect of alleged breaches of covenants in the lease by failure to build and failure to keep the licence in existence. The respondent corporation denied that it was in breach, and asked the appellant's approval of the 1956 plans. This the appellant refused, and required the respondent corporation to carry out the 1954 plans. In August, 1956, the order cancelling the licence was set aside. In an action by the appellant for injunctions and declarations and an inquiry as to damages, the trial judge held that the appellant's consent to the 1956 plans was unreasonably withheld.

Held: (i) it had not been established that there had been such approval of the modified 1954 plans as would render the respondent corporation liable under cl. 4 of the lease to build without submitting further plans; and in any event the respondent corporation would not have been precluded by approval of plans from submitting new plans for the appellant's consideration.

(ii) on the true construction of cl. 4 the appellant must have reasonable grounds for a disapproval of plans and, there having been ample evidence to support the conclusion of the trial judge that the appellant's approval had been unreasonably withheld, the decision of the trial judge should stand; therefore building in accordance with the 1956 plans could have proceeded without the appellant's consent.

Balls Bros., Ltd. v. Sinclair ([1931] All E.R. Rep. 803) applied.
Appeal dismissed.

[As to building leases, see 23 HALSBURY'S LAWS (3rd Edn.) 480, 481, paras. 1105-1108; and for cases on the subject, see 31 DIGEST (Repl.) 88 et seq., 2396 et seq.]

Cases referred to:

- (1) *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; [1945] A.C. 221; 114 L.J.K.B. 110; 172 L.T. 140; 12 Digest (Repl.) 454, 3406.

- A (2) *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 17 Digest (Repl.) 357, 1632.
- (3) *Bulls Bros., Ltd. v. Sinclair*, [1931] All E.R. Rep. 803; [1931] 2 Ch. 325; 100 L.J.Ch. 377; 146 L.T. 300; 31 Digest (Repl.) 178, 3121.

Appeal.

B Appeal by the Commissioner for Railways from a judgment and decree of McLELLAND, J., sitting as the Supreme Court of New South Wales in Equity, dated Feb. 11, 1958, dismissing a suit of the appellant brought against the respondents, Avrom Investments Proprietary, Ltd., John Bonaventure Limerick and John Birkett Wakefield, for injunctions and declarations. The respondents, John Bonaventure Limerick and John Birkett Wakefield, were successively nominees of the respondent Avrom Investments Proprietary, Ltd. as licensees under the provisions of the New South Wales Liquor Act, 1912. The facts are set out in the judgment of the Board.

R. O. Wilberforce, Q.C., N. Jenkyn, Q.C., and H. Jenkins (both of the Australian Bar) for the appellant.

D Gordon Wallace, Q.C., and R. W. Fox (both of the Australian Bar) for the respondents.

LORD SOMERVELL OF HARROW: This is an appeal from a judgment and decree of McLELLAND, J., sitting as the Supreme Court of New South Wales in Equity dismissing a suit brought by the appellant for injunctions and declarations. His Honour gave leave to appeal.

E The appeal turns on the construction of a lease and the application of its provisions to the facts which led up to the dispute. The lease was granted on June 26, 1941, to Rachel Gardiner and Permanent Trustee Company of New South Wales, Ltd., and was assigned to the respondent Avrom Investments Proprietary, Ltd. (hereinafter called "the defendant corporation") on Feb. 24, 1943.

F The appellant (hereinafter called "the plaintiff") is a body corporate charged with the duty of administering the railway system of the State of New South Wales. It owned an estate in fee simple in the land leased which is in the city of Sydney. In 1927 an underground railway system was in course of construction, and one of its stations was to be constructed near the land. There were premises on the land for which the plaintiff had a liquor licence. The land goes from George Street to Carrington Street being divided by Wynyard Lane. G Carrington Street is about two storeys higher than George Street. Beneath the surface of the land there were subways and passages to the station. The plaintiff called for tenders for a lease of the land for a term of sixty years, the successful tenderer to build a hotel to cost at least £150,000. The prospective lessee was to have the licence vested in him. The successful tenderer was a Mr. Gardiner. He died in February, 1941, and the original lessees were his H executors. Protracted negotiations took place.

The following facts are relevant for the purpose of understanding some of the provisions of the lease and how the dispute arose. Mr. Gardiner obtained a design for a hotel to be constructed on heavy steel columns. The hotel as then planned would have covered the site to the full building limit. It would have been carried over Wynyard Lane but at a height that would not impede I traffic. The plaintiff was at that time doing its own excavations and work, and it was agreed that it should construct the steel columns and do excavation work necessary for the then contemplated building. The cost of this work done for the defendant corporation's predecessor was to carry interest. The cost as agreed is set out in the lease in covenant 3 as £109,134 5s. 9d. In 1938 the Minister for Transport intervened on the question of the extent of the licensed premises and liquor advertisements. There were further difficulties in 1939 with the licensing authorities as to the lack of accommodation, and on July 3,

1939, the Licensing Court refused to renew the licence. By this time Mr. Gardiner was claiming specific performance of an agreement for a lease. On June 27, 1940, an appeal from the Licensing Court's refusal to renew the licence was successful. On Nov. 18, 1940, building became controlled. There had been previous weekly tenancies for part of the land, and Mr. Gardiner, and later his executors, were in possession of the licensed premises and the licence. The lease was executed on June 26, 1941. The Licensing Court renewed the licence on condition that bedroom and ancillary accommodation costing about £10,000 would be constructed by the licensee. This work was approved by the authorities and the plaintiff and completed by the defendant corporation by Nov. 30, 1942. The lease was for a term of sixty years. For the first two years the rent was £9,000. For the following five years it was £15,000. From the eighth to the twelfth year it was £19,200. There was a proviso that, if the profit to the lessee from the demised premises for these five years was less than ten per cent. on the capital invested, there were to be reductions in rent. Thereafter the rent was to be £19,200. The licensed premises originally known as Café Francais became known as the Plaza Hotel.

The appeal turns mainly on cl. 4 of the lease which reads as follows:

"That the lessee will within two (2) years from the date of the commencement of this lease expend a sum of not less than one hundred and fifty thousand pounds (£150,000) in erecting constructing and completing in a workmanlike and substantial manner in every respect complying with any provision of any law statutory or otherwise having application thereto and to the satisfaction of any civic licensing local public or statutory authority (hereinafter called the said authority) and the lessor a new building on in under over through or along the demised premises (hereinafter included in the expression 'said building' which expression shall include also the permanent improvements erected or constructed or other constructional work which has been carried out by the lessor on the land hereby leased) and the said building shall be erected constructed and completed with external walls of stone brick concrete or other approved material and shall at all times be in accordance with such building design plan and specification as the said authority or the lessor may in their absolute discretion approve and the plan and specification shall be completely prepared and submitted by the lessee for the approval of the lessor within sixteen weeks from the date of commencement of this lease and the lessee will within a period of six months from the commencement of this lease commence or cause to be commenced the erection and construction of the said building and shall thereafter diligently and continuously proceed with or cause to be proceeded with such erection and construction so that at the expiration of the said period of two (2) years from the date of the commencement of this lease the lessee without cost to the lessor shall have erected constructed and completed on in under over through or along the demised premises the said building hereinbefore mentioned and shall have expended thereon the sum of not less than one hundred and fifty thousand pounds (£150,000) within the time aforesaid and the said building design plan and specification shall provide for the complete safety of the lessor's passageway and the lessee will only build subject to any requirements of the lessor concerning the absolute stability safety and well being in every respect of the lessor's passageway And so that the space between the said building and the column known as number 155 of the lessor on the George Street level will be not less than six feet (6ft.) And there shall be no openings of any description into any splayed alignment of the said building on or near the George Street frontage unless approved in writing by or on behalf of the lessor And the lessee will at any time or from time to time produce and show to the lessor on demand

A any book document paper bill account voucher and evidence relating to any money expended as aforesaid for material labour or any other item used or employed or upon which expenditure has been made in and about the said building. And the said building shall be erected constructed and completed in a good workmanlike and substantial manner in accordance with the said building design plan and specification and in accordance with any requirement and subject at every reasonable time to inspection and approval of the said authority and the lessor and in accordance with any provision of any law statutory or otherwise having application to such erection construction and completion. And the lessee will use no old or second-hand material therein except such as shall be approved by the said authority and the lessor. And the lessee will if the said building be three or more storeys in height provide the same with ample cut-off escapes to the requirement and satisfaction of the said authority and the lessor. And the lessee will in case of any shop and dwelling in combination so arrange them as to permit of the two portions being absolutely cut off from one another by a fire resisting wall floor and ceiling or other thing of separation or partition. And the lessee will erect or construct any awning to be erected of the cantilever or suspended type in accordance with a building design and plan and specification approved by the said authority and the lessor. And the lessee will use damp courses if any be required of material approved by the said authority and the lessor. And the lessee will not erect or construct a roof on the said building which contains any corrugated iron excrescence or tank or any tower or other cowl cupola dome cistern or thing unless treated ornamentally and specially approved or permitted by the said authority and the lessor. And the lessee will in the course of such erection and construction as aforesaid make construct and complete any necessary drain and other convenience of the like or a different kind as may be required by the said authority and the lessor and in accordance with any provision of any law statutory or otherwise having application thereto. And notwithstanding anything hereinbefore contained the building design plan and specification of the said building shall be subject to the reasonable requirements of the lessor. And if during the erection construction and completion of the said building it shall in the opinion of the said authority or the lessor be necessary for the purpose of providing for the stability safety or well being thereof in any respect that any alteration or amendment should be made in or to the building design or plan or specification thereof then and on every such occasion the lessee at his own expense will immediately carry out such alteration or amendment as may be required by the said authority or the lessor."

Arguments were based on other clauses but they can be referred to later.

H On Feb. 24, 1943, the then lessees, with the consent of the plaintiff, transferred and assigned the lease to the defendant corporation which expressly covenanted with the plaintiff to observe the covenants in the lease. The individual defendants are nominees for the purpose of holding the licence. Building control came to an end on Sept. 30, 1952. The learned judge was satisfied that no application to erect a building as contemplated by cl. 4 of the lease would have succeeded from the date of the lease until the end of control. The learned judge found that the hotel as originally contemplated, which had been estimated to cost £600,000, would have cost approximately £1,500,000 at the date of the lease and probably several millions by 1954. As the figures show, substantial profits were being made from the hotel and shops already in existence.

I It is convenient to set out s. 40A (1) of the Liquor Act, 1912, as it then stood:

"(a) Upon proof that public convenience requires additional accommodation in, or the renovation, structural alteration, or re-building of any premises in respect of which a publican's licence is held, the Licensing Court

may order the owner of the premises to carry out, within a reasonable time to be set out in the order, the work specified in the order.

" (b) Not less than thirty days' notice of intention to make application for any order under this sub-section shall be given to the owner and to the occupier of the premises, and to the clerk of the Licensing Court for the licensing district.

" (c) The notice shall set out reasonable particulars of the work which it is proposed to ask the court to order to be done."

A power to revoke or vary the terms of an order made under sub-s. (1) (a) was conferred by an amending Act in 1954*. Prior to 1954, certain work had been done by the defendant corporation with the approval of the plaintiff and the Licensing Court for remodelling the southern bars.

On July 14, 1953, the Metropolitan Licensing Inspector gave notice of intention to apply under the above section for an order directing the construction, *inter alia*, of two hundred bedrooms. The hearing was on Nov. 9. On Nov. 3 the solicitors for the defendant corporation wrote to the solicitor for the plaintiff saying that their clients proposed to consent to an order for the construction of one hundred bedrooms with ancillary sitting-rooms and bath and toilet facilities, with plans to be submitted within six months and work to be carried out within twelve months. The letter went on to say that, if the plans were approved by the Licensing Court, they would be submitted to the plaintiff for its approval and then to the city council for its approval. In the order the dates were varied. The plans were to be lodged by Mar. 31, 1954, and the building to be completed by Mar. 31, 1955. The order in accordance with the Act put the obligation to carry out the work on the owner. The date for lodging plans was later extended to Apr. 30. The plans were sent to the plaintiff on Apr. 21. The building did not cover the whole site but about two-thirds. One of the matters in issue was whether the plaintiff approved the plans. This will be dealt with later. On May 21, 1954, the solicitor to the plaintiff wrote approving the plans subject to modifications and conditions one of which at least was substantial. On May 26 the Licensing Court approved plans providing for sixty-two additional bedrooms with lounges and ancillary facilities. These plans, with alterations subsequently made to them, are conveniently referred to by the learned judge as the 1954 plans. Discussions took place between the parties and, in a history of the matter prepared by the defendant corporation for a later application to the court for extension of time, it is stated that on Oct. 5, 1954, the plaintiff agreed to modification of its demands—that is in relation to the 1954 plans. It is unnecessary to detail the various matters which led up to the application referred to above which was made on Sept. 29, 1955. The Licensing Court apparently refused the application. An appeal to quarter sessions was lodged and not prosecuted.

The defendant corporation had anticipated that the cost of the building would be about £388,000. Tenders were called for and the lowest was £525,881. This was more than the defendant corporation was prepared to spend. It put forward various proposals including a surrender of the licence, and extension of the lease or a less costly type of construction. On May 25, 1956, the plaintiff's solicitor expressed the view that, under cl. 4 of the lease, the defendant corporation was bound to construct a building in accordance with the 1954 plans, these plans having been approved, it was said, by the plaintiff. The plaintiff required the defendant corporation to construct such a building within eighteen months or be treated as having broken its contract. On May 29, 1956, the Licensing Court cancelled the licence as from June 21. At this hearing, the defendant corporation made it clear that, for financial reasons, it did not propose to build in accordance

* The New South Wales Liquor (Amendment) Act, 1954 (No. 50 of 1954), s. 4 (1)(r)(iii).

A with the 1954 plans. The defendant corporation appealed to quarter sessions. Rent and interest were paid and accepted up to June 30, 1956. For subsequent periods rent was tendered but refused.

B In June, 1956, the defendant corporation retained a new architect who produced new plans. These were for a building of three storeys on the Carrington Street frontage with its back to Wynyard Lane. They made provision for seventy-six bedrooms with a public bar lounge and a coffee lounge, with a shopping court on either side of Wynyard Lane. These are referred to as the 1956 plans. The cost was estimated at £420,000. On July 31, 1956, the plaintiff served a notice on the defendant corporation under s. 129 of the Conveyancing Act, 1919-1943, in respect of alleged breaches of the lease. It is unnecessary to set these out in detail. They were based on an alleged failure to put up the building as provided by cl. 4, and failure to keep the licence in existence. On C Aug. 1, 1956, the solicitors for the defendant corporation wrote denying that it was in breach. They reiterated the defendant corporation's financial inability to go on with the 1954 plans. They then referred to the new plans which were enclosed. The plaintiff's approval was asked for. Details were given and it was stated that, if the plaintiff's approval was given, the appeal to quarter sessions D was likely to succeed. The letter in reply, dated Aug. 14, is as follows:

E "Your letter of Aug. 1 instant is acknowledged. The allegations therein and particularly in the sixth paragraph thereof are, on my instructions, completely unfounded. The commissioner takes the view that the lessee was bound to erect the building which has been approved by him under the lease and which the Licensing Court on May 31, 1953, ordered the lessee to build, and the commissioner does not propose to diminish his rights in this regard or to waive the breaches of covenant on the part of the lessee."

A further letter from the plaintiff's solicitor dated Aug. 17, 1956, reiterated the position taken up in the earlier letter and added:

F "It is pointed out that the commissioner has spent £109,134 at the request of the lessee in the erection of columns and substructure (vide cl. 3 of the lease) to support a building which would occupy substantially the whole of the land the subject of the lease, and the commissioner has, in his view, always been entitled to have a building erected which would be based upon the whole of such columns and substructure. It is further pointed out G that the expenditure of £109,134 was at a time when currency was at its pre-war value, and that the value of this expenditure today approximates £450,000.

H "In 1953 when the plans for a building were submitted to the commissioner by the lessee, the commissioner, in approving such plans, made substantial concessions to the lessee in that the building would only occupy approximately two-thirds of the site. It is certainly not now proposed by the commissioner that his rights in respect of such building should be jettisoned so that, in lieu of such building there will be erected by the lessee a building which will occupy, at the most, no more than one-third of the site.

I "It is not agreed that the lessee's present proposal is in accordance with the requirements of the notice of breach of covenant herein, but, on the contrary, the lessee has indicated in no uncertain manner that it does not propose to remedy the breaches of covenant.

"The lessee is required at the hearing of the appeal to undertake to the court that it will forthwith commence the erection of the building approved by the commissioner and the Licensing Court in 1954, and to satisfy the court that it will complete such building with a minimum of delay."

On Aug. 24, 1956, a contract was entered into between the defendant corporation and a building contractor to construct a building in accordance with the 1956 plans. On that day the plans were approved by the Council of the City of Sydney and no objection had been raised by the Fire Board. On Aug. 28, 1956, quarter sessions set aside the order cancelling the licence on the defendant corporation's undertaking to apply to the Licensing Court to vary the terms of the order of Nov. 9, 1953, by ordering a building in accordance with the 1956 plans. The defendant corporation further undertook to use its best endeavours to obtain the consent of all parties, including the plaintiff. The defendant corporation applied on Sept. 5 and the hearing was fixed for Oct. 18.

On Oct. 4 the plaintiff began the present suit by statement of claim, filing a notice on the following day for interlocutory injunction. The learned judge refused an injunction. The plaintiff appealed to the High Court of Australia. On the learned judge fixing the hearing of the case for Mar. 5, 1957, the plaintiff elected not to pursue its appeal. The application before the Licensing Court was adjourned. The relief claimed is as under:

"1. That it may be declared that the defendants are not entitled to build a building on the demised premises other than in accordance with plans and specifications approved by the plaintiff.

"2. That it may be declared that the defendant Avrom Investments Proprietary, Ltd. was and is bound under the said lease of the demised premises to build the building approved by the plaintiff on May 21, 1954, and by the Licensing Court on May 26, 1954.

"3. That it may be declared that an application by the defendant under s. 40 or s. 40A of the Liquor Act, 1912, to the Licensing Court for its approval of plans and specifications which have not been approved by the plaintiff for a building to be erected on the subject land is inconsistent with the performance by the defendant of its covenants express and implied in the lease.

"4. That it may be declared that an application by the defendant to the Licensing Court for an order under s. 40A of the Liquor Act, 1912, that the plaintiff build upon the subject land a building according to plans and specifications not approved by the plaintiff is inconsistent with the performance by the defendant of its covenants express and implied in the lease.

"5. That the defendants may be restrained from building a building on the demised lands other than in accordance with plans and specification approved by the plaintiff.

"6. That the defendant Avrom Investments Proprietary, Ltd. by itself or through any servant agent or person holding a licence under the Liquor Act, 1912, as amended in respect of the demised land may be restrained from making or further proceeding with an application to the Licensing Court of the Metropolitan District for variation of the order of that court made on Nov. 9, 1953, under s. 40A of the Liquor Act, 1912, as amended in respect of additions to the demised premises or for variation of the approval of that court of May 26, 1954, of certain plans for additions.

"7. That the defendant Avrom Investments Proprietary, Ltd. by itself or through any servant agent or person holding a licence under the Liquor Act, 1912, as amended in respect of the demised land may be restrained from making or further proceeding with an application to the Licensing Court of the Metropolitan District for approval of plans which have not been approved by the plaintiff.

"8. That the defendant Avrom Investments Proprietary, Ltd. by itself or through any servant agent or person holding a licence under the Liquor

A Act, 1912, as amended in respect of the demised land may be restrained from making or proceeding with applications to the Licensing Court which are inconsistent with the plaintiff's rights under the irrevocable power of attorney as set forth in the said lease.

B " 8A. That an inquiry may be held as to damages suffered by the plaintiff and that the defendant Avrom Investments Proprietary, Ltd. may be ordered to pay the same to the plaintiff.

" 9. That the defendants may be ordered to pay the costs of the plaintiff of this suit.

" 10. That the plaintiff may have such further or other relief as the nature of the case may require."

C The pleadings are voluminous, and many amendments were allowed in the course of the hearing which lasted for thirty-eight days. The learned judge dismissed the suit.

The issues which arise for decision on this appeal may be summarised. (i) Were the 1954 plans approved within the meaning of cl. 4 of the lease? (ii) If so, did the defendant corporation thereupon become liable under the contract to build the building in accordance with these plans having no right to submit further plans for consideration?

D If the plaintiff succeeds on these two points, the question would then arise whether it was entitled in equity to the declarations asked for in para. 2 and para. 4 and to the injunction asked for in para. 5 and para. 7. If the plaintiff fails on these two points, further questions arise. The plaintiff has clearly not approved the 1956 plans. Is the defendant corporation entitled to proceed with its application to the Licensing Court to approve them and, if so approved, to construct a building in accordance with them? The learned judge decided that it was, on the following grounds:—(iii) He decided that the plaintiff's refusal to approve must be reasonable. He relied on the terms of the contract and alternatively on s. 133B of the Conveyancing Act, 1919-1943. (iv) He also held that the plaintiff's refusal was unreasonable. One other point can be disposed of first. The defendant corporation submitted that the obligation to build had come to an end on principles analogous to those applied in frustration cases. This contract was entered into at a time when building restrictions made the contemplated building impossible. The original time limit for the building expired fifteen or sixteen years ago. Their Lordships are of opinion that both parties have proceeded on the basis that the times were extended, and that at all relevant times the obligation to build remained. The question, therefore, whether frustration can ever apply to a lease does not arise (see *Cricklewood Property & Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.* (1), [1945] 1 All E.R. 252 at p. 258).

H Their Lordships will now consider the first two points as set out above. It is plain that the plaintiff approved the general scheme of the 1954 plans. It insisted on modifications. It is clear from a document drawn up by the defendant corporation in 1955 that the plaintiff's original demands were modified, and in October, 1954, engineering and architectural plans and specifications were ordered "pursuant to the modified structural plan agreed on by the plaintiff". On Mar. 23, 1955, substituted plans were lodged with, and approved by, the Licensing Court. These plans did not differ in principle from the former ones. They may have been sent to the plaintiff, but there is no evidence that they were approved either by it or the city council or other statutory bodies concerned. In these circumstances, the learned judge held that there was no approval of the plans sufficient to justify the submission set out in (ii) above and their Lordships agree.

I In any event, however, their Lordships do not accept the submission that, under cl. 4, there was no right in the defendant corporation to ask the plaintiff

to consider new plans. The plaintiff might have had a right to refuse on the ground of unreasonable delay, or on the ground that it had altered its position in some way which made it a breach of contract for the defendant corporation not to proceed in accordance with the approved plans. The point taken in the letters and at the hearing was that the approval of plans in itself precluded the lessee from asking that the matter should be reconsidered. Their Lordships do not find anything in the contract which justifies this submission. Nor do their Lordships find anything in the circumstances which would have entitled the plaintiff to refuse to consider the plans.

The plaintiff then submits that it did not consider them; that it had an absolute discretion to approve or disapprove and that it disapproved. The defendant corporation under the contract cannot build except in accordance with plans that have been approved and the plaintiff is, therefore, it submits, entitled to the relief claimed under para. 1, para. 3, para. 4, para. 5 and para. 7. The plaintiff sought to support its submission that the defendant corporation became bound to build in accordance with the 1954 plans by arguing that, under cl. 5 of the lease, the order made by the Licensing Court in relation to the 1954 plans became binding on the defendant corporation under that clause. It reads as follows:

"That the lessee will during the said term well and sufficiently repair maintain pave cleanse amend and keep the demised premises and the said building with any appurtenance of either of them and any fixture or thing or any fitting thereto belonging or which at any time during the term shall be erected or constructed or made by the lessor or the lessee when where and so often as need shall be in good clean and substantial repair and condition in all respects and replace any such fixture or thing or any fitting as is requisite and as shall during the said term become useless or unsuitable for use because of being worn out broken beyond repair damaged beyond repair obsolete or out of date with a new or suitable one in keeping with the premises approved by the lessor And will also make and carry out any cleansing and any amendment alteration reparation or addition whether structural or otherwise which by virtue of any provision of any law statutory or otherwise having application thereto now or hereafter in force or by virtue of any requirement of the said authority may be required to be made or carried out by either the lessor or the lessee in or upon the demised premises or the said building or any appurtenance of either of them."

The learned judge held that the words of the clause were not intended to cover an order made under s. 40A. In their Lordships' opinion, neither the order made in relation to the 1954 plans nor an order, if made, in relation to the 1956 plans would come within the general words of cl. 5 because their subject-matter is the building to be constructed under the special provisions of cl. 4. Whether other orders if made would come under cl. 5 must be left to be decided if and when a dispute on the point arises.

The words "absolute discretion" in line 15 of cl. 4* are rightly contrasted by the plaintiff with formulae to be found in several places in the lease where a right in the lessor is qualified by words negating an absolute right. In cl. 6, for example, it is provided that the lessor "shall not unreasonably withhold permission" for extending the interval between paintings of the building. It is contended for the defendant corporation that the words "absolute discretion" are qualified by the express words to be found towards the end of the clause:

"And notwithstanding anything hereinbefore contained the building design plan and specification of the said building shall be subject to the reasonable requirements of the lessor."

* See p. 66, letter F, ante.

A The plaintiff submitted that this refers to requirements after approval has been given. As the learned judge pointed out, it would have been simple so to provide if that had been meant. Further it is, *inter alia*, the plan itself which is to be subject to the requirements, presumably before approval. In their Lordships' opinion, the opening words clearly indicate the cutting down of a right "hereinbefore contained". It is then said that the words should be construed as applying only to the "requirements" expressly referred to earlier in the clause. The first of these deals with the lessor's passageway, the second "requirement" is in addition to the obligation to build in accordance with the said building design plan and specification. It seems impossible, therefore, to restrict the words to "requirements" as referred to expressly. As against that, it is the "building design plan and specification" which in the words "hereinbefore contained" are to be subject to the lessor's approval in its absolute discretion. It would not probably be contemplated that plans would be rejected in toto. The lessor would "require" this or that modification or addition. As these later words have to be given effect to "notwithstanding anything hereinbefore contained", their Lordships, agreeing with the learned judge, are of opinion that the lessor, if he disapproves plans, must have reasonable grounds for so doing.

D Alternatively, the defendant corporation relied on the principle that general words must if necessary be limited so as not to defeat the main object of the contract (*Glyn v. Margetson & Co.* (2), [1893] A.C. 351). It is not necessary to deal with this argument.

E The learned judge found that s. 133B of the Conveyancing Act applied. That section would import a provision that approval was not to be unreasonably withheld, if such a provision was not to be found in the contract. Counsel for the plaintiff was prepared to accept that the building in question might be "improvements" within the section. He also accepted that one did not have to find a covenant which was in form a covenant against making improvements (F *Balls Bros., Ltd. v. Sinclair* (3), [1931] All E.R. Rep. 803). He relied, however, on these words in support of a submission that it did not apply to "improvements" which, under the lease, the lessee had covenanted to make, although, of course, subject to consent as to plans. It did not, in other words, apply to leases under which the lessee undertakes to build. It is not necessary to determine this question which is one of difficulty and importance.

G Was the plaintiff reasonable in refusing to approve the 1956 plans? The learned judge held that the 1956 plans had the following advantages over the 1954 plans:— (a) The design is better and more modern. (b) Provision is made for a greater number of bedrooms. (c) All the bedrooms have private bathrooms, whereas a considerable number in the 1954 plans have not. (d) The bedrooms are of better design. (e) There is more first-class accommodation. (f) They make provision for a coffee lounge suitable for the provision of light meals. The 1954 plans make no such provision. (g) They make greater use of the Carrington Street frontage which is more suitable for an entrance to a hotel than George Street, this frontage being more suitable for commercial development. (h) They make provision for a greater number of shops. (j) They would permit of extensions to the building at less cost. (k) They would permit more flexibility so far as future development is concerned. The learned judge also found that a building according to the 1956 plans was a very much better economic proposition than a building according to the 1954 plans.

I The plaintiff submitted that, under the contract, the building had to cover the whole site. Their Lordships do not accept this. The building has to be on the demised premises and cost not less than £150,000. Both these conditions are fulfilled. The reason put in the forefront by the plaintiff, namely, that the

defendant corporation had no right to ask for consideration of further plans was, for the reasons given, based on a misconstruction of the contract. There were, of course, some disadvantages as set out in the letters cited. The learned judge found that approval was unreasonably withheld by the plaintiff. There was ample evidence to support this conclusion with which their Lordships agree. In *Balls Bros., Ltd. v. Sinclair* (3), LUXMOORE, J., held that consent having been unreasonably withheld by the lessor to an alteration, the alteration could in the circumstances have been made by the lessee without any further application to the lessor. This applies here, though there are authorities, including the Licensing Court, whose approval is necessary.

On the above findings it is unnecessary to deal with other points raised. Their Lordships would like in this complicated case to express their indebtedness to the full and clear judgment of the learned judge.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Light & Fulton* (for the appellant); *Ashurst, Morris Crisp & Co.* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re YOUNG'S SETTLEMENT TRUSTS. ROYAL EXCHANGE ASSURANCE AND ANOTHER v. TAYLOR-YOUNG AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 18, March 4, 25, 1959.]

Settlement—Acceleration by disclaimer—Distribution “upon the determination or failure of the last surviving life interest”—Whether disclaimer can alter vested interests in possession.

By a voluntary settlement property was settled on trusts under which one-third of the income was to be held on trust for each of three sons of the settlor for life, after the death of a son for his wife during widowhood, and subject thereto (by cl. 2 (b)) for each son's children equally, with a proviso, if a child died before distribution, for the substitution of his issue per stirpes. The trusts of capital (cl. 2 (d)) were “upon the determination or failure of the last surviving life interest in any part of the income of the trust fund” to divide the trust fund equally per capita amongst the sons' children at twenty-one or, if female, marriage under that age. In August, 1958, when two of the sons had died without leaving wives entitled to income, but adult children and infant grandchildren of sons were living, the surviving son and his wife by deed surrendered and disclaimed their interests in income of the trust fund to the intent that the income and capital of the trust fund should be held on the trusts that would be applicable thereto if they were dead. On the question whether the last surviving life interest had determined or failed so that capital would have become distributable among adult children of the settlor's sons, and, if not, how the disclaimed income should be treated,

A **Held:** (i) on the true construction of cl. 2 (d) of the settlement the direction for distribution on the determination or failure of the last surviving life interest meant after the lives in question (or, in the case of a widow, her widowhood) should have come to an end, and

B (ii) the doctrine of acceleration was inapplicable, because it applied only where an intention on the part of a settlor to bring about its result could be inferred, and in the present case the result of applying it would be to alter vested interests and to deprive a grandchild of a chance of inheriting income if his father predeceased the settlor's surviving son or his wife; accordingly, capital of the trust fund had not become distributable on the execution of the deed of 1958.

C (iii) the one-third share of income of the trust fund comprised in the deed of surrender and disclaimer of August, 1958, should, until the time for distribution of capital arrived, be paid to the children or remoter issue of the surviving son of the settlor on the footing that cl. 2 (b) of the settlement remained operative in relation to the income, and should not be paid equally among the children of all three sons of the settlor under cl. 2 (d).

D [As to the acceleration of subsequent interests, see 34 HALSBURY'S LAWS (2nd Edn.) 132, para. 171; and for cases on the subject, see 44 DIGEST 428-432, 2575-2596.]

Cases referred to:

- E (1) *Re Davies, Davies v. Mackintosh*, [1957] 3 All E.R. 52; 3rd Digest Supp.
(2) *Re Johnson, Danily v. Johnson*, (1893), 68 L.T. 20; 44 Digest 777, 6346.
(3) *Re Flower's Settlement Trusts, Flower v. I.R. Comrs.*, [1957] 1 All E.R. 462; 40 Digest (Repl.) 601, 1031.

Adjourned Summons.

F A settlor by deed made on Sept. 11, 1937, transferred certain properties to trustees on trust for sale and investment. By cl. 2 (b) they were to hold an equal third part of the income of the trust fund on trust to pay the same to her son Harold Strang Taylor-Young (the second plaintiff), during his life and from and after his death to pay the same to his wife (if she should be living and married to him at the date of his death) during her widowhood and from and after his death and the death or re-marriage of his wife to pay the same to his children (of whom there were two, the second and third defendants) in equal shares if more than one, provided that if any child should die before the date fixed for the distribution of the trust fund leaving issue, the share of the income which would have been payable to such child should be paid to his or her issue and if more than one in equal shares per stirpes. The remaining two-thirds of the income

G were settled on like trusts on the settlor's other two sons, one of whom died in 1942 and the other in 1955, each leaving no wife but one son (the first and fourth defendants), both of whom were now over twenty-one. The second plaintiff had an infant grandchild (the sixth defendant) and there was an infant grandchild (the fifth defendant) of one of the deceased sons of the settlor.

H I By cl. 2 (d) it was provided that "upon the determination or failure of the last surviving life interest in any part of the income of the trust fund hereinbefore granted" to the three sons and their wives, the trustees should "stand possessed of the trust fund both as to capital and income upon trust to divide the same equally and per capita amongst each and every the child or children" of the sons as being male should attain the age of twenty-one years or being female should attain that age or previously marry.

By deed dated Aug. 15, 1958, Harold Strang Taylor-Young's wife disclaimed

her reversionary interest for life expectant on the death of her husband and he surrendered his interest for life. By originating summons dated Nov. 18, 1958, the trustees of the settlement asked for the determination, among others, of the following question: whether on the true construction of the above-mentioned settlement and in the events which have happened (including in particular the surrender by the second plaintiff and the disclaimer by his wife of their successive interests for life in the share of the income arising under the said settlement and settled by cl. 2 (b) thereof) the whole of the capital of the property comprised in the said settlement is now distributable in equal fourth shares between the first four defendants (the grandchildren of the settlor).

R. Cozens-Hardy Horne for the plaintiffs, the trustees of the settlement.

J. E. Vinelott for the first, second and third defendants (three grandchildren of the settlor).

L. H. L. Cohen for the fourth defendant (a grandson of the settlor).

P. R. de L. Giffard for the fifth and sixth defendants (great-grandchildren of the settlor).

Cur. adv. vult.

Mar. 4. **HARMAN, J.**, read the following judgment: This summons, which raises a question of construction affecting the trusts of the settlement mentioned at the head of it, does not, as it should, ask for execution of those trusts so far as necessary, but this is a technical defect which can be cured by amendment.

By the settlement, which bears date Sept. 11, 1937, Annie Rankin Young, mother of the second plaintiff, grandmother of the second, third and fourth defendants, and great-grandmother of the fifth and sixth defendants, made a voluntary settlement of personalty on her descendants. Income is divisible by counting the number of the settlor's children, while corpus is or will be distributable according to the number of her grandchildren, and odd results ensue.

By cl. 2 (a), (b) and (c) the income of the trust fund is disposed of in favour of the three sons of the settlor and their then existing wives. Each one-third of the income is to be paid to a son for his life, with remainder to his named wife, if married to him at the date of his death, during her widowhood, with remainder to the children of that son, whether by the named wife or any other, subject to two provisos, first, that if any child of a son die "before the date hereinafter fixed for the distribution of the capital of the trust fund" leaving issue, then the share of the income which would have been payable to such child had he or she survived shall be paid to the issue of such child equally per stirpes; second, that in the event of a complete failure of the trusts of any one-third of the income before the distribution date, that third part of the income shall accrue to the other shares of income.

The settlor had issue three sons, of whom one, Walter, survived his wife named in the settlement and died in 1942, leaving no wife and an only son, the fourth defendant, who is unmarried and of full age. The second, William Hugh, died in 1955, having had two wives, not being at his death married to either of them. He left one child by each, of whom one was expressly excluded from the benefits of the settlement, and the other is the first defendant, who has attained twenty-one and is married and has one son, the fifth defendant. The third son is the second plaintiff, whose only wife is still living. By her he has had two children, the second and third defendants, both of whom are of age and of whom one has issue, a daughter, the sixth defendant. Thus immediately before the

A execution of the instrument of Aug. 15, 1958 (hereafter to be recited), the income was payable as to one-third to the second plaintiff, as to one-third to the first defendant, and as to one-third to the fourth defendant.

The capital of the trust fund was disposed of by cl. 2 (d) of the instrument, which, so far as relevant, is in these terms:

B "Upon the determination or failure of the last surviving life interest in any part of the income of the trust fund hereinbefore granted to the said William Hugh Taylor-Young Edith Mary Taylor-Young Harold Strang Taylor-Young Nancy Adelaide Taylor-Young Walter Taylor-Young and Betty Angela Taylor-Young the trustees shall stand possessed of the trust fund both as to capital and income upon trust to divide the same equally and per capita amongst each and every the child or children of the said C William Hugh Taylor-Young Harold Strang Taylor-Young and Walter Taylor-Young (whether such child or children be the issue of their present respective wives or of any other wife or wives of any of them) as being male shall attain the age of twenty-one years or being female shall attain D that age or previously marry."

It was not suggested before me, having regard to the preceding trusts of income, that one-third of the capital became distributable on the cesser of the life interests limited to each son and his wife, and this, in my judgment, was right, because there is clearly one date for distribution and not three, notwithstanding the E curious reference to "any part of the income". Thus, so long as any of the so-called life interests subsist, the income of the trust fund is divisible in thirds among the three stocks represented by the sons, but at the end of that period the capital becomes distributable in as many shares as there are children of the three sons, whether surviving the period of distribution or not, who attain twenty-one or, if female, marry under that age.

F The only two of the so-called life tenants who remain alive are the second plaintiff, Harold Strang Taylor-Young, and his present wife, who by a deed of Aug. 15, 1958, expressed to be made between them and the four existing grandchildren, but not executed by the latter, purported to dispose of their interests under the settlement. By cl. 1 of this deed, the wife irrevocably disclaimed her interest G in these terms:

"Mrs. Taylor-Young doth hereby irrevocably disclaim and forever forego the reversionary interest for life expectant on the death of Mr. Taylor-Young to which she is entitled under the settlement in the income of the property comprised therein to the intent that Mrs. Taylor-Young's life interest in any and every part of such income shall fail and determine."

H By cl. 2 the second plaintiff surrendered his interest in these terms:

I "In consideration of the sum of £15,000 this day paid to him as to £7,500 by Patricia Jean Noble and as to £7,500 by Christopher William Taylor-Young [his two children], Mr. Taylor-Young doth irrevocably surrender and forever forego the interest for life to which he is entitled under the settlement in the income of the property comprised therein to the intent that Mr. Taylor-Young's life interest in any and every part of such income shall henceforth be absolutely determined."

The question is whether the effect of this deed has been to bring to an end the trusts affecting income and bring into possession the trusts affecting capital. On the face of the settlement, the trusts affecting capital come into operation 'upon the determination or failure of the last surviving life interest in any

part of the income of the trust fund hereinbefore granted to " the three sons of the settlor and their named wives. The first four defendants, that is to say (ignoring the excluded grandchild), all the existing grandchildren, being of full age, have elected to argue that the event has happened, with the result that the first and fourth defendants exchange an interest in one-third of the income for one-quarter of the capital, while the second and third defendants take one-quarter of the capital each instead of no interest in possession. Under the 1958 deed each of these latter is expressed to have paid £7,500 to his or her father in consideration of that advantage.

If this be the right view, it follows that the interest of any son hereafter born to the second plaintiff will be cut out and also that the fifth and sixth defendants and any after-born members of the younger generation lose their contingent interests in income. This is a startling result. It would be still more startling if, for instance, the second plaintiff had twelve children, for capital would then go as to 12/14ths to them, while the child of each of the other two sons of the settlor, that is to say, the first and fourth defendants, would, at the behest of their uncle and aunt, be obliged to accept 1/14th of the capital in place of one-third of the income. A still odder result would ensue had the settlement not excluded the child of William Hugh by his first wife; and it is more curious still that the children of the second plaintiff, by buying their father's life interest, should be able entirely to alter the beneficial interests of their cousins.

This case was argued before me on behalf of the four grandchildren on the footing that it was a case of acceleration, and it was pointed out that this doctrine does at times involve some alteration in beneficial interests; for inst nce, in the latest case *Re Davies, Davies v. Mackintosh* (1) ([1957] 3 All E.R. 52), this is alluded to by VAISEY, J., in these words (*ibid.*, at p. 54):

" It seems rather surprising that the purely gratuitous act (that is, the disclaimer) of one of the beneficiaries, Mrs. Mackintosh, should operate to deprive and dispossess a number of other beneficiaries, namely, Mrs. Mackintosh's grandchildren and remoter issue, of the interest which the testatrix had given them by her will. It is clear, however, that acceleration may and does sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated: see *Re Johnson, Danily v. Johnson* (2) ((1893), 68 L.T. 20). Another view, which I will call the second view, is that as the disclaimed life interest must be treated as struck out of the will and not to have been thereby effectively disposed of, the obvious consequence is a partial intestacy . . ."

All the cases to which I have been referred, where the so-called doctrine of acceleration has been applied, involve, I think, construing a reference to an interest for life as being equivalent to some such words as " subject as aforesaid ", it being held that the only object of holding up the distribution of capital was to provide for the interest of the life tenant, so that when that interest failed, whether by death, disclaimer or other form of forfeiture, such as, for instance, the life tenant witnessing the will, the court will as a general rule accelerate the remainder. This usually applies to wills, but may take effect in the case of settlements, as in *Re Flower's Settlement Trusts, Flower v. I.R. Commrs.* (3) ([1957] 1 All E.R. 462), where JENKINS, L.J., says this (*ibid.*, at p. 465):

" The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any

A earlier failure or determination of his interest, with the result that if the gift to the first taker fails—as, for example, because he witnessed the will—or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker. It has long been settled that this principle applies not only to realty (in respect of which I think it was first introduced) but equally in respect of personalty; and although all the authorities to which we have been referred have been concerned with wills, counsel for the trustees submits—and I do not think that counsel for the Crown disputes—that there is no reason for applying any different rule to a settlement *inter vivos*. As to that I would say that I am disposed to agree that the principle must be broadly the same; but I cannot help feeling that it may well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play.”

D Then the learned lord justice refers to a number of authorities, which have been read to me and to which I do not propose to refer. As JENKINS, L.J., observes in the last words which I have read, the result is only reached where the court can conclude from the instrument the express or implied intention of the settlor or testator to bring it about.

E I was referred to no case in which the effect of a disclaimer or surrender was to alter vested interests in possession, as is suggested to be the result here. Counsel for the infants pointed out that so to construe the settlement would have the odd result that a renunciation by either of the first two sons to die would have no immediate effect on the distribution of capital, whereas the third son or his widow could, by a stroke of the pen, change the interests of his nephews and nieces. Apart from this, the limitation of capital is for all the children of the sons who attain full age, and it is now proposed to exclude a possible future child of the second plaintiff. Furthermore, the sixth defendant, representing here the next generation, will also lose the chance of inheriting a third of the income in the event of his father predeceasing him during the lifetimes of the second plaintiff or his wife.

G Alternatively, it was argued for the grandchildren of the settlor that this is not a case of acceleration at all, but of construing the words in cl. 2 (d) of the settlement, and it was said that in ordinary parlance the last surviving life interest has in fact determined or failed, by death in the cases of the sons Walter and William Hugh, by surrender in the second plaintiff's case, and by disclaimer in that of his wife, so that the moment of distribution indicated in the words of the settlement has arrived.

H In my judgment, it would be wrong, in view of the very peculiar limitations of this document, to infer an intention on the settlor's part to bring about a distribution of capital so long as any of her sons is alive and any of the named daughters-in-law has survived and has not re-married. I feel constrained to hold that when the settlor directs that distribution shall be made when the life interests have determined, she means after the lives in question (which, in the case of females, must be construed as life or widowhood) shall have ended.

I
Mar. 25. The court heard argument on a further question whether the share of the income settle by cl. 2 (b) of the settlement should, until the capital of the property comprised in the settlement became distributable, be paid either (i) to the children and issue of Harold Strang Taylor-Young on the footing

that (subject to the extinction of the interests for life of Harold Strang Taylor-Young and his wife, Nancy Adelaide Taylor-Young), the provisions of cl. 2 (b) remain in operation, or (ii) to the first four defendants in equal shares. The first four defendants were the son of the settlor's son William Hugh, the two children of the settlor's son Harold Strang, and the son of the settlor's son Walter.

L. H. L. Cohen for the first and fourth defendants.

J. E. Vinelott for the second and third defendants.

P. R. de L. Giffard for the fifth and sixth defendants.

HARMAN, J.: The question now before me is what is to become of the one-third share of the income formerly payable to Harold Strang Taylor-Young.

There are two alternatives. The first alternative is that, although the deed of surrender and disclaimer did not affect capital, yet it affected the one-third share of income comprised in the deed, which income must accordingly be treated as if the day of distribution had in fact arrived and as if cl. 2 (d) of the settlement of 1937 had come into effect. The result of that would be that the income would be distributed per capita amongst the first four defendants, who are the four surviving members of the next generation. The second alternative is that the settlor's son, Harold Strang Taylor-Young, in surrendering his interest in income must be taken to have surrendered to those next interested, with the result that his two children take the income between them, defeasible in favour of issue pending the date of distribution. I prefer the second alternative. Clause 2 (d) is intended to be a clause operating on capital on determination of the last surviving life interest and I have held that it must be construed literally. The events governing distribution have not yet occurred and therefore one must not look at cl. 2 (d) and one is thrown back on cl. 2 (b)*.

My difficulty has been that in the deed of Aug. 15, 1958†, there was no mention of surrender to any person but I have had quoted to me, from COKE ON LITTLETON (13th Edn.), p. 337, para. 636, "surrender of property is the yielding up of an estate for life to him who is next entitled to the immediate estate in reversion or remainder". This applies to the children of Harold Strang Taylor-Young and I declare that the one-third share of income is to be paid, under cl. 2 (b) of the settlement of Sept. 11, 1937, to the children or remoter issue of Harold Strang Taylor-Young.

Declarations accordingly.

Solicitors: *Freshfields* (for all the parties).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

* The terms of cl. 2 (b) are stated at p. 75, letters F and G, ante.

† This was the deed of surrender by Harold Strang Taylor-Young and of disclaimer by his wife, see p. 77, letters F to I, ante.

M. & J. S. PROPERTIES, LTD. v. WHITE.

[COURT OF APPEAL (Hodson, Sellers and Willmer, L.J.J.), March 17, 18, 1959.]

Rent Restriction—Decontrol—New tenancy—Former tenancy of flat including right to use of garden—New tenancy of another flat with same right—Whether right part of the “premises”—Rent Act, 1957 (5 & 6 Eliz. 2 c. 25), s. 11 (2) proviso.

The tenant of a ground floor flat subject to the Rent Acts had the right to use the garden in common with the occupant of the first floor flat. After the Rent Act, 1957, had come into operation, she was granted a new tenancy of the first floor flat in place of her original flat with the right to use the garden in common with the occupant of the ground floor flat. In an action by the landlords to recover possession of the first floor flat after notice to quit the tenant contended that her tenancy was excepted from the decontrol effected by s. 11 (1) because “part of the premises” comprised in her former tenancy (namely, the right to use the garden) was included in her latter tenancy.

Held: the word “premises” in the proviso to s. 11 (2) of the Rent Act, 1957, referred to premises which were capable of physical occupation, not to ancillary incorporeal rights such as a right to use a garden in common with another tenant; therefore, the tenancy of the first floor flat was not within the proviso, and the landlords were entitled to possession.

Appeal allowed.

[As to decontrol of dwelling-houses on the grant of new tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 741, para. 1494.

For the Rent Act, 1957, s. 11 (2), see 37 HALSBURY'S STATUTES (2nd Edn.) 561.]

Cases referred to:

- (1) *Gardiner v. Sevenoaks Rural District Council*, [1950] 2 All E.R. 84; 114 J.P. 352; 2nd Digest Supp.
- (2) *Whitley v. Stumbles*, [1930] A.C. 544; 99 L.J.K.B. 518; 143 L.T. 441; 31 Digest (Repl.) 632, 7411.
- (3) *Parperis v. Panteli*, (Mar. 17, 1958), 108 L.Jo. at p. 476.

Appeal.

The landlords appealed against an order of His Honour JUDGE WRIGHT, Q.C., made in Willesden County Court on Nov. 11, 1958, dismissing an action by the landlords for possession of premises (reported 109 L.Jo. 76) occupied by the defendant, comprising first floor rooms at No. 308, Chapter Road, N.W.2, in the county of Middlesex let to the defendant on July 13, 1957. The landlords contended that the judge was wrong in law in holding that the tenant was a protected tenant under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and in particular that he was wrong in law in holding that the tenant's right to share a garden constituted “premises” for the purposes of s. 11 (2) proviso of the Rent Act, 1957, and constituted premises comprised of or included in premises common to both her tenancies (before and after July 13, 1957) in the building.

S. W. Magnus for the landlords.

E. Grayson for the tenant.

HODSON, L.J.: This is an appeal from an order of His Honour JUDGE WRIGHT, made at Willesden County Court on Nov. 11, 1958, in an action by a property company, the landlords, against a tenant. The landlords, who were the plaintiffs, were seeking possession of the first floor rooms at No. 308, Chapter Road, N.W.2, in the county of Middlesex, which were let to the defendant tenant by the landlords' predecessors in title on July 13, 1957, on a weekly verbal tenancy at an inclusive rent of 25s. a week. The tenant's tenancy was duly

determined by a notice to quit served on or about Jan. 23, 1958, which expired on Feb. 22, 1958. A

The premises are affected by the Rent Act, 1957, which came into operation on July 6, 1957. The tenancy with which we are concerned came into existence after that date. The landlords rely on s. 11 (2) of that Act, which provides that the Rent Acts

"shall not apply to a tenancy created by a lease or agreement coming into operation at or after the commencement of this Act, and the tenant shall not by virtue of those Acts be entitled to retain possession as a statutory tenant on the coming to an end of such a tenancy . . ."

The tenant had previously occupied under a controlled tenancy the ground floor of No. 308, Chapter Road, and in August, 1957, she moved to the upper floor of the same premises. That is a new tenancy, according to the landlords, which was created after the commencement of the Act, and which is not controlled. The tenant relies on the proviso to sub-s. (2), which is as follows: C

"Provided that this sub-section shall not apply where the person to whom the tenancy is granted was immediately before the granting the tenant under a controlled tenancy and the premises comprised in one of the tenancies are the same as, or consist of or include part of, the premises comprised in the other."

The only way in which it is said that these premises come within the proviso is this. A garden is attached to this building, and the evidence shows that each of the tenants of the flats, i.e., the ground floor and the upper floor, was entitled to the use of the garden. In practice, one tenant used one half and one tenant used the other half, and the strip of grass in the middle of the two halves was used in common. The tenant of the ground floor flat had the use of a water closet in the garden; the tenant of the upper floor flat had a water closet in his own part of the house. The question which arises for decision is whether, on the true construction of this Act, the word "premises" is apt to include this right to use the garden. The right to use the garden is not part of the tenant's holding in the ordinary sense of the word. It is not even an exclusive right to the garden. It is a right to use the garden in common with the tenant of the other part of the building. E

In interpreting the word "premises", one has to look at this Act and the setting in which the word appears. The Act is called the Rent Act, 1957, and it is part of a series of Acts which have been passed to protect tenants and their tenancies. This is a decontrolling Act, and it gives a measure of relief to landlords. I think that it is easy to see the mischief against which the proviso was intended to provide. Those familiar with the working of these Acts know that a landlord has, in the past, been able to change the identity of the subject-matter of a letting so as to obtain a new standard rent—and in most cases a higher standard rent—for premises which are very little different from the old controlled premises, and the mischief aimed at by this proviso is no doubt that of a landlord who might persuade a tenant to enter into an agreement for tenancy of substantially the same premises as the tenant had occupied before, or perhaps of slightly different premises (smaller in that some part had been taken away, or larger in that some part had been added). It seems to me plain that the word "premises" is on the face of it directed to premises which are capable of physical occupation, and is not directed to an incorporeal right or easement which may be added to the tenancy. In construing the word "premises" one can have in mind its history to which LORD GODDARD, C.J., referred in *Gardiner v. Sevenoaks Rural District Council* (1) ([1950] 2 All E.R. 84 at p. 85), where he pointed out that the word "premises" had originally been no more than a reference to what had gone before, but that, in the language of conveyancers who were dealing with parcels of property, it came to mean "land or what stands upon land". In the language of conveyancers, that is what is usually meant by F

A "premises", and is, I think, illustrated by a precedent in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (15th Edn.), at p. 998, where a garden—and a garden is what we are considering here—was referred to separately from "the premises hereby demised". The same point was made by the House of Lords in *Whitley v. Stumbles* (2) ([1930] A.C. 544), where the only speech was that of VISCOUNT HAILSHAM. VISCOUNT HAILSHAM there was considering an

B incorporeal right—the right of fishing—and the question was whether (*ibid.*, at p. 544):

"Where an incorporeal right, such as a right of fishing, is demised along with corporeal hereditaments by the same lease, and the lessee uses both for the purpose of his trade or business, the incorporeal right is part of the 'premises' within s. 5 of the Landlord and Tenant Act, 1927."

C The House was considering s. 17 of the Landlord and Tenant Act, 1927, which contained this definition (sub-s. (1)):

"The holdings to which this Part of this Act applies are any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on

D thereat any trade or business, and not being agricultural holdings within the meaning of the Agricultural Holdings Act, 1923."

VISCOUNT HAILSHAM discussed the meaning of the word "premises", pointing out that it was conceded that ([1930] A.C. at p. 546):

"in strict conveyancing language the word 'premises' is used as meaning the subject-matter of the habendum in a lease . . ."

E It was, however, also pointed out that "premises" must include, or must be capable of including, things like easements, and, in the particular case under consideration, a wide construction was given to the word "premises" to cover the fishing rights in question there. VISCOUNT HAILSHAM said (*ibid.*, at p. 547):

"Any other construction would, it seems to me, defeat the plain purpose of the Act, which obviously was to provide that in the circumstances defined in the Act the tenant should have a right to continue to carry on his trade or business in the premises in the legal sense in which he was carrying them on under the lease for which he seeks that renewal."

G One gains assistance in the present case from considering the purpose, not only of this particular Act, but of the whole of the Rent Acts, which is to protect tenants in their physical occupation of premises rather than to protect such subsidiary rights as may be attached to those premises. It appears to me that in this case the position really was that the tenant of the ground floor flat and the tenant of the first floor flat had and have a right to use the garden which is in the nature of a licence. I respectfully agree with what was said by His Honour

H JUDGE PRICH in *Parperis v. Panteli* (3) (Mar. 17, 1958), 108 L.Jo. at p. 476) in the county court, which had to deal with this Act where a new tenancy began in August, 1957, i.e., after the date of the coming into operation of the Rent Act, 1957. There the tenant had the right to share a water closet in the same way as, in this case, the tenant has the right to use the garden. The learned judge was of opinion—and I agree with him—that the user of the water closet

I was no more than a licence, and the proviso did not apply. For myself, I think that to hold otherwise might lead to absurd results, because, in cases where a building, even a relatively small building, is split up into parts which are commonly called flats—though I suppose where they are not self-contained they are not strictly flats—it is a common enough thing for the occupants of the different parts to have rights of access, rights of communication between various parts of the building, rights to deposit dustbins, rights to use telephones, and matters of that kind, which on the face of it are not to be supposed to be the subject-matter of this proviso. On that ground I would allow this appeal.

A second point was taken by the landlords. It was said that, once the tenant had moved upstairs into the first floor flat, the right to use the garden was not the same right as she had when she was occupying the place below. That seems to me a point which is rather over-subtle, and should perhaps for that reason alone be rejected. Substantially it is the same right to use the garden, although it is true that it attaches to different premises when the tenant moves upstairs.

However, I rest my judgment on the first ground advanced by counsel for the landlords, on which he mainly relies, and say that the proviso does not apply, because the right to use the garden is not "part of the premises" on the true construction of this Act of Parliament.

SELLERS, L.J.: I agree with my Lord's interpretation of the proviso and the application of it to the facts of this case. The question which arises is whether the premises which the tenant now occupies include part of the premises which she previously occupied. The only evidence adduced to establish that is that when she entered into her tenancy of the previous premises—the ground floor flat—she was granted the right to use the garden. A similar right was given apparently to Mr. Lincoln, who occupied the upstairs premises which the tenant has now taken. Nothing more is said about it in substance, I think, than that that was a right given to her. What was its precise extent or legal nature was not really investigated and perhaps has to be derived from those simple facts. What in fact took place was that one of the two tenants agreed to cultivate one part and one another part of the garden, and there seems to have been a grass plot in the middle which, if they wished, they could share in common.

My Lord has given an interpretation of the section with which I agree. It is on that slender evidence that the tenant seeks to make some link of continuity or overlapping between the two premises occupied by her. It is quite inadequate to establish that on any reasonable interpretation of this proviso.

My Lord has referred to the other argument which was advanced, which may be highly technical and not very acceptable. But in fact the tenant in the present occupation of the upstairs flat is enjoying no more than and no less than the previous occupier of the flat, i.e., she is there occupying the same physical premises and enjoying precisely the same right, and she has in no way in any real sense continued anything which was part of her previous tenancy. I prefer the judgment of His Honour JUDGE PUGH in the somewhat similar case cited to us.

I agree that this appeal should be allowed.

WILLMER, L.J.: I also agree that this appeal must be allowed, and I venture to add a few words of my own only because we are differing from the learned judge below. The learned judge held that, when the tenant moved upstairs from the ground floor to the first floor, her retention of the right to use the garden was sufficient to bring her within the proviso to s. 11 (2) of the Rent Act, 1957. If such an incorporeal right as the right to use the garden in common with the other tenant in this case is to be held to be included in the word "premises" for the purpose of the proviso to this sub-section, I find it difficult to see where one is to stop in relation to other incorporeal rights which normally go with the occupation of flats such as these. My Lord has already drawn attention to other rights that normally go with the occupation of a flat, such as the right to use the passages and entrances and so forth. Are all such incorporeal rights to be included under the word "premises" for the purposes of this section? If so, there will be few cases where a tenant moving from one flat to another flat in the same building will not be able to invoke some incorporeal right which will bring him or her within the proviso. It is in those circumstances that it seems to me that, in order to make sense of the proviso, one must construe the word "premises" in its physical sense, i.e., as referring to physical premises which are capable of physical occupation. It is perfectly true, as was pointed out by LORD GODDARD, C.J., in *Gardiner v. Serenoaks Rural District Council* (1) (1950)

A 2 All E.R. 84) and by VISCOUNT HAILSHAM in *Whitley v. Stumbles* (2) ([1930] A.C. 544), that "premises" is a word which is wide enough to include not only corporeal hereditaments but also any incorporeal right the subject-matter of the habendum in a lease. But in the course of his speech in that case, VISCOUNT HAILSHAM was at pains to draw attention to the fact that, in the very Act which he was then construing, the Landlord and Tenant Act, 1927, the word "premises" was used in different senses in different contexts. For instance, he referred to instances where the Act referred to the "premises" being demolished—a clear use of the word in its physical or colloquial sense. Having VISCOUNT HAILSHAM'S weighty authority for the proposition that "premises" is an ambiguous word which may be used in alternative senses, it seems to me to be open to us to say that "premises" in the present context must have been intended by Parliament to be understood in its popular or physical sense. Unless this is so, I find it difficult to make sense of the proviso. For these reasons, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *A. A. Sellar & Co.* (for the landlords); *Scott, Winter & Co.* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SQUIRES v. SQUIRES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Stevenson, J.), October 22, 1958, March 2, 3, 6, 1959.]

Divorce—Decree nisi—Rescission—Material facts not before court—Application by respondent—“Any person” may show cause—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 12 (2).

In July, 1958, the wife obtained in an undefended suit a decree nisi on the ground of the husband's cruelty. In October, 1958, the husband applied to the court to rescind the decree nisi on the ground that since the decree the parties had for a while resumed cohabitation and that there had been an effective reconciliation. The application was made in reliance on s. 12 (2) of the Matrimonial Causes Act, 1950*, under which "any person" may show cause why a decree nisi should not be made absolute. On an objection by the wife that the court had no jurisdiction to hear the summons,

Held: the court had no jurisdiction to hear the summons since the words "any person" in s. 12 (2) did not include the husband who was a party to the suit.

Stoate v. Stoate ((1861), 2 Sw. & Tr. 384) and observations of LINDLEY, L.J., in *Howarth v. Howarth* ((1884), 9 P.D. at p. 228) applied; *Miller v. Miller* (unreported) and *Saunders v. Saunders* (unreported) distinguished.

[As to party to suit showing cause against a decree nisi, see 12 HALSBURY'S LAWS (3rd Edn.) 414, para. 922, note (q); and for cases on the subject, see 27 DIGEST (Repl.) 581, 582, 5405-5410.]

For the Matrimonial Causes Act, 1950, s. 10 (2), s. 12 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 398, 400.]

Cases referred to:

- (1) *Stoate v. Stoate*, (1861), 2 Sw. & Tr. 384; 30 L.J.P.M. & A. 173; 5 L.T. 138; 164 E.R. 1045; 27 Digest (Repl.) 581, 5405.
- (2) *Howarth v. Howarth*, (1884), 9 P.D. 218; 51 L.T. 872; 27 Digest (Repl.) 600, 5612.

* The terms of s. 12 (2) are set out at pp. 86, 87, post.

- (3) *Harries v. Harries & Gregory*, (1901), 86 L.T. 262; 27 Digest (Repl.) 582, 5411. A
- (4) *W.—, M.J. v. W.—, H.R.W.*, [1936] 2 All E.R. 1112; [1936] P. 187; 105 L.J.P. 97; 155 L.T. 319; 27 Digest (Repl.) 591, 5524.
- (5) *Sloggett v. Sloggett*, [1928] P. 148; 97 L.J.P. 71; 139 L.T. 238; 27 Digest (Repl.) 581, 5394.
- (6) *Miller v. Miller*, (1922), ("The Times", Apr. 7, May 3), Unreported. B
- (7) *Saunders v. Saunders*, (1936), ("The Times", Dec. 8), Unreported.

Summons.

This was a summons by the husband requiring the wife to show cause why a decree nisi granted to the wife on July 7, 1958, in an undefended suit in which the husband had entered a limited appearance by solicitors, should not be rescinded. The summons came before STEVENSON, J., on Oct. 22, 1958, when the wife objected that the court had no jurisdiction to hear the summons and the matter was adjourned for argument by the Queen's Proctor in open court. The facts appear in the judgment.

H. J. Phillimore, Q.C., and *John B. Gardner* for the wife.

Miss J. Bisschop for the husband.

J. P. Comyn for the Queen's Proctor. D

Cur. adv. vult.

Mar. 6. STEVENSON, J.: The short history of the matter is this. The marriage took place on Mar. 11, 1947. An adopted boy aged eight and another child (described as a foster child) have been brought up as children of the marriage. The wife's petition alleging cruelty against her husband was filed on Mar. 14, 1958. In the course of the proceedings the wife sought and obtained an injunction against the husband restraining him from molesting her and, on July 7, 1958, when His Honour JUDGE RAWLINS, sitting as a special commissioner at Reading, granted the decree nisi, the injunction was continued. The husband did not defend the suit, but he was represented by counsel at the hearing. The history of the suit is not relevant to the matters which I have now to consider. The present summons was issued on Oct. 15, 1958, requiring the wife to show cause why the decree of July 7 should not be rescinded. No ground on which that relief was asked was specified in the summons, but it appears from an affidavit sworn by the husband on Oct. 15, 1958, that, according to him, cohabitation was resumed with the wife between Aug. 4 and 23, 1958, and that sexual intercourse took place between them on various dates during that period and the husband seeks to establish that the cruelty on which the decree nisi was founded was condoned and that there was an effective reconciliation and on that ground he said that the decree nisi should be rescinded. I express no opinion and have formed none as to the truth or otherwise of the husband's allegations of fact and I refer to them now only for the purpose of indicating the ground on which this summons is founded. It is to be observed that the matters on which the husband relies are matters which arose, if they arose at all, after the decree nisi. The husband brought his allegation of condonation to the attention of the Queen's Proctor who, having considered the matter, intimated to the parties on Oct. 13, 1958, and to the court, that he did not intend to take any steps in the proceedings in his capacity as Queen's Proctor or to show cause why the decree nisi should not be made absolute. The Queen's Proctor's presence in the proceedings before me is due to a request by the court for his assistance on the question of jurisdiction raised on behalf of the wife. E
F
G
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I

The Queen's Proctor has argued that a party to a suit for dissolution is not entitled to show cause why a decree should not be made absolute. The husband has, for the purpose of this summons, sought to invoke the jurisdiction vested in the court by the Matrimonial Causes Act, 1950, s. 12 (2). That sub-section says:

"After the pronouncing of the decree nisi and before the decree is made

A absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

B The Queen's Proctor contends that "any person" in s. 12 (2) of the Act of 1950 has to be compared with the same phrase in s. 10 (2) of the same Act which says:

C "any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient."

Now, those provisions, it is to be observed, are lineal descendants of s. 7 of the Matrimonial Causes Act, 1860, which provided that:

D "Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court; and, on cause being so shown, the court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including the wife if she have separate property..."

H and there follow other provisions dealing only with costs with which I am not concerned myself at the moment.

I I am told and I think that it is accurate to say that s. 7 of the Act of 1860 was the first expression in statutory form of the rights and duties of the Queen's Proctor in relation to matrimonial causes although that office had, of course, existed long before the Act was passed. The view of the matter put before me on behalf of the Queen's Proctor is that the phrase in s. 10 (2) "any person" which forms part of the provision

"any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter..."

there specified, does no more than declare what was already a fact which was or should have been apparent to those who had to consider the matter that "any person" in the widest sense, meaning any member of the public, might indeed give evidence to a public official charged with the duties which were and are

imposed on the Queen's Proctor in relation to matrimonial causes. It is said, however, that the same phrase "any person" in s. 12 (2) must be differently construed for the reason that s. 12 (2) is doing something quite different from the declaration of a fact which already exists; it is conferring a procedural right which is designed to safeguard the interest of the public in seeing that a marriage is not dissolved in consequence of collusion or the suppression of material facts. It was not intended to and does not permit a party to re-open a judgment which has resulted in a decree nisi being given against him, and emphasis has been placed on the inconvenience, indeed, the scandal which might result if a party to a suit were enabled by reason of this provision which is designed for the protection of the public at large to re-open a litigation to which he has been a party and has had an opportunity of defending.

In support of that view of the matter my attention has been called to *Stoate v. Stoate* (1) ((1861), 2 Sw. & Tr. 384). The case was heard on Apr. 24, 1861, very shortly after s. 7 of the Act of 1860 to which I have referred was passed. The headnote reads:

"Decree nisi for dissolution of marriage.—Right of respondent under [the Matrimonial Causes Act, 1860], s. 7.—A respondent, against whom a decree nisi for dissolution of marriage has been pronounced, cannot show cause against the decree being made absolute under s. 7 of the [Act of 1860]."

The report reads as follows:

"In this case a decree nisi had been pronounced for dissolution of the marriage on the ground of the adultery of the wife. The respondent had appeared. Dr. Swabey now moved that the respondent might be allowed, under s. 7 of the [Act of 1860], to show cause against the decree being made absolute. Under that section a respondent ought to be at liberty to show cause against the decree nisi being made absolute, if material facts arise or come to her knowledge after the decree nisi has been pronounced."

The Judge Ordinary (SIR CRESSWELL CRESSWELL) said:

"The respondent has no right under that section to show cause against the decree nisi being made absolute. She should have applied for a new trial. The motion must be rejected, and the costs of it must not be allowed against the husband."

In *Howarth v. Howarth* (2) ((1884), 9 P.D. 218), the Court of Appeal had to consider a case in which a husband respondent applied for a new trial of a petition which had resulted in a decree against him on the ground that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and he filed affidavits alleging facts not known at the trial which it was said went to prove adultery. He obtained a rule nisi but the rule was discharged on argument, and from that decision the husband appealed. Immediately afterwards an uncle of the husband entered an appearance, as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the husband. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given to her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by SIR JAMES HANNEN, P. and refused. Against that decision the petitioning wife appealed, and it was held by the Court of Appeal that s. 7 of the Act of 1860 authorised intervention by any person where material facts had not been brought before the court, whether by intention or through accident. The headnote of this case says:

"Whether where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor, *quaere*."

A I venture to doubt whether that headnote is a completely accurate reproduction of the effect of what is said in the judgment, because LINDLEY, L.J. (9 P.D. at p. 228) says this:

B "The question turns upon s. 7 of the Act of 1860. That section provides that during the period there referred to any person shall be at liberty to show cause why the decree nisi should not be made absolute. Pausing there for a moment, let us consider the meaning of 'any person'. It has been decided, and properly, that 'any person' does not include the respondent. The respondent has other means of applying to the court besides availing himself of this intervention proceeding. 'Any person' not only does not apply to the respondent, but it does not apply to the respondent in disguise, that is to say, to any mere nominee or puppet of his. That which he cannot do in his own name he cannot do by anybody else, or by using anybody else's name, but so far as I know 'any person' means anybody except the respondent and somebody who is the respondent in disguise, his agent, or his puppet."

D The suggestion being, of course, that in this particular case the uncle of the respondent who had sought to intervene was for this purpose an agent or puppet of the respondent. BAGGALLAY, L.J., said this (9 P.D. at p. 224):

E "In this case I am bound to say that I have arrived at the conclusion to which the president of the court came, that there are now brought before the court facts more or less material as regards the ultimate decision of this case, that had not been brought before the court at the time when the decree nisi was made. It appears to me, therefore, that, assuming Mr. Walker to be an independent intervener, not an intervener acting in collusion or by arrangement with either of the parties to the suit, there were circumstances which would justify the intervention. The question then is whether he can be regarded as a person independently intervening. I am not sure that it is necessary for the court to be satisfied that the party is not acting F in collusion with either of the parties to the cause. I am rather disposed to think that the court should allow the intervention unless it is satisfied that there is collusion between the party intervening and one of the parties to the cause."

G Those words, as I understand them, could only have been used by BAGGALLAY, L.J., on the basis that he accepted the view which is stated with so much emphasis by LINDLEY, L.J., on this matter. I do not think that any real assistance is to be gathered from the judgment of COTTON, L.J. He took the view which he expressed (9 P.D. at p. 226):

H "It is not necessary to decide that question in the present case; the Queen's Proctor certainly can intervene on the ground of subsequent adultery, and we have not to consider the question whether any other person can."

I One derives, I think, no assistance on this matter from the judgment of COTTON, L.J., but I am in no doubt as to what view was taken by LINDLEY, L.J., and I think also by BAGGALLAY, L.J.

Then, *Harries v. Harries & Gregory* (3) ((1901), 86 L.T. 262) was a case in which the co-respondent entered an appearance in a divorce suit but did not defend the proceedings, a decree nisi was obtained by the petitioner, and it was held by the court that the co-respondent could not afterwards intervene to show cause why the decree should not be made absolute. This was a decision of GOPELL BARNES, J. It was contended (86 L.T. at p. 262) on behalf of the co-respondent, who asked for leave to intervene:

"(i) that the decree nisi was obtained contrary to the justice of the case by withholding material facts from the court, (ii) that the petitioner had been guilty of unreasonable delay in presenting his petition, and (iii) that the

court had been misled and deceived at the hearing of the case by the false evidence of the petitioner.”

GORELL BARNES, J., said (*ibid.*):

“A respondent cannot intervene to prevent a decree nisi being made absolute. The authorities are clear upon the point. In the case of *Stoute v. Stoute* (1) it was held that ‘a respondent against whom a decree nisi for dissolution of marriage has been pronounced cannot show cause against the decree being made absolute under s. 7 of the [Act of 1860]’. And a co-respondent is in no better position than a respondent. It seems to me a novel idea that a co-respondent should seek to intervene as a member of the public . . . The decree nisi must be made absolute . . .”

In more recent times the matter has been canvassed in *W. —, M.J. v. W. —, H.R.W.* (4) ([1936] 2 All E.R. 1112), where BUCKNILL, J., considered the three authorities to which I have already referred. It was a case in which a woman named in a wife’s petition as having committed adultery with the husband was served with the petition but did not enter an appearance or apply for leave to intervene. The husband appeared but filed no answer. The decree was pronounced and it was held that the mere service of the petition on her did not make her a party to the suit. In the course of discussing her position, BUCKNILL, J., went through the authorities to which I have referred. He had before him in argument *Sloggett v. Sloggett* (5) ([1928] P. 148) where LORD MERRIVALE, P., said (*ibid.*, at p. 153):

“Contrary to the ordinary course of trial of civil proceedings the court is required not only to deal with issues raised by the parties, but with independent matters deemed by the legislature fit to be dealt with, in respect of a larger interest, that namely of the community.”

The judgment of BUCKNILL, J., proceeds on the basis that the woman named, who in the case sought to intervene, was not a party to the suit; but it is quite plain that his decision must have been otherwise if he had come to the conclusion that she was a party. He says ([1936] 2 All E.R. at p. 1117):

“If the proceedings for divorce were a personal matter between the parties alone, it would, I think, be unjust and contrary to public policy which requires that litigation if possible should not be unduly prolonged, that a woman in the position of the intervener in this case should be allowed to intervene after the hearing of the case. Her opportunity to apply for leave to intervene arose as soon as the petition was brought to her notice, and she should have acted then. But the legislature by the various statutes that have been passed has clearly indicated that proceedings for divorce are not merely a personal matter but are also a matter of public interest. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 178, states that on a petition for divorce it becomes the duty of the court to satisfy itself so far as it reasonably can as to the facts alleged.”

Then the learned judge quotes the words of LORD MERRIVALE, P., in *Sloggett v. Sloggett* (5), to which I have referred and goes on:

“It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured so as to indicate adultery where none in fact has taken place.”

The emphasis is there placed on the function of what is now s. 12 (2) of the Matrimonial Causes Act, 1950, in protecting the public interest in seeing that a marriage is not dissolved contrary to the justice of the case or as a result of collusion or any of the other matters there specified.

On the other hand, it has been argued by counsel for the husband that the view that has been put forward on behalf of the Queen’s Proctor and the wife on the authorities to which I have referred, cannot be reconciled with the established practice of the court which permits a summons by consent to be issued

A and acted on for the purpose of rescinding a decree nisi in a case where there has been a reconciliation between the parties and, in that connexion, my attention has been drawn to *Miller v. Miller* (6) ((1922), "The Times", Apr. 7, May 3). That was a motion by a respondent husband for rescission of a decree of judicial separation, which was pronounced in favour of the wife on the ground of cruelty in June, 1926, and subsequent to the decree the parties had come together again

B and there had been a reconciliation, and counsel in moving the court for the rescission of the decree of judicial separation said that he knew of no precedent for such an application being made, and that although there was authority for such an application being made on motion on behalf of the petitioner, there was nothing in the Supreme Court of Judicature (Consolidation) Act, 1925, which afforded definite guidance or direction in such a case, but it was submitted that

C the court could make the order, provided the petitioner concurred. LORD MERRIVALE said:

"If there is no precedent it is time there was. The ecclesiastical courts dealt with such matters according to common sense. I do not see that it matters which of the parties makes the application, provided they both concur in it. I make the order."

D It is to be observed first of all that this was an application by consent to rescind the decree on the ground of a reconciliation and s. 12 (2) in the present case contemplates a person showing cause why a decree should not be made absolute. The present summons is in form a summons to rescind the decree. No point has been taken that the form of this summons disqualifies it in itself from being

E considered as a possible proceeding under s. 12 (2), but it is nevertheless a summons in form to rescind the decree and no application has been made to amend it. *Saunders v. Saunders* (7) ((1936), "The Times", Dec. 8) is another example where following on reconciliation a decree nisi of divorce was by consent rescinded on the respondent's application.

I personally find no difficulty in distinguishing the court's practice of permitting decrees to be rescinded by consent, where there has been a reconciliation between the parties, from a contested application which it is sought to base on s. 12 (2) such as the present one. It has been suggested to me, and it may be right, that the court's practice of permitting applications to rescind a decree by consent following on a reconciliation subsequent to the decree nisi is really based on the inherent jurisdiction of the courts to prevent what might otherwise become an abuse of the court's process. I do not know, and I express no view about that.

G It may well be that the inherent jurisdiction of the court to keep its records clean is in fact the basis on which in practice consent applications following a reconciliation are made. In my view, however, the existence of that practice does not afford a valid foundation for the argument that the respondent can in a contested application such as this to rescind a decree nisi bring himself within the meaning and intention, as I see it, of s. 12 (2).

H The authorities to which I have referred and the reasoning that I have indicated lead me to the conclusion that the court has no jurisdiction to entertain this summons. I expressed doubt in the course of the hearing whether in any event it should not be a motion rather than a summons but no point was taken on that. I am satisfied having considered this matter, and having received the most generous and helpful assistance from counsel for the Queen's Proctor, and from

I counsel for the wife, that I must dismiss this summons.

Summons dismissed.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the wife); *Seifert, Sedley & Co.* (for the husband); *Queen's Proctor.*

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

R. v. OAKES.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Streatfeild and Hinchcliffe, J.J.).
March 23, 1959.]

Criminal Law—Official secrets—Act preparatory to the commission of an offence under Official Secrets Acts, 1911 and 1920—Whether the doing of such an act is an offence in itself—Official Secrets Act, 1920 (10 & 11 Geo. 5 c. 75), s. 7.

Statute—Construction—Criminal and penal statutes—Construction to avoid unintelligible and absurd result—Substitution of “or” for “and”, although result less favourable to accused—Official Secrets Act, 1920 (10 & 11 Geo. 5 c. 75), s. 7.

By the Official Secrets Act, 1920, s. 7. “Any person who attempts to commit any offence under the [Official Secrets Act, 1911] or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the [Act of 1911] or this Act, shall be guilty” of an offence.

The appellant was charged on an indictment containing, among other counts, a count charging him under s. 7 of the Official Secrets Act, 1920, with doing an act preparatory to committing an offence under the Official Secrets Act, 1911. At the trial, before the appellant pleaded to the count, counsel for the defence moved to quash the count on the ground that it disclosed no offence known to the law, but the trial judge overruled the submission. The appellant then pleaded guilty to the count and was convicted. On appeal,

Held: the word “or” should be read in place of the word “and” in the phrase “and does any act preparatory to” in s. 7 of the Official Secrets Act, 1920, for otherwise no intelligible meaning would be given to the phrase: accordingly the doing of an act preparatory to the commission of an offence under the Act of 1920 or under the Official Secrets Act, 1911, was an offence in itself, and the appellant had been rightly convicted.

A.-G. v. Beauchamp ([1920] 1 K.B. 650) applied.

Appeal dismissed.

[**Editorial Note.** By the Defence (General) Regulations, 1939, reg. 20B, and Sch. 1, para. 4, the words “or does any act” were substituted for the words “and does any act” in s. 7 of the Official Secrets Act, 1920. Regulation 20B and Sch. 1 were revoked as from Sept. 28, 1945, by S.R. & O. 1945 No. 1208, but by reg. 100 (6), and later reg. 99B, the Defence Regulations and orders made under them were deemed to be Acts of Parliament for the purposes of s. 38 of the Interpretation Act, 1889, sub-s. (2) (a) of which section excludes the revival of anything not in force at the time of the repeal in the absence of a contrary intention.

As to the construction of a penal statute, see 31 HALSBURY'S LAWS (2nd Edn.) 536, para. 704.

For the Official Secrets Act, 1920, s. 7, see 5 HALSBURY'S STATUTES (2nd Edn.) 1051.]

Cases referred to:

- (1) *Mayor & St. Mellons Rural District Council v. Newport Corpn.* [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 3rd Digest Supp.
- (2) *A.-G. v. Sillem*, (1864), 2 H. & C. 431; 33 L.J.Ex. 92; 159 E.R. 178; sub nom. *R. v. Sillim*, *The Alexandra*, 3 New Rep. 299; 11 L.T. 223; on appeal, 10 H.L. Cas. 704; 42 Digest 612, 130.
- (3) *Col v. Lawrence*, (1853), 1 E. & B. 516; 22 L.J.Q.B. 140; 20 L.T.O.S. 222; 17 J.P. 342; 118 E.R. 529; 42 Digest 727, 1486.
- (4) *A. G. v. Beauchamp*, [1920] 1 K.B. 650; 89 L.J.K.B. 219; 122 L.L. 527; 84 J.P. 41; 42 Digest 728, 1509.

- A (5) *R. v. Eagleton*, (1855), Dears. C.C. 376, 515; 24 L.J.M.C. 158; 26 L.T.O.S. 7; 19 J.P. 546; 14 Digest (Repl.) 113, 786.
- (6) *R. v. Linneker*, [1906] 2 K.B. 99; 75 L.J.K.B. 385; 94 L.T. 856; 70 J.P. 293; 14 Digest (Repl.) 114, 794.
- (7) *R. v. Robinson*, [1915] 2 K.B. 342; 84 L.J.K.B. 1149; 113 L.T. 379; 79 J.P. 303; 11 Cr. App. Rep. 124; 14 Digest (Repl.) 114, 795.

B Appeal.

The appellant, Robert Nelson Embleton Oakes, was charged at Kingston-on-Thames Assizes on an indictment containing four counts, on the first of which he was acquitted. He pleaded guilty to the second and third counts, which charged him with offences under s. 2 (1) of the Official Secrets Act, 1911. The fourth count charged him with an offence under s. 7 of the Official Secrets Act, 1920, in that he "did an act preparatory to" the commission of an offence under the Act of 1911. Before the appellant pleaded to the fourth count, counsel for the defence moved to quash the count on the ground that it disclosed no offence known to the law, but SLADE, J., overruled the submission. The appellant then pleaded guilty and was sentenced to eighteen months', twelve months', and two years' imprisonment, the sentences to run concurrently. He appealed against his conviction on the fourth count.

S. G. Howard, Q.C., and J. S. Abdela for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Harold Brown, Q.C., and E. J. P. Cussen for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was charged at Kingston-on-Thames Assizes on four counts. In regard to the first count, which was stealing official documents, no evidence was tendered and he was acquitted. To the second and third, which consisted of retaining documents contrary to s. 2 of the Official Secrets Act, 1911, and communicating a document contrary to that Act, he pleaded guilty. The fourth count was in these terms:

"That on July 4, 1958, in this county, you did an act preparatory to communicating to another person for a purpose prejudicial to the safety or interests of the State documents calculated to be of use to an enemy by entering into an arrangement with one Warner whereby the said Warner was to secure a purchaser for certain documents used in a prohibited place and in the possession of you, the said Oakes."

Before the appellant pleaded to that count, counsel for the appellant moved to quash the count on the ground that it disclosed no offence known to the law. The learned judge, SLADE, J., after hearing arguments, overruled that submission, whereupon the appellant pleaded guilty, and it is in regard to that motion to quash the indictment that this appeal is made.

The section in question is s. 7 of the Official Secrets Act, 1920, which provides:

"Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence."

It is pointed out, as it was pointed out to the learned judge, that several matters are there set out each of which will constitute an offence. Each is separated by the disjunctive "or" until one gets to the word "abets", when, instead of the sentence going on "or does any act preparatory to the commission of an offence", the words are "and does any act . . .". Accordingly it is said that under that

section, on its literal meaning, the doing of an act preparatory to the commission of an offence is not constituted an offence of itself alone, and, as it was that with which the appellant was charged, no offence under the section was alleged.

The argument here is in a very short compass. Counsel for the appellant points out, what is undoubtedly true, that the concern of the courts is to ascertain the intention of Parliament. That intention, certainly in the first instance at any rate, is to be found from the actual words used, and he quotes in support of that some very strong observations of LORD SIMONDS in *Magor & St. Mellons Rural District Council v. Newport Corpn.* (1) ([1951] 2 All E.R. 839 at p. 841). Counsel goes further; he says that, when one is looking at a penal statute, still more so when one is looking at a penal statute constituting a new offence, it is imperative on the court to look only at the words used, and in that connexion he refers to the judgment of POLLOCK, C.B., in *A.-G. v. Sillem* (2) ((1864), 33 L.J.Ex. 92). There, POLLOCK, C.B., said (*ibid.*, at p. 110):

"We have had in this country no court of criminal equity since the Star Chamber was abolished, as LORD CAMPBELL called it, in a case* tried before him . . . BLACKSTONE, J., well lays down the rule†: 'The freedom of our constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter' . . . If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."

Counsel also refers to *Coe v. Lawrance* (3) ((1853), 22 L.J.Q.B. 140). From there counsel goes on to contend that, if the sentence in s. 7 is read literally, it in fact makes a grammatical sentence, one can give to each word a meaning, and, accordingly, he says that, even if the result may be absurd, there is no ground for making any alteration in the language or reading any words into it. The court feels that it is at that point that it is constrained to depart from counsel's argument. It seems to this court that, where the literal reading of a statute, and a penal statute, produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. Here, however, we venture to think that the result is unintelligible. LORD COLERIDGE, J., in *A.-G. v. Beauchamp* (4) ([1920] 1 K.B. 650), put it quite shortly in these words (*ibid.*, at p. 655):

"Unquestionably, when one is construing a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction which satisfies those rules makes the enactment intelligible, and especially if it carries out the obvious intention of the legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not to be departed from."

We think that the literal construction here produces an unintelligible result, and for many reasons. In the first place, there is an obvious difficulty as to what is qualified by the words "and does any act preparatory to the commission of an offence". Does it qualify all the alternatives that have gone before? Does it qualify only the words that have followed the last comma, namely, "or aids and abets", or does it qualify only the last word "abets"? If it qualifies all that has gone before, clearly in regard to an attempt it makes nonsense, because an act preparatory to the offence is something more remote than an act which constitutes an attempt, and, accordingly, it is meaningless in connexion with attempts, and, indeed, it is difficult to give it a meaning with regard to "solicits or incites or endeavours to persuade". If, on the other hand, it qualifies only the words "or aids or abets", or the word "abets" alone, then

* *Emperor of Austria v. Day & Kossuth*, (1861), 30 L.J.Ch. 690.

† 1 BLACKSTONE'S COMMENTARIES 92.

A immediately one asks: What is the sense of it applying to those words and not to the words "solicits or incites or endeavours to persuade". Whichever way it is read, an absurd result is obtained. Secondly, it is to be observed that, but for these words, an aider or abettor by reason of the Accessories and Abettors Act, 1861, would have committed an offence, and, accordingly, if the argument is right and the literal interpretation is given, it results in this, that, in a matter
 B which involves the the security of the state, the offence of aiding and abetting is limited to aiding and abetting in which an act preparatory to the commission of an offence has taken place. Thirdly, it is to be observed that the conception of doing an act preparatory to the commission of an offence had been considered by the courts before the passing of the Act of 1920. As long ago as in 1855, in *R. v. Eagleton* (5) ((1855), 24 L.J.M.C. 158), PARKE, B., was considering the
 C sort of acts which would constitute an attempt and drawing a distinction between those acts and acts which were more remote and which were merely acts of preparation. Again, in *R. v. Linncker* (6) ([1906] 2 K.B. 99), the court* drew a distinction between acts of preparation and acts which would constitute attempts, and in *R. v. Robinson* (7) ([1915] 2 K.B. 342) the same distinction was drawn. Then, before *R. v. Robinson* (7), in the regulations made in the First
 D World War, the Defence of the Realm (Consolidation) Regulations, 1914 (S.R. & O. 1914 No. 1699, as amended), reg. 48, it was provided:

"Any person who attempts to commit, or procures aids or abets, or does any act preparatory to, the commission of, any act prohibited by these regulations, or harbours any person whom he knows, or has reasonable
 E grounds for supposing, to have acted in contravention of these regulations, shall be guilty of an offence against these regulations."

Passing for a moment to the period after the passing of the Act of 1920, it is to be observed that by reg. 28 of the Emergency Regulations, 1921 (S.R. & O. 1921 No. 440), it was again provided that
 F

"Any person who . . . does any act preparatory to, the commission of any act prohibited by these regulations . . . shall be guilty of an offence against these regulations."

Similar words appear in the Defence (General) Regulations, 1939, reg. 90 (1), in force during the Second World War. Each context, be it observed, where
 G this sort of situation is being discussed and enactments are made in regard to it, is considering the doer of an act preparatory to the commission of an offence by him, and it seems to the court that the natural meaning of the words refers to that. If one tries to read those words as a qualification of aiding and abetting, the result becomes absurd, because the essence of aiding and abetting is the
 H aiding and abetting of someone else to commit an offence, and to say it is a qualification of that that a man should do an act preparatory to the commission of an offence by himself is pure nonsense.

Accordingly, for all those reasons it seems to this court that no intelligible meaning can be given to this section if it is read literally, and, accordingly, this court agrees with the learned judge. The learned judge thought that the natural
 I way of getting over the difficulty was to read into the Act after the word "and" and before the word "does" the opening words of the section, "Any person who", so that it would read, "or aids or abets and any person who does any act preparatory to the commission of an offence under the principal Act or this Act . . ." The court on the whole prefers to read the word "or" for "and", because, if the words "any person who" are inserted, it leaves the words "aids

or abets" in the air, whereas if "and" is changed to "or" it will read in this way: "or aids or abets or does any act preparatory to"—and then I insert a comma—"the commission of an offence". Indeed, read in that way it happens very closely to correspond with the only two enactments near the time, namely, the Regulations of 1914 and the Regulations of 1921. A

Counsel for the appellant has quite rightly pointed out that, although the court has on occasions read "and" for "or" and "or" for "and", it has with one exception been in order to produce a result more favourable to the subject. The court feels, however, that, on principle, there is no reason, if compelled to that end, why the words should not be changed even though the result is less favourable to the subject, and, indeed, that was done in *A.-G. v. Beauchamp* (4). In that case ROWLATT, J., having referred to the manifest absurdity which would arise if a literal construction was given, went on in this way ([1920] 1 K.B. at p. 657): B

"It is not really a question of adding anything to the section, for it is quite clear what the intention was, and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression." C

It seems to the court that it is quite clear in the present case what the intention was, and that there has been merely a faultiness of expression. Again, McCARDIE, J., who agreed with ROWLATT, J., said at the end of his judgment (*ibid.*, at p. 658): D

"That seems to be the reasonably plain meaning of the section which we have to consider, while it is in agreement with the earlier legislation on the subject." E

Everything that was said by those two judges seems to this court to apply fully in the circumstances of this case. Accordingly, the court will read "or" for "and", and this appeal is dismissed. F

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

R. v. COOK.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Devlin, Donovan, McNair and Hinchcliffe, JJ.), March 9, 23, 1959.]

B

Criminal Law—Evidence—Character of accused—Allegation that police witness obtained confession by threat—Whether cross-examination of accused as to character should be allowed—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1, proviso (f) (ii).

C

The appellant was charged at quarter sessions with obtaining a motor car by false pretences and with receiving five cheque forms knowing them to be stolen. The witnesses for the prosecution included a detective constable, who gave evidence that the appellant, when charged, admitted that he had obtained the car by means of a forged cheque. The appellant had also made a written statement saying that he had found the cheque forms in a road. The appellant conducted his own defence, and, when cross-examining the detective constable, suggested that his statement had been obtained by means of a threat that, if he did not speak, his wife would be charged. He repeated this allegation in his own cross-examination, and prosecuting counsel then indicated that he wished to put "certain further questions" to the appellant. The chairman said that, while counsel was, strictly, entitled to do so, he would not have thought that it was necessary. Counsel then cross-examined the appellant about previous convictions. The appellant had received no previous warning that the way in which he was conducting his defence might put his character in issue under s. 1, proviso (f) (ii)* of the Criminal Evidence Act, 1898. The chairman gave a proper direction to the jury about the limited effect of the appellant's bad character. The appellant was convicted of the offences with which he was charged and was sentenced to imprisonment. On appeal,

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Held: (i) the defence had been so conducted as to involve an imputation on the character of the police witness and the trial judge had a discretion whether questions as to accused's previous convictions should be allowed; but the trial judge did not exercise his discretion, which would, accordingly, be exercised by the Court of Criminal Appeal, and in the circumstances of this case, especially as no warning of the prosecution's intention to exercise rights under s. 1, proviso (f) (ii) of the Criminal Evidence Act, 1898, had been given, the questions should not have been put.

R. v. Hudson ([1912] 2 K.B. 464) and *R. v. Jenkins* ((1945), 114 L.J.K.B. 425) applied.

(ii) in the circumstances of this case there had been no miscarriage of justice and the appeal would be dismissed under s. 4 (1)† of the Criminal Appeal Act, 1907.

Appeal dismissed.

H

[As to cross-examination of defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 449, para. 828; and for cases on the subject, see 14 DIGEST (Repl.) 511-513, 4942-4968, and 515-518, 4987-5016.

* Section 1, proviso (f) of the Criminal Evidence Act, 1898, so far as material, reads:

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that whereof he is then charged, or is of bad character, unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

† The proviso to s. 4 (1) of the Criminal Appeal Act, 1907, reads:

"Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

I

For the Criminal Evidence Act, 1898, s. 1, proviso (f) (ii), see 9 HALSBURY'S STATUTES (2nd Edn.) 614. A

For the Criminal Appeal Act, 1907, s. 4 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Cases referred to:

- (1) *R. v. Rouse*, [1904] 1 K.B. 184; 73 L.J.K.B. 60; 89 L.T. 677; 68 J.P. 14; 14 Digest (Repl.) 515, 4990. B
- (2) *R. v. Turner*, [1944] 1 All E.R. 599; [1944] K.B. 463; 114 L.J.K.B. 45; 171 L.T. 246; 30 Cr. App. Rep. 9; 14 Digest (Repl.) 516, 5003.
- (3) *Stirland v. Public Prosecutions Director*, [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; sub nom. *R. v. Stirland*, 30 Cr. App. Rep. 40; 14 Digest (Repl.) 511, 4949. C
- (4) *R. v. Hudson*, [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 7 Cr. App. Rep. 256; 14 Digest (Repl.) 512, 4961.
- (5) *O'Hara v. H.M. Advocate*, 1948 S.C. (J.) 90; 14 Digest (Repl.) 518, 3420.
- (6) *R. v. Clark*, [1955] 3 All E.R. 29; 119 J.P. 531; 39 Cr. App. Rep. 120; 14 Digest (Repl.) 517, 5010.
- (7) *Maxwell v. Director of Public Prosecutions*, [1934] All E.R. Rep. 168; [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; 24 Cr. App. Rep. 152; 14 Digest (Repl.) 515, 4983. D
- (8) *R. v. Jenkins*, (1945), 114 L.J.K.B. 425; 173 L.T. 311; 110 J.P. 86; 31 Cr. App. Rep. 1; 14 Digest (Repl.) 512, 4950.
- (9) *R. v. Preston*, [1909] 1 K.B. 568; 78 L.J.K.B. 335; 100 L.T. 303; 73 J.P. 173; 2 Cr. App. Rep. 24; 14 Digest (Repl.) 517, 5007. E
- (10) *R. v. Jones*, (1923), 87 J.P. 147; 17 Cr. App. Rep. 117; 14 Digest (Repl.) 517, 5009.

Appeal.

The appellant, Albert Samuel John Cook, was convicted at Somerset Quarter Sessions of obtaining a motor car by false pretences and of receiving five banker's cheque forms knowing them to have been stolen. He was sentenced on Sept. 26, 1958, to a term of four years' imprisonment for the first offence and to a term of three years' imprisonment, to run concurrently, for the second offence. He appealed against conviction and sentence, the main ground of appeal being that the prosecution was wrongly allowed to cross-examine him about his previous convictions. F

N. R. Blaker for the appellant.

J. H. Inskip for the Crown. G

Cur. adv. vult.

Mar. 23. LORD PARKER, C.J.: DEVLIN, J., will give the judgment of the court.

DEVLIN, J., read the following judgment of the court: On Sept. 26, 1958, the appellant was sentenced at Somerset Quarter Sessions to a term of four years' imprisonment for obtaining a motor car by false pretences and to a term of three years concurrent for receiving five banker's cheque forms knowing them to have been stolen. On Mar. 9, 1959, this court heard his appeal against conviction and sentence and dismissed it. There is only one point in the appeal that deserves serious consideration and that is the contention that the appellant was improperly cross-examined about his previous convictions. H

The facts that are relevant to it can be shortly stated. On July 9, 1958, the premises of Ackland & Pratten, Ltd. were broken into and among the property missing were five cheque forms. On July 25 a Mr. Long, who lives at Nailsea near Bristol, advertised a Humber Hawk motor car for sale. On July 28 he was rung up by a woman, who said that she was Mrs. Pratten and who arranged to buy the car. The appellant's wife was joined with him in the indictment and I

A it appears that the case for the prosecution against her was that she falsely pretended to be Mrs. Pratten. Separate trials were ordered and we are concerned only with the case against the appellant. Later, on July 28, the appellant telephoned Mr. Long to say that he was bringing round a cheque from Mrs. Pratten and would collect the car. The appellant came and represented himself to be an employee of Ackland & Pratten, Ltd., a concern well known to Mr. Long.

B Mr. Long let him take away the car in exchange for a cheque for £430 signed G. E. Pratten. The cheque was on one of the stolen forms and the signature on it was fictitious.

The witnesses for the prosecution included Detective Constable Thomas who gave evidence that on Aug. 3, when the appellant was charged, he said that he made out the cheque himself and that he admitted that he had got the car on a dud cheque. Later the appellant made a statement in writing in which he said that he found the cheque book in the road dumped down by the side of the wall. The appellant conducted his case in person, and in the course of his cross-examination of the police officer he suggested that the statement had been obtained from him by means of a threat that, if he did not speak, his wife would be charged. This suggestion was denied. The appellant later gave evidence

D on his own behalf and in answer to questions in cross-examination about his statement to the police he again said that he had made them under the threat that his wife would be charged. On that counsel for the prosecution indicated that he wished to put "certain further questions". The learned chairman said that, while counsel was, strictly, entitled to do so, he would have thought that it would not be necessary. Counsel then put to the appellant, and the appellant agreed, that he had a long record of crime behind him; details of various convictions for offences of dishonesty were then put. In the circumstances of this case and under the provisions of the Criminal Evidence Act, 1898, s. 1, proviso (f) (ii), those questions were permissible only if the nature or conduct of the defence were such as to involve imputations on the character of Detective Constable Thomas.

F It is clear from the sub-section as a whole that it does not intend that the introduction of a prisoner's previous convictions should be other than exceptional. The difficulty about its phraseology is that, unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation on his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime. The authorities show that this court has endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words as benevolently as possible in favour of the accused. Secondly, it has laid it down that in cases which fall within the words the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

H The judgments in many of the earlier cases are based on a limited construction of the statute. Thus in *R. v. Rouse* (1) ([1904] 1 K.B. 184) it was held that a statement by the prisoner in cross-examination that the prosecutor was a liar must be regarded only as an emphatic denial of the truth of the charge against him and did not enable the prosecution to put his character in issue. Cases of rape have given rise to a peculiar difficulty; the prisoner cannot assert that the connexion was with the consent of the prosecutrix without making imputations against her chastity. There was for a long time a difference of opinion about the effect of this; it was not definitely settled in favour of the defence until *R. v. Turner* (2) ([1944] 1 All E.R. 599), a case which was shortly after approved by the House of Lords in *Stirland v. Public Prosecutions Director* (3) ([1944]

I

2 All E.R. 13 at p. 18). At the same time this court has refused as a general rule to read into the section words that are not there. This was plainly laid down by a full court in *R. v. Hudson* (4) ([1912] 2 K.B. 464 at p. 470) in the following terms:

"We think that the words of the section, 'unless...the nature or conduct of the defence is such as to involve imputations', etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily', or 'unjustifiably', or 'for purposes other than that of developing the defence', or other similar words."

We need not go through the cases in detail. They were all carefully reviewed in the Scottish case, *O'Hara v. H.M. Advocate* (5) (1948 S.C. (J.) 90), and the effect of them is succinctly stated by the Lord Justice-Clerk (LORD THOMSON) as follows (*ibid.*, at p. 97):

"The net result seems to be that the Court of Criminal Appeal in England adheres to *R. v. Hudson* (4) with certain modifications in cases of rape and subject to the discretionary power of the presiding judge."

Since then *R. v. Hudson* (4) has been again applied by this court in *R. v. Clark* (6) ([1955] 3 All E.R. 29 at p. 31).

The alternative approach to the problem has been by the application of the general rule that the trial judge must always exercise his discretion so as to prevent the introduction of material whose prejudicial effect would outweigh its evidential value. The point that under this sub-section the judge had a discretion was first made by VISCOUNT SANKEY, L.C., in *Maxwell v. Director of Public Prosecutions* (7) ([1934] All E.R. Rep. 168 at p. 174). It was made again by VISCOUNT SIMON, L.C., in *Stirland v. Public Prosecutions Director* (3) ([1944] 2 All E.R. at p. 17). The principle was first elaborated in *R. v. Jenkins* (8) ([1945], 114 L.J.K.B. 425). In that case this court reaffirmed *R. v. Hudson* (4) and then dealt with the question of discretion. SINGLETON, J., said (*ibid.*, at p. 431):

"The sub-section was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that it is better that the jury should know nothing about an accused's past history if that is to his discredit. Just as it was recognised by the legislature that this was fair and proper, so it was recognised that, if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, it was equally fair and proper that the prosecution should have the right to ask questions tending to show that the accused has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel to apply to the presiding judge that he may be allowed to take the course indicated, as was done in this case. Such an application will not always be granted, for the judge has a discretion in the matter. He may feel that, even though the position is established in law, still the putting of such questions as to the character of the accused may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused almost impossible. On the other hand, in the ordinary and normal case, he may feel that if the credit of the prosecutor or his witnesses has been attacked it is only fair that the jury should have before them material on which they can form their judgment as to whether the accused is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark as to an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial, and that the legislature sought to ensure by s. 1 (f)."

A In our opinion the difficulties created by s. 1, proviso (f) (ii) are, as a general rule, best dealt with in accordance with the principle in *R. v. Hudson* (4), as applied in *R. v. Jenkins* (8). The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of s. 1, proviso (f) (ii) in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of s. 1, proviso (f) (ii) that would be too severe. It may be that, as indicated in *O'Hara v. H.M. Advocate* (5), cases of rape should be regarded as sui generis; certainly the peculiar questions to which they give rise have been settled by *R. v. Turner* (2) and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular, no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The cases on this subject-matter—in particular, *R. v. Preston* (9) ([1909] 1 K.B. 568), *R. v. Jones* (10) ((1923), 17 Cr. App. Rep. 117), and *R. v. Clark* (6)—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made on the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then, as SINGLETON, J., put it in *R. v. Jenkins* (8) and LORD GODDARD, C.J., repeated in *R. v. Clark* (6) ([1955] 3 All E.R. at p. 34), the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.

F We now apply these principles to the circumstances of this case. In our judgment, when the prosecution's evidence of an admission to a police officer is met by saying that it was extorted by means of a threat that otherwise the prisoner's wife would be charged, the defence is so conducted as to involve an imputation on the character of the police officer. The issue, therefore, becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision; but in this case we are not satisfied that the learned judge really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the learned chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter.

I Counsel for the appellant did not dispute that the conduct imputed to the police officer was grossly improper, but he submitted that it was not like a charge of fabrication or concoction which goes to the root of a witness's integrity and which, if accepted, destroys the whole of his evidence on every point in the case. He submitted also that the attack was not pointedly directed against the witness under cross-examination, but was made against the police generally. The charge was not elaborated or pressed; it was repeated several times, but that was probably because the appellant is a man who often repeats himself. Finally, counsel for the appellant made the substantial point that no warning was given to the appellant before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under s. 1, proviso (f) (iii), or for the judge to give the defence a caution. This

is especially needful when the prisoner, as here, was not represented, although it is fair to say that the appellant professed familiarity with the law and rejected the legal aid that had been assigned to him. We have come to the conclusion that the questions ought not to have been put. A

It is not often in this type of case that the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, can properly be applied. But here, in our judgment, the case against the appellant is overwhelming. The evidence for the prosecution called for some reasonable explanation by him about how he came to be in possession of the cheque forms and to use one with a fictitious signature on it. The appellant's story was that a motor dealer called Todd, who had died just before the trial took place, offered him a car for £300. The appellant agreed to buy the car; he had only got £165, but proposed to collect the balance off his mates in the morning. Mr. Todd then told the appellant to collect the car from Mr. Long and for this purpose gave him the cheque signed in the name of Pratten for £430; this meant that Mr. Todd would have been losing £130 on the transaction. No one in his senses could believe a story of this sort. Apart from all its inherent improbability, it was quite inconsistent with the statements made by the appellant to Detective Constable Thomas. Finally, we may add that the learned chairman gave to the jury a proper direction about the limited effect of the appellant's bad character. Although we think that the chairman, in his discretion, should have refused to allow the appellant to be cross-examined as to his previous convictions, we are satisfied that the only reasonable and proper verdict on the facts was one of guilty and that there has been no miscarriage of justice. It is for that reason that we dismissed the appeal. B

Appeal dismissed. C

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Stileman, Neate & Topping*, agents for *Fryer, Bennett & Deal*, Weston-super-Mare (for the Crown). D

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] E

EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1955), LTD. F

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Ormerod, L.J.J.),
March 2, 3, 23, 1959.] G

Town and Country Planning—Enforcement notice—Appeal against notice—Jurisdiction of justices to determine whether or not matters referred to in notice constituted development—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (4).

On an appeal under the Town and Country Planning Act, 1947, s. 23 (4) to a magistrates' court by a person served with an enforcement notice, the court has power to determine whether the matters referred to in the enforcement notice as being development do or do not constitute development within s. 12 (2) of the Act. H

East Riding County Council v. Park Estate (Bridlington), Ltd. ([1956] 2 All E.R. 669) applied.

Keats v. London County Council ([1954] 3 All E.R. 303) overruled. I

Norris v. Edmonton Corpn. ([1957] 2 All E.R. 801) approved.

Decision of the DIVISIONAL COURT ([1958] 2 All E.R. 276) reversed.

[For the Town and Country Planning Act, 1947, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 524.]

Cases referred to:

- (1) *East Riding County Council v. Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223; 120 J.P. 380; 3rd Digest Supp.

- A (2) *Guildford Rural District Council v. Penny*, post, p. 111.
 (3) *Robinson v. Sunderland Corpn.*, [1899] 1 Q.B. 751; 68 L.J.Q.B. 330;
 80 L.T. 262; 63 J.P. 341; 38 Digest 154, 41.
 (4) *Point of Ayr Collieries, Ltd. v. Lloyd-George*, [1943] 2 All E.R. 546; 2nd
 Digest Supp.
 B (5) *Krats v. London County Council*, [1954] 3 All E.R. 303; 118 J.P. 548;
 3rd Digest Supp.
 (6) *Norris v. Edmonton Corpn.*, [1957] 2 All E.R. 801; [1957] 2 Q.B. 564;
 121 J.P. 513; 3rd Digest Supp.

Appeal.

C This was an appeal by Fortes Ice Cream Parlour (1955), Ltd. (called herein the appellants) from a decision of the Queen's Bench Divisional Court on Apr. 30, 1958, and reported [1958] 2 All E.R. 276, whereby a decision of the justices for the County Borough of Eastbourne on July 12, 1957, quashing an enforcement notice, was reversed.

John Pennycuick, Q.C., and J. D. James for the appellants.

D *Geoffrey Lawrence, Q.C., and P. T. S. Boydell* for the respondents, Eastbourne Corporation.

Cur. adv. vult.

Mar. 23. The following judgments were read.

E LORD EVERSHERD, M.R.: The appellants, Fortes Ice Cream Parlour (1955), Ltd., at all material times have occupied at Eastbourne premises which they have used as an ice cream parlour. In June, 1956, the appellants placed on the forecourt outside the premises an automatic coin-operated ice cream sales machine, bolted to the ground when in use and supplied with refrigeration by means of electric cables from the shop. The appellants did not ask for or obtain planning permission from the respondents, the Eastbourne Corporation, who, in May, 1957, served on the appellants an enforcement notice requiring removal of the machine. The appellants appealed to the justices under the Town and F Country Planning Act, 1947, s. 23 (4); and the justices quashed the notice, on the ground that no "development", within the meaning of s. 12 of the Act, had occurred. On appeal, by way of Case Stated, by the Eastbourne Corporation to the Divisional Court of the Queen's Bench Division, that court held (by a majority; LORD GODDARD, C.J., dissenting) that the justices had no power under the Town and Country Planning Act, 1947, to inquire or determine whether in G fact development had taken place. From that decision, Fortes Ice Cream Parlour (1955), Ltd., now appeal to this court.

I adopt as a statement of the problems raised by the appeal the language of LORD GODDARD, C.J. ([1958] 2 All E.R. at p. 279):

H "The question which we have to determine depends, in my opinion, on the construction of the words 'if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof.' Are the court to assume that there has been development and must they confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not, in fact, been any development? I propose in the first place to treat this as a matter of I construction, and then to consider what effect, if any, the cases which have been decided on the section have on the conclusion to which I have come."

I propose accordingly for my part also to deal with the problems raised as he did and as, indeed, they were presented to us by counsel for the appellants and respondents, namely, first to consider the matter of construction of the Act, and second, the effect of the cases, and particularly of *East Riding County Council v. Park Estate (Bredlington), Ltd.* (1) ([1956] 2 All E.R. 669) in the House of Lords.

First, then, as to the construction of the Act. The vital words in s. 23 (4) are those cited by LORD GODDARD, C.J.—“or that no such permission was required in respect thereof”. Section 12 (1) enacts that A

“... permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.”

The appointed day was July 1, 1948. Sub-section (2) provides: B

“In this Act, except where the context otherwise requires, the expression ‘development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say . . .”: C

and then there are under paras. (a) to (f) inclusive a number of such cases not deemed (accordingly) to involve development. Sub-section (3) provides: “For the avoidance of doubt it is hereby declared that for the purposes of this section . . .” and then there are two paragraphs showing matters which, for avoidance of doubt, are to be treated as affirmatively involving development (e.g., “the use as two or more separate dwelling-houses of any building previously used as a single dwelling-house”); and there is a proviso which I need not read. Sub-section (5) is as follows: D

“Notwithstanding anything in this section, permission shall not be required under this Part of this Act . . .”: E

and then there follow in three paragraphs, (a), (b) and (c), cases in which permission is not required for what is assumed none the less to be development. Again there are provisos to which I need not allude. F

Counsel for the corporation observed that three conceptions are involved in s. 12, viz.: (i) that of “development of land”, which is closely defined in the section; (ii) that of changes of user which are deemed not to constitute development; and (iii) that of changes of user which, though constituting development, are excused from requiring permission. Counsel drew attention to the distinction between the second and third conceptions. Parliament might, as he pointed out, have treated those changes in user falling within the second conception in the same way as those falling within the third, viz., that they were excused from the requirement of permission. An answer to his point in this respect may be that, by so doing, Parliament would or might have thereby widened the meaning of the word “development”. But the distinction is made and was somewhat relied on, as later appears, by counsel in support of his argument for the corporation. G

I turn to s. 23. It provides: H

“(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section. I

“(2) Any notice served under this section (hereinafter called an ‘enforcement notice’) shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition . . .

A “(4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may . . . appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or
B that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring the land . . . shall vary the notice accordingly; (c) in any other case shall dismiss the appeal.”

C As I have already stated, the relevant words in the last sub-section that I have read, sub-s. (4), are “that no such permission was required in respect thereof”.

It was conceded by counsel for the corporation that if his arguments were to prevail the clear meaning of these words *must* exclude the relevant inquiry, viz., whether the use alleged or complained of constituted development at all.

D The concession was, in my judgment, necessary; for if on this matter the construction and scope of the words be doubtful, then counsel for the corporation would be inevitably faced with the serious difficulty presented to his argument by inconsistency created by other provisions in the Act and most forcibly by the terms of s. 17.

E Counsel for the corporation’s first submission was based on the strict limitation on the powers of justices which appears from the language of s. 23 (4) itself, and particularly the words in para. (c) “in any other case shall dismiss the appeal”. The limitation is indeed plain and has been noted in the cases, including the *East Riding* case (1) itself. With this background of strict limitation of powers, counsel then proceeded to emphasise the word “such” immediately before the word “permission” in the relevant formula. He contended—and
F in my judgment rightly contended—that the word “such” was a reference back to s. 12, so that the phrase, when extended, reads “no permission under this Part of this Act was required”—etc. With this interpretation of the word “such” Mr. Megarry (who argued this point in *Guildford Rural District Council v. Penny* (2) (post, p. 111) our judgment in which follows after this case) was himself in agreement. It follows, according to counsel for the

G corporation, that if one refers back to s. 12, then permission is only found to be required for what must be, or must be assumed to be, post-1948 development. Thus, although in this matter counsel may be said to have protected his argument in advance from the effect of the *East Riding* case (1), it may be open to the justices to inquire whether the “development” was carried out before or after the appointed day. But that, according to counsel’s argument, is all that

H the justices may investigate as regards the existence of the development. In other words, subject to this one question of date, the justices’ only function, according to the proper meaning of the language used in the relevant formula, is to inquire whether the development mentioned in the notice is or is not of the “excused” class. Thus will be observed the significance of the distinction emphasised by counsel between the second and third conceptions above mentioned, i.e., the conception of user not deemed to be development and user which, though constituting development, is excused from the requirement of permission.
I

Counsel for the corporation sought further support for his contention from the opening formula in s. 23 (1), “if it appears to the local planning authority . . .”, a formula which he claimed to be hallowed by authority as indicating the intention by Parliament that that which so appeared in good faith was unchallengeable in the courts; and he cited by way of illustration the judgments of LAWRENCE, J., and CHANNELL, J., in *Robinson v. Sunderland Corpn.* (3) ([1899] 1 Q.B. 751) and of this court in *Point of Ayr Collieries, Ltd. v. Lloyd-George* (4)

([1943] 2 All E.R. 546). Finally, counsel drew attention to the contrast between the limited scope of the justices' powers as it appears from the terms of s. 23 (4) of the Act of 1947 and the generality of the corresponding powers of the older legislation (see the Town and Country Planning Act, 1932, s. 13 (4), and the Town and Country Planning (Interim Development) Act, 1943, s. 5 (2), and Sch. 1). The contrast, said he, emphasised that in the later legislation Parliament deliberately circumscribed the powers vested in the magistrates' courts of interference with the planning authorities.

There is plainly great force in these arguments. It is, in my judgment, undeniable that on a first reading of the relevant words in s. 23 (4) the draftsman appears to be directing himself to the question whether the (assumed) development is of a kind for which no permission is required—the conception of “excused development”. I do not, therefore, doubt that the words may fairly, and perhaps more naturally, be construed in this narrow sense. But I have for my part reached a clear conclusion that it is not the necessary and inevitable meaning of the words. I will first dispose briefly of the two general contentions on the corporation's part last mentioned. There is no doubt that in certain contexts and for certain purposes the words “if it appears” and similar formulae are intended to exclude challenge where the opinion formed has been arrived at in good faith. But, as counsel for the appellants pointed out, in these cases the purpose and effect of the formation of such an opinion was not itself to determine private rights but was the condition precedent for the exercise of some statutory power. Thus, in the *Point of Ayr* case (4) the formation by the Minister of Fuel and Power of the opinion that the interests of public safety or the efficient prosecution of the war or like considerations required it, gave rise to a power on his part to take the necessary steps to assume control of a colliery undertaking. Such considerations have no application to the present case, where the relevant question is whether unauthorised development of land has taken place—a question admittedly liable to challenge at some stage, under s. 24, if not under s. 23. In such a case there would appear to be no natural ground of logic or precedent for giving to three simple English words the effect of prejudging one of the essential matters of fact on which the justification of the owner's actions will depend. I am also unable to think that the difference in the relevant terminology between the old and the new legislation can really assist in the problem of construction. And I note that, notwithstanding the change in form, the scheme of the older legislation does not differ from that of the new in this, that where the planning authority seek actually to enforce their previous notice, then the owner will not be entitled to rely by way of defence on points that he might have earlier taken by way of appeal to the justices (see s. 13 (6) of the Act of 1932).

I return to the vital language of s. 23 (4) of the Act of 1947, and, in my judgment, much assistance towards a proper solution is to be found in the last seven words “... the development to which the notice relates”. For properly expounded by reference to the earlier sub-s. (1) and sub-s. (2), these words must, in my view, mean (and I am again indebted to Mr. Megarry in the *Guildford* case (2)) “the development which is alleged to have been carried out without the grant of permission required in that behalf under this Part of the Act”. In my judgment, it is the use of the word “alleged” derived from sub-s. (2) that provides the all-important clue. It is, as I think, an essential requirement of the enforcement notice that it should *allege* development carried out without permission; and I can see no compelling reason for holding that the only subject of the “allegation” is the absence of permission, the development itself (that is, the requirement) being assumed. On the contrary, it appears to me more natural to treat the allegation as being, as it were, a double allegation—an allegation both of the development (requiring permission) having been carried out and of the absence of permission; and, if so, that the justices' powers conferred by the formula in question involve inquiry whether no permission under Part 3 of the Act was required on the ground that there had been in fact no

A development either after 1948 or at all, no less than on the ground that, though post-1948 development had occurred, it was of a kind that did not require permission.

If, then, this is a fair and legitimate view of the construction of the sub-section, there are (as I have earlier indicated) strong grounds of consistency in the Act as a whole, and of convenience, for its adoption. I refer first to s. 75, which makes applicable, subject to the provisions of the section, the enforcement procedure of s. 23 to contraventions of pre-1948 planning control. But in such cases there is substituted for the terms of para. (a) of s. 23 (4) the para. (a) set out in s. 75 (5), viz.:

"if satisfied that the works or use to which the notice relates are not works or a use to which s. 75 of this Act applies, shall quash the notice to which the appeal relates."

In my judgment it is impossible, according to the ordinary sense of this paragraph, to deny to the justices the power of determining whether in fact the use complained of occurred before 1948 or at all; and if this is right there would, according to the corporation's argument, be an incongruity between the justices' powers in the cases of alleged pre-1948 and post-1948 development.

More cogent still, however, are the terms of s. 17. This section relates to "Applications to determine whether permission [is] required". By that section it is provided:

"(1) If any person who proposes to carry out any operations on land or make any change in the use of land wishes to have it determined whether the carrying out of those operations or the making of that change in the use of the land, would constitute or involve development . . . and, if so, whether an application for permission . . . is required . . . having regard to the . . . development order, he may . . . apply to the local planning authority to determine that question.

"(2) The foregoing provisions of this Part of this Act shall, subject to any necessary modifications, apply in relation to any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications: Provided that where it is decided by the Minister under any of the said provisions that any operations or use . . . would constitute . . . development . . . or that an application for permission is required . . . that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

It is clear, and was conceded by counsel for the corporation, that the terms of the proviso to sub-s. (2), which clearly assume the power which the corporation deny, cannot be reconciled with s. 23 (4) if the corporation's contention is well-founded. Faced with this repugnancy, counsel for the corporation would reject the proviso to s. 17 (2) altogether—for no middle course is possible. This was indeed the conclusion of the majority of the Divisional Court, but I am unable to accept the necessity. It is no doubt true, as DONOVAN, J., said, that if two sections of an Act of Parliament are in truth irreconcilable, then *prima facie* the later will be preferred: and that the courts will tend against inferring an independent substantive enactment from a mere proviso to another enactment. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention. In the present case, for reasons already given, I do not think the repugnancy, on a true analysis, arises.

On the matter of convenience, perhaps I may be allowed, in anticipation of what follows, to cite from my own speech in the *East Riding* case (1). I said ([1956] 2 All E.R. at p. 684):

" But other cases may well arise in which serious questions of fact might be involved, questions whether, in truth, the development had been carried out before the appointed day, or whether the land had, in fact, ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices on an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under s. 24 of the Act, and then to challenge the validity of the notice: a course which might well involve him in a long period of uncertainty, and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all."

I therefore, on the question of construction, reach the same conclusion as LORD GODDARD, C.J., and I am unable, with all respect to them, to agree with the view of the majority of the court as expressed by DONOVAN, J. DONOVAN, J., said ([1958] 2 All E.R. at p. 281):

" . . . I think that it is inaccurate to speak of permission not being required under the Act on the ground that the particular operation or change of use is not 'development'. For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission."

It is at this point that I have to part company with the learned judge; for in saying that, in the circumstances he supposed, "the question does not arise at all", he might, as it seems to me, be said to be begging the question which has to be decided. I add in conclusion on this part of the case that (particularly having regard to s. 17) I can see no sufficient ground for supposing that the competence of the justices to inquire, aye or no, into the fact of development should be regarded as a subject-matter inappropriate for their jurisdiction. Rather, and as a matter of principle, I should prefer the view that clear words must be found to justify an ousting, on such a matter, of the jurisdiction of the courts.

I turn now to the second question posed at the beginning of this judgment, viz., what effect, if any, the decided cases, and particularly the *East Riding* case (1), have had on the question. In the *East Riding* case (1), the questions before the House of Lords included the questions whether the enforcement notice there in suit ought to be taken as alleging a post-1948 development and, if so, whether the justices had power to quash it, the alleged development being admitted or found to have been pre-1948. These questions were answered affirmatively by the majority of the House. It will, however, be observed that the second of these two questions was not the precise question now before us. The problem in the *East Riding* case (1), so far as it concerned development, was confined to date—a problem which counsel for the corporation might be regarded as open to inquiry by the justices, having regard to the reference to the appointed day in s. 12 (1) of the Act. The problem whether it is competent for the justices to investigate the question whether what has been done amounts to development at all within the meaning of the Act was not expressly decided, and indeed may be said to have been deliberately left undecided by the last paragraph of my own speech. Nevertheless, I agree with LORD GODDARD, C.J., that the reasoning which underlay the decision of the majority of the House applies to, and covers, the present question. VISCOUNT SIMONDS, in his leading speech, said ([1956] 2 All E.R. at p. 672):

"I do not dissent from the conclusion to which the Divisional Court came, and I think that, in the earlier part of the passage that I have cited, the view is clearly expressed that, on its true construction, the notice purported to refer to development for which permission under the Act of 1947

A was required, whereas, in fact, such permission was not required. That, not the lack of clear indication, gave jurisdiction to quash."

LORD COHEN similarly stated his conclusion in general terms (ibid., at p. 681):

B "It was proved before the magistrates that the development took place before the appointed day, and it was agreed that no obligation rested on the respondents to obtain permission under the law in force before the appointed day. It seems to me that, in these circumstances, the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the development to which the notice relates'. The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so."

C The matter is dealt with perhaps more fully in my own speech: and I have already referred to the concluding paragraph, where I said (ibid., at p. 684):

D "The words in s. 23 (4), 'no such permission was required in respect thereof', are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether. In the absence, therefore, of any provision for the case of a notice related to development alleged to have been carried out after July 1, 1948, but executed, in fact, prior to that date, and having regard to the incongruity which would otherwise appear to arise in the converse case of a notice related to development alleged to have been carried out before but, in fact, executed after the appointed day, I think the Court of Appeal and the Divisional Court were right in holding that, in the circumstances and on its true construction, the enforcement notice of Apr. 26, 1951, ought to have been quashed by the justices."

F Although in this passage I do not refer to the problem which has arisen in this case, I venture to think that, in the light of the earlier argument in the speech, my conclusion must be taken to have been in favour of a construction of the relevant words rendering them applicable to any case in which permission was not, for any reason, required under the Act of 1947. Put in other words, I think that if we were to distinguish the present case from that directly covered by the *East Riding* case (1), we would introduce an extremely narrow and unjustifiable refinement in the construction of the section.

G Agreeing, then, as I do, with the judgment of LORD GODDARD, C.J., I agree also with him that *Keats v. London County Council* (5) ([1954] 3 All E.R. 303) must be taken to have been wrongly decided, and that the opinion to that effect expressed by the Divisional Court in *Norris v. Edmonton Corpn.* (6) ([1957] 2 All E.R. 801) was correct.

H We were referred to a number of other cases by Mr. Megarry in the *Guildford* case (2) and by counsel for the appellants in the present case. In none of these other cases was the point raised which calls for determination in the present case. I do not, therefore, find it necessary to refer further to them save to say that there is nothing in any of the judgments in those cases which is in conflict with the view that I have formed. This court, like the Divisional Court, has been much assisted by the full arguments of counsel for the appellants and I counsel for the corporation, and also by the argument in the *Guildford* case (2) of Mr. Megarry which counsel for the appellants adopted, and I wish to acknowledge my indebtedness to counsel accordingly. Counsel for the corporation informed us that the particular concern of the Eastbourne Corporation (and other local planning authorities) was to obtain from the court a decision which would assist them in the performance of their duties under the Act. For this reason I have thought it desirable to deal somewhat fully with the arguments

put before us. But in the end I have reached a clear conclusion that the appellants' contention should prevail. I think, therefore, that the appeal should be allowed. Since no other matter is raised in the appeal, the result will be that the question raised by the Case Stated will be answered in the affirmative and that the justices were entitled to quash the enforcement notice. A

I am authorised by **ORMEROD, L.J.**, to say that he agrees with the judgment which I have just delivered. B

SELLERS, L.J.: On the construction of the words

"if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof" C

I would go the whole way with the reasoning and conclusion of **LORD GODDARD, C.J.**, in his dissenting judgment. No permission is required unless there has been development and on their face the words "or that no such permission was required in respect thereof" would permit, as I read them, of a contention that no permission was required because there had been no development. If it is to be conceded that s. 23 of the Town and Country Planning Act, 1947, construed narrowly by itself can be made to work and can so provide a more limited jurisdiction to the justices, this construction admittedly would put the section out of harmony with the Act as a whole as it involves ignoring the proviso to s. 17 (2). D

The interpretation which the appellants advance and which my Lord has stated and developed in detail relies on and accepts in full the proviso and leaves no repugnancy or inconsistency or, as **DONOVAN, J.**, puts it, no "real difficulty". E Further, **DONOVAN, J.**, says ([1958] 2 All E.R. at p. 282):

"If local benches of justices . . . can override the planning authority on the question whether something is 'development' or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter." F

The force of this comment seems to be minimised when it is seen that if the penal powers under s. 24 of the Act were to be invoked the justices would admittedly have power to consider whether development had taken place or not and so, if thought fit, to "override" the planning authority. Unguided by my Lord here and perhaps more compellingly by his speech in *East Riding County Council v. Park Estate (Bridlington) Ltd.* (1) ([1956] 2 All E.R. 669) in the House of Lords, I should not have felt any certainty or probability that by the words "or that no such permission was required in respect thereof" the draftsman was intending to direct himself solely to the question whether the (assumed) development is of a kind for which no permission is required, but with that unimportant reservation, if unfettered, I agree entirely with the judgment delivered by my Lord and would allow the appeal accordingly. G

Appeal allowed. Leave to appeal to the House of Lords granted. H

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for Town clerk, Eastbourne (for the respondents).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

A GUILDFORD RURAL DISTRICT COUNCIL v. PENNY AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Ormerod, L.J.J.), February 25, 26, 27, March 2, 23, 1959.]

B *Town and Country Planning—Enforcement notice—Appeal against notice—Caravan site—Increase of caravans from eight to twenty-seven—"Development"—Whether decision of justices that there had been no development was a decision of fact—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 12 (2), s. 23 (4).*

C On July 1, 1948, the appellants' land, $1\frac{1}{2}$ acres in area, was being used as a site for eight caravans. In 1956 the planning authority permitted twenty-one caravans to be on the site. The appellants allowed more caravans than twenty-one to be on the site, and the planning authority issued an enforcement notice (at which time twenty-six caravans were on the land) requiring the removal of all caravans in excess of the permitted number. The appellants appealed to the justices (at which time twenty-seven caravans were on the site) under the Town and Country Planning Act, 1947, s. 23. The justices were of the opinion that the increase in the number of caravans from eight to twenty-seven did not constitute a "development" within the Act, and quashed the notice. On appeal from a decision of the Divisional Court on Case Stated reversing the decision of the justices,

E **Held:** (i) the justices had power to determine whether development had occurred.

Eastbourne Corpn. v. Fortes Ice Cream Parlour (1955), Ltd. (ante, p. 102) followed.

F (ii) the question whether the increase from eight to twenty-seven caravans constituted a material change in the use of the land so as to constitute "development" within s. 12 (2) of the Town and Country Planning Act, 1947, was a question of fact, and, therefore, the decision of the justices was one with which the court should not interfere.

S **SEMBLE:** increase or intensification of use is capable, in appropriate circumstances, of constituting development (see p. 113, letters H and I, and p. 114, letter I, post).

Appeal allowed.

G [For the Town and Country Planning Act, 1947, s. 12, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 506, 524.]

Case referred to:

(1) *Eastbourne Corpn. v. Fortes Ice Cream Parlour (1955), Ltd.*, [1958] 2 All E.R. 276; [1958] 2 Q.B. 41; *reversd.* C.A., ante, p. 102.

H Appeal.

I This was an appeal by Jack Spence Penny and Doris Elsie Penny from a decision of the Divisional Court, dated May 22, 1958, reversing the order of the Woking justices dated Oct. 29, 1957, whereby an enforcement notice served on Aug. 21, 1957, on the appellants by the Guildford Rural District Council, (acting as local planning authority), was quashed under the Town and Country Planning Act, 1947, s. 23 (4). The following facts (among others) were found by the justices. The land to which the enforcement notice related was about $1\frac{1}{2}$ acres in extent. From about 1934 until March, 1955, the land was used as a health and holiday camp which involved: (i) the construction of chalets on the land for use as holiday homes, none of which now remained in existence; (ii) the use of the land for camping in tents; (iii) the use of the land as a site for caravans. The number of caravans stationed on the land at any one time between 1935 and 1955 was never less than three or more than eight. In June, 1955, the number of caravans on the land, all used as permanent residences, had

increased to fifteen. The appellants applied for permission under s. 14 of the Act to continue use of the land as a site for residential caravans up to the maximum number of thirty-five. The application was refused. The appellants appealed to the Minister under s. 16 of the Act. In April, 1956, a public inquiry into that appeal was held. The number of residential caravans had by then increased to twenty-one. On June 18, 1956, the Minister allowed the appeal to the extent that he permitted the use of the land for the stationing of not more than twenty-one caravans. At the date of the service of the enforcement notice the number of caravans on the land was twenty-six, and at the date of the hearing before the justices twenty-seven. On Dec. 15, 1955, the planning authority granted to the appellants a licence under s. 269 of the Public Health Act, 1936, authorising the use of the land as a site for caravans not exceeding thirty. It was contended by the planning authority: (a) that the increase in the number of residential caravans on the land which occurred between July 1, 1948, and the grant of permission by the Minister constituted a material change in the use of the land, and accordingly that there had been a development for which permission was required under s. 12 of the Act; (b) that the permission given by the Minister was a necessary permission granted with retrospective effect in the exercise of the powers under s. 18 of the Act which validly limited the number of caravans permitted to be stationed on the land to twenty-one; (c) that the further increase in the number of caravans bringing the total in excess of twenty-one was a development of the land carried out without permission under the Act. It was contended by the appellants: (a) that the use of the land as a whole on July 1, 1948, was as a camping and caravan site and that the increase in the number of caravans on the land which had occurred thereafter did not amount to a material change of the user; (b) that the appellants did not require the permission for which they applied in 1955 and the permission which the Minister purported to grant was of no effect; (c) that there was no limit to the number of caravans which could lawfully be stationed on the land save that contained in the licence granted under the Public Health Act, 1936. The justices were of the opinion that the increase in the number of caravans from eight to twenty-seven did not in the circumstances constitute a material change of use of the land and accordingly quashed the enforcement notice. On appeal by Case Stated to the Divisional Court the determination of the justices was reversed and the appellants now appealed.

R. E. Megarry, Q.C., and B. A. Marder for the appellants.

N. C. Bridge for the respondents, Guildford Rural District Council.

Cur. adv. vult.

Mar. 23. The following judgments were read.

LORD EVERSHERD, M.R.: This appeal raises two questions, namely — first, whether the justices at Woking had jurisdiction under the Town and Country Planning Act, 1947, to inquire into and determine whether there had in fact been development on the land owned and occupied by the appellants, within the meaning of s. 12 of the Act; and second, if so, whether they were entitled to conclude, as they did, that there had not been any development.

The facts appear from the Case Stated and may be briefly summarised as follows. The appellants, Mr. and Mrs. Penny, are the proprietors of 1½ acres of land within the jurisdiction of the respondents, the Guildford Rural District Council, as the appropriate local planning authority. On July 1, 1948 — the date of the coming into operation of the Town and Country Planning Act, 1947 — the land was being used (as it had been before that date and as it has continued to be used since) as a site for residential caravans. On July 1, 1948, the number of such caravans appears to have been eight, but thereafter the number steadily increased. In 1955 and 1956 recourse was had to the powers and jurisdiction of the local planning authority and (on appeal) to the Minister, the result of

A which was that the Minister permitted twenty-one caravans to be placed on the land. The appellants, however, were not satisfied with the scope allowed by this determination on the part of the Minister; and it is not now in doubt that, in spite of the time and the trouble taken, we must determine the question before us without regard to what was then done.

B When the matter came before the justices, the number of caravans on the site was twenty-seven and the justices were of opinion that the increase in the number of caravans from eight to twenty-seven did not, in the circumstances, constitute a material change of use of the land and they accordingly quashed the council's enforcement notice dated Aug. 21, 1957. The matter having then been taken, by way of Case Stated, to the Divisional Court, the present appellants C conceded before that court that its recent decision in *Eastbourne Corpn. v. Fortes Ice Cream Parlour (1955), Ltd.* (1) ([1958] 2 All E.R. 276) must cover this case also, and they submitted accordingly to an order allowing the council's appeal and setting aside the justices' order. From that order by the Divisional Court the matter has now come on appeal before this court.

D On the first question, that of the jurisdiction of the justices, we have had the advantage of a full and careful argument by counsel for the appellants. Counsel for the local authority did not desire to contest that point; and in any event the judgments which we have now delivered in the *Eastbourne* case (1) have determined that point in the present case in the appellants' favour. There remains, however, the second question: Were the justices justified in concluding, as they did, that the increase from eight to twenty-seven in the number of caravans on this site did not amount to a material change in the user of the E land? If it is open to the justices to decide the question aye or no, then according to the appellants it is a question of fact and degree, with which this court cannot interfere.

F It was said by counsel for the appellants that on July 1, 1948, the land was a caravan site and that its use as such has not changed materially or otherwise by the mere fact of adding to the number of caravans; and so the justices must be taken to have held. At one time during the argument the question was raised by the court whether the placing—or, to use the word sometimes used, the stationing—of caravans on the land might constitute "other operations on land" within the formula in s. 12 (2) which reads (so far as relevant) "In this Act . . . 'development' means the carrying out of building, engineering, mining or other operations . . . on . . . land . . .". This point was not one taken or G indeed put to us at all by counsel for the local authority; and on reflection I have no difficulty in rejecting it. After all, these caravans (as I understand) remain, and remain always, mobile on their wheels and never become so attached to the land that they could fairly be regarded as equivalent to dwelling-houses of some kind.

H Counsel for the appellants contended that the mere intensity of user or occupation could never be relevant. As a general proposition, I am not prepared to accept that argument; nor indeed is it necessary to do so. Mere intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use—or one of them. An example was taken during the argument of some housing estate, or part of a housing estate, on which houses had been erected of a certain density per acre. If the I density of the houses on that part of the estate is greatly increased, it seems to me that it may—I say no more—affect the material nature or character of the housing estate as such, or that part of it, and, therefore, of the user of that part of the land. I refer also to another example taken during the argument—that of a cricket ground. If the Kennington Oval Cricket Ground were used so as to provide continuously a great number of pitches, on which boys or others could contemporaneously play cricket during the summer, no doubt the Kennington Oval would remain a cricket ground but it would be a cricket ground materially changed: it would no longer be a first-class county cricket ground.

but would be a cricket ground of a different kind. It is also, as it seems to me, obvious that increasing intensity of use or occupation may involve a substantial increase in the burden of the services which a local authority has to supply, and that in truth might, in some cases at least, be material in considering whether the use of the land had been materially changed.

These are questions all of which would depend on the particular circumstances of the particular cases in which they arose for decision. They do not arise here; and I, therefore, express no view about them, leaving it rather open for future consideration when the occasion (if ever) arises. But, as I have earlier indicated, I am not able to accept, and find it unnecessary to accept, the wide and general proposition which counsel for the appellants put forward.

None the less all these matters—including the illustrations which I have given—are, primarily at any rate, questions of fact for the justices; and in this case there seemed to be no such points taken of the nature of the examples which I have given. So much I gather from the Case itself. But a reference to the Case does show this—and it is a matter which caused me some concern. The Case states, in very brief form, the relevant facts as found. The first paragraph is merely the date and fact of the enforcement notice. The second is:

“The land to which the said enforcement notice relates (hereinafter called ‘the land’) is about $1\frac{1}{2}$ acres in extent. From about 1934 until March, 1955, the land was used as a health and holiday camp. The said use involved: (i) the construction of chalets on the land for use as holiday homes, none of which now remains in existence [though, I interpolate, the date of their final disappearance is unstated.] (ii) the use of the land for camping in tents; (iii) the use of the land as a site for caravans . . .”

Then the Case goes on to deal with the number of caravans. It seems to me that a health and holiday camp may well be something sensibly or materially different from a caravan site; and indeed so much appears from the language of the Case itself, which states that of the three uses which the health and holiday camp involved only the third was that of a caravan site. Many activities might be associated with a health and holiday camp which would not be the same as its use for caravans. Notwithstanding that statement in the Case, it has never, as I understand, in the argument either in this court or before the justices, been contended that this $1\frac{1}{2}$ acres of land was used for any purpose save that of a caravan site or that it was, save in that sense, a health and holiday camp.

It therefore comes back to this, as the question has been put and argued here and before the justices: assuming that these $1\frac{1}{2}$ acres of land were from first to last used as a caravan site, did the increase from eight caravans to twenty-seven caravans, in the circumstances as found, constitute or amount to a material change? I can find no problem of law involved in the posing of that question. The justices who heard the arguments and found the facts answered the question in the negative; and in all the circumstances I conclude (as counsel for the appellants contended) that it is not open to this court to interfere with that finding of facts. I, therefore, would allow the appeal on both points.

SELLERS, L.J.: I agree with my Lord that the decision of fact in this case whether or not there has been development lies within the province of the justices and that it cannot be said that they erred in law in their finding. I too, like my Lord, would not wish to be taken, however, as supporting a view that no increase or intensification of user could in any circumstances amount to a change of user. To consider the concept broadly I would take an illustration from the sea rather than one which might arise under the Town and Country Planning legislation. If a roadstead within the control of a harbour authority were restricted to the use at one time by only two vessels of not less than two thousand tons and then it became open to all vessels irrespective of tonnage or the number at anchor, then although it remained a roadstead by its situation and nature and could be so described the change in its user might fundamentally

A change its character as an anchorage and might by its changed user make it that vessels of two thousand tons or over could no longer safely use it by reason of the presence of other craft. A change of this sort would appear to be a material change and might affect the whole planning arrangement for vessels using a port. I have not sought to visualise circumstances which might arise on land.

B I agree with my Lord that this appeal should be allowed on both points.

LORD EVERSHED, M.R.: I am also authorised by ORMEROD, L.J., to say that he also agrees with the conclusions of SELLERS, L.J., and myself.

Appeal allowed.

C Solicitors: *Garber, Vowles & Co.* (for the appellants); *Jaques & Co.*, agents for *Barlow, Norris & Jenkins*, Guildford (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

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JENNER v. ALLEN WEST & CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., and Pearce, L.J.), March 5, 6, 9, 10, 1959.]

Building—Building regulations—Roof work—Provision of “crawling boards”—Requirement of regulations not communicated to workman—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 31 (3) (a).

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Master and Servant—Duty of master—Experienced workman—Task not shown to be within his competence—Duty not sufficiently discharged by relying solely on workman.

Fatal Accident—Damages—Assessment—Deduction from damages—Voluntary pension paid by employer to widow—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2.

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The deceased was employed by the defendants as the leading plumber in their maintenance department. He was fifty-three years of age, had worked for the defendants for thirty-nine years, and was experienced in making minor repairs on roofs and repairs to gutters. On June 23, 1955, he and three other workmen were engaged in repairing the gutter of the roof of one of the factory buildings. The deceased was in charge of the work. To carry out the repair it was necessary to remove sheets of corrugated iron from the roof of the building, thereby exposing the beams and the asbestos ceiling of the building. The replacement of the sheets was a difficult operation which required careful thought, and it was work of a kind to which reg. 31 (3) (a) of the Building (Safety, Health and Welfare) Regulations, 1948*, applied, and which required the provision and use of crawling boards. No instructions how the work should be done were given to the deceased, and there was no evidence that he had been informed of the regulations or that the work was within his experience and competence. He knew that, in general, boards should be used on roofs, and he was in the habit of using boards for roof work. The boards provided by the defendants were scaffold boards, and not boards with battens on them. On June 23, 1955, although the deceased had warned his assistants to keep their weight off the exposed asbestos ceiling of the building on which they were working, he himself did not use any boards. In the course of the work he slipped, fell through the ceiling and was fatally injured. His widow, as administratrix of his estate, claimed damages against the defendants under the Fatal Accidents Acts, 1846 to 1908, for their breach of statutory duty under reg. 31 (3) (a) and for negligence. From the date of the accident until Feb. 24, 1956, the defendants

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* The terms of reg. 31 (3) (a) are printed at p. 119, letter D, post.

paid to the widow a voluntary pension of £10 10s. a week, and since that date until the hearing of the action they had paid her £5 a week. At the trial the court found the defendants liable for negligence and for breach of statutory duty to use crawling boards, but not to provide them, and the deceased to have been guilty of contributory negligence, and apportioned the responsibility as to three-quarters to the deceased and one-quarter to the defendants. On appeal,

Held: (i) the term "crawling boards" in reg. 31 (3) (a) of the Building (Safety, Health and Welfare) Regulations, 1948, referred to boards with battens on them, not to plain boards, the former meaning being the meaning of the term according to usage in the relevant trades.

(ii) as crawling boards had not been provided, the defendants were in breach of their statutory duty under reg. 31 (3) (a) to provide such boards, as well as being in breach of the statutory duty that such boards should be used, since, on the facts, the fault was not wholly the deceased's as it was not shown that the defendants had communicated to him the requirements of the regulations (see p. 120, letters E to H, post); accordingly the apportionment of responsibility would be varied so as to rest as to two-thirds on the deceased and one-third on the defendants.

(iii) the defendants were also liable for negligence, as, on the facts, the defendants had relied entirely on the deceased in a job that was not shown to be within his experience and competence, so that some part of the fault was theirs (see p. 121, letter C, post).

(iv) the voluntary pension paid by the defendants to the plaintiff should be taken into account in assessing the damages, as it was a compensating gain "resulting from the death" within s. 2 of the Fatal Accidents Act, 1846; accordingly its value (assessed at £1,110, slightly more than the total payments of £914 at the date of the trial) should be deducted from the aggregate damages before apportionment.

Dicta of JENKINS, L.J., in *Mead v. Clarke Chapman & Co., Ltd.* ([1956] 1 All E.R. at p. 48) applied.

[**Editorial Note.** The decision in the present case should be considered with that in *Gandy v. Belmont Building Supplies, Ltd.* ([1959] 1 All E.R. 414).

As to a master's duty to provide a safe system of work, see 25 HALSBURY'S LAWS (3rd Edn.) 512, para. 979; and for cases on the subject, see 34 DIGEST 194-198, 1583-1621.

As to voluntary advantages to be taken into consideration in assessing damages under the Fatal Accidents Acts, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408, and 23 HALSBURY'S LAWS (2nd Edn.) 698, para. 986.

For the Fatal Accidents Act, 1846, s. 2, see 17 HALSBURY'S STATUTES (2nd Edn.) 5.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 31 (3) (a), see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 225.]

Cases referred to:

- (1) *Manwaring v. Billington*, [1952] 2 All E.R. 747; 24 Digest (Repl.) 1077, 335.
- (2) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (3) *Unwin v. Hanson*, [1891] 2 Q.B. 115; 60 L.J.Q.B. 531; 65 L.T. 511; 55 J.P. 662; 42 Digest 631, 337.
- (4) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest (Repl.) 223, 1191.
- (5) *Peacock v. Amusement Equipment Co., Ltd.*, [1954] 2 All E.R. 689; [1954] 2 Q.B. 347; 3rd Digest Supp.
- (6) *Mead v. Clarke Chapman & Co., Ltd.*, [1956] 1 All E.R. 44; 3rd Digest Supp.

Appeal.

The plaintiff, Dorothy May Jenner, was the widow and administratrix of

A Edwin Adolphus Jenner, deceased, who was fatally injured as a result of an accident which occurred on June 23, 1955, while he was working on the roof of a building on the premises of his employers, Allen West & Co., Ltd., the defendants. In an action against the defendants, the plaintiff claimed damages under the Fatal Accidents Acts, 1846 to 1908, on behalf of the dependants of the deceased, and under the Law Reform (Miscellaneous Provisions) Act, 1934, on behalf of the deceased's estate, on the ground that the deceased's death was caused by negligence and or breach of statutory duty on the part of the defendants. The breach of statutory duty chiefly relied on was a breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3). By their defence the defendants denied negligence or breach of statutory duty, pleaded that the accident was due to the negligence and or breach of statutory duty of the deceased, and claimed that, if the plaintiff should be held to be entitled to any damages, credit should be allowed to them in regard to sums paid to the plaintiff weekly since the death of the deceased, which sums were paid without any admission of liability on their part.

C In his judgment, dated May 22, 1958, GORMAN, J., held (a) that the defendants were guilty of negligence and were in breach of their statutory duty to the deceased, in that, although they had provided suitable and sufficient boards pursuant to reg. 31 (3) of the Regulations of 1948, they had failed to instruct the deceased to use the boards or to supervise him; (b) that the deceased was himself guilty of negligence and breach of statutory duty in failing to use the boards, and that his proportion of the liability was seventy-five per cent.; and (c) that the damages to which the plaintiff was entitled should not be reduced by the amounts paid to her by the defendants between the date of the deceased's death and the hearing of the action. On the question of suitable boards, the learned judge found that a "crawling board", within the meaning of reg. 31 (3) (a) of the Regulations of 1948, was a board on which one could crawl and that it was not inherent in the definition of a crawling board that there should be struts across the board. He assessed the total damages at £4,439 19s. and awarded to the plaintiff the sum of £1,110. The defendants appealed from the judgment. The plaintiff served notice that, on the hearing of the appeal, she would contend that the judgment should be varied. One of the grounds of the plaintiff's notice was that the learned judge was wrong in holding that scaffold boards or deals without cross struts were "crawling boards" within the meaning of reg. 31 (3) (a) of the Regulations of 1948.

F *Martin Jukes, Q.C., and J. D. May* for the defendants.
F. W. Beney, Q.C., and E. M. Ogden for the plaintiff.

Cur. adv. vult.

G Mar. 10. LORD EVERSHED, M.R.: I have asked PEARCE, L.J., to deliver the first judgment.

H PEARCE, L.J., read the following judgment: This is the defendants' appeal from a judgment of GORMAN, J., in favour of the plaintiff, a widow, awarding her £1,110 damages under the Fatal Accidents Acts, 1846 to 1908, in respect of the defendants' breach of statutory duty and negligence at common law, whereby the plaintiff's husband met his death. The total damages were assessed at £4,440, but that amount was reduced by three-quarters owing to the contributory negligence of the deceased. The defendants appeal on two grounds. First, they contend that the judge should have entered judgment for the defendants on the facts as he found them or as he should have found them. Secondly, they contend that in estimating damages the judge wrongly refused to take into account the benefit received by the plaintiff from a pension given to her by the defendants by reason of the husband's death. The plaintiff contends that the judge should have found yet a further breach of statutory duty against the defendants, and that the deceased was guilty of no contributory

negligence, or, alternatively, that the judge assessed his proportion of it too highly. A

The defendants have a factory at Lewes Road, Brighton, where they make electrical switch-gear. The deceased was a plumber working in the defendants' maintenance department which employs about a hundred men. He was fifty-three years of age and had worked for the defendants for thirty-nine years. On June 23, 1955, he was working on the roof of a building, in charge of three men, when he fell to the ground and was killed. The nature of the work was this. The building in question was about twenty feet high at its apex and was roofed with corrugated iron. One side of the roof sloped down at an angle of twenty degrees and ended in a gutter running between that roof and the next. On the other side of the gutter was a steep adjoining roof set with glass fanlights. The gutter was about ten feet off the ground. It had had to be removed and repaired. In order to do that it had been necessary to remove the sheets of corrugated iron that ran down to it. The roof consisted of three rows of corrugated iron sheets, each ten feet six inches by two feet three inches and weighing sixty-four pounds. The bottom row of sheets had been removed, while the two top rows were left in position. The removal of sheets exposed and laid bare the beams, purlins, and wooden stretchers, and the asbestos ceiling or inner skin of the building. On the day of the accident the work of the deceased and his three helpers was to replace the row of corrugated iron sheets that had been removed. They would naturally start by putting in the sheet nearest to the side-edge of the roof. Sheets could be handed to a man standing in the gutter by another man standing on a low lean-to roof of corrugated iron that ran up to that side of the building. A man standing in the gutter would have glass fanlights behind him, and in front of him would be the ten-foot strip of exposed timbering on which they had to replace the corrugated iron sheets. The asbestos and stretchers were obviously unsafe to tread on, but the top two-thirds of the roof (from which the corrugated iron had not been removed) would bear their weight safely. They could approach that either by a ladder set against the side of the building or by putting boards across the unprotected ten foot gap, or (very precariously) by crossing on the stout beams and purlins and taking care not to tread on the stretchers and asbestos. It was not possible for the sheets to be wholly manipulated by men standing in the gutter, because the upper end of the ten-foot sheets of corrugated iron had to be inserted underneath the row of sheets higher up on the roof (that is to say, between the edges of those sheets and the purlins on which they rested) so as to create an overlap of about a foot to keep out the water. Therefore, while one man in the gutter was taking the sheet over the side of the building and pushing it up into position, taking care not to break the glass fanlights behind him, another man had to be holding up the edge of the higher sheet in order that the new sheet could be slid under it. If the man who was holding up the edge of the higher sheet was stationed on the higher sheets, he would obviously have to make some arrangement by which he was not sitting on the actual sheet whose edge he was trying to raise. He would have to do it by placing himself on a sheet to the side of the sheet which he was trying to raise. Or he could place planks across the bare beams and purlins and from that plank he could raise the edge, always provided that the plank did not, by its weight, hold down the edge of the sheet which he was trying to raise. Or he could stand on a ladder against the side of the building and so raise the higher sheet while the lower was slid into position by the man standing in the gutter. When the first sheet of the bottom row was in position, he could then kneel or lie on that sheet in order to hold up the edge for the next, and so forth. Several possible methods were discussed in evidence at the trial. It is clear, therefore, that, although it was not a perilous task, it was one which demanded some thought and care. It had one serious risk to be avoided, namely, the risk which anyone would incur if he put his weight on the bare and exposed stretchers and asbestos. B
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A The deceased was well accustomed to the roofs of the defendants' premises and it was to him that the defendants looked when repairs had to be done on them. He was in the habit of using boards for roof work and had himself on that day warned his assistants to keep their weight off the exposed asbestos and stretchers. He went up on to the gutter by means of a ladder. When next seen, **B** he was on the second row of sheets, that is, just above the exposed strip. As there were no boards on the roof, he had presumably reached that position by the precarious method of crossing on one of the beams. He had sent one of the men for a ladder but had apparently become impatient and thought he could manage without it. The first sheet was then passed up, and a man standing in the gutter tried to push it up into position underneath the edge of the sheet on the higher row. The deceased was trying to help the manoeuvre by lifting **C** that edge. He moved in order to get a better grip. He had his weight on his left foot, which was on the solid second row of sheets, but his right foot was overhanging the sheets and rested lightly on a stretcher in the exposed part of the roof. He slipped or placed too much weight on the stretcher, fell through the asbestos ceiling and was fatally injured.

D The plaintiff alleged that the defendants were in breach of reg. 31 (3) of the Building (Safety, Health and Welfare) Regulations, 1948, which reads:

"Where work is being done on or near roofs or ceilings covered with fragile materials through which a person is liable to fall a distance of more than ten feet—(a) where workmen have to pass over or work above such fragile materials, suitable and sufficient ladders, duck ladders or crawling boards, **E** which shall be securely supported, shall be provided and used . . ."

The breaches alleged were both failure to provide and failure to use. Under reg. 4:

"It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Parts 2 and 7 of these regulations and **F** if he discovers any defect in the scaffolding, plant or appliances to report such defect without unreasonable delay to his employer or foreman . . ."

The learned judge found that reg. 31 (3) applied to the circumstances of this case. He found that the obligation to provide suitable crawling boards had not been broken, since boards were available, had the deceased chosen to avail **G** himself of them, and the deceased knew where they were. Counsel for the plaintiff contends that the learned judge was in error in thus acquitting the defendants of a breach of duty to provide crawling boards in that they only provided scaffold boards. I will deal with that point later. It is of some importance since, if correct, it would in my opinion demand some (not very large) consequential alteration in the proportions of blame. The judge did, however, find that the **H** obligation to use crawling boards was broken. He said:

"Unfortunately, those boards were not used, and it is the twofold obligation on the defendants here to provide and to use. It is quite clear that [the deceased] knew quite well that those boards were there, and in so far as there is a failure on the part of the defendant company to carry out their obligation, under the regulations, of using these boards, the fault is on [the **I** deceased]."

The judge then gave anxious consideration to the question whether the facts of the case came within the authority of *Manuaring v. Billington* (1) ([1952] 2 All E.R. 747). In that case the plaintiff had been given definite instructions as to the fixing of ladders, but in breach of the regulations he failed to carry them out. It was held that he could not recover damages for an injury that resulted from this breach. Counsel for the defendants relies on that case and on the words of MORRIS, L.J. (ibid., at p. 750):

"I would deem it incongruous and irrational if, on the facts as found by the learned judge, the plaintiff could, in effect, successfully say to his employer: 'Because of my disregard of your reasonable instructions I have brought about the position that you are in breach of your statutory obligations, and so I claim damages from you because of such breach'."

Not without some doubt the judge concluded on this point:

"... while some of the liability here must fall on [the deceased], I feel myself unable to say that the whole of the responsibility must fall on [the deceased], as the defendants urge. It seems to me that by far the greater responsibility in these circumstances is on [the deceased], but not the whole of it."

I think that the learned judge was right in reaching that conclusion, even on the basis that there was only a breach of the duty to use and no breach of the duty to provide. It is true that the deceased was, and had been for years, very experienced in making minor repairs on roofs and repairs to gutters. The deceased was the man to whom the defendants turned when work had to be done on roofs; but the evidence does not show that he had done a task of these dimensions before. It shows rather that years might go by without a task involving the removal of iron sheets. The deceased was the leading plumber, but he was not the foreman of the maintenance department. It appears that he was given no instructions or help as to how this awkward task should be performed, although he apparently knew that, in general, boards should be used on roofs as a matter of practice. There was no evidence that he had been informed of the regulations by anybody. It appears that Mr. Dumbrell, the foreman, did not know them. The letter* written by the defendants after the accident is perhaps illuminating. It does not suggest that the deceased had been informed of the regulations at any time and had disregarded them. It contains the rather elusive paragraph:

"As you are aware, it is our safety officer's first duty to ensure that all the requirements of the Factory Acts are met and these are constantly borne in mind by the [defendants'] executive."

The important question, however, is whether the executive informed the workmen of, or enforced, the regulations. The safety officer was in court, we are told, but he was not called. There is no evidence to suggest that the defendants ever made any efforts by instruction or otherwise to see that the regulations were communicated to the deceased or that any person with knowledge of the regulations devoted any consideration to the work in question. I appreciate that this may not be easy where men are skilled and old employees; but one would have thought that the safety officer would have some knowledge on the point.

In each case it is a question of fact whether or not a breach of the regulations by an employer through the fault of an employee gives rise to any claim by that employee. An employer can defeat such a claim if he can say: "I am in breach of the regulations because of, and only because of, your default. I myself have not failed in any respect (apart from my vicarious default through your wrongful act) and my breach is co-terminous with yours." I think that the judge was right in holding that this was not such a case and that some fault in the matter lay with the defendants, even on the basis that there was only the breach of the duty to use.

In considering the case at common law, I think that the judge was also right in coming to the conclusion that the defendants were guilty of negligence, although the fault of the deceased was greater than theirs. It is said that the judge wrongly regarded *General Cleaning Contractors, Ltd. v. Christmas* (2) ([1959] 2 All E.R. 1119) as binding him to find that in all cases, even where an employee is highly skilled and experienced, the employer must independently apply himself

* The letter, dated Aug. 18, 1955, was to the inspector of factories.

A to problems regarding that employee's safety. I do not think that he so regarded that case. The facts of it were, admittedly, different from those in the present case. In that case the servant was engaged in work involving great and constant peril. That case was decided on its own facts, but it shows clearly that, in cases where perils are involved which thought or planning might avoid or lessen, it may not be enough for the employer to trust that thought and planning to the skill and experience, however great, of the man who carries out the work, since there is always a duty on the employer to take all reasonable steps for the safety of his servants. The considerations involved are lucidly expressed in the often quoted passage from LORD OAKSEY'S opinion ([1952] 2 All E.R. at p. 1114). In each case, however, it is a question of fact whether the employer failed in his duty by doing no more than trust to the skill and experience of his servant.

C In this case the task was an awkward one which involved some degree of danger. It needed careful thought, as is shown by the varying evidence on what was the appropriate method of doing it. There is no sufficient evidence that it was within the experience and competence of the deceased. The defendants relied solely on him. He was admittedly a man of skill and experience, but he failed. That does not, in my opinion, on the facts of this case, absolve the defendants wholly from any part in that failure. In my view, the judge was right in holding that some part of the fault lay with the defendants.

Had the learned judge found that there had been a breach of the duty to provide, as well as a breach of the duty to use crawling boards, the defendants' argument based on *Manwaring v. Billington* (1), which even on the basis of a breach of duty to use he rightly rejected, would have had less force. Moreover,

E the indications are, I think, that he would in that case have probably assessed the deceased's contributory negligence at a lower, but not very much lower, figure. For the lack of proper crawling boards, if such there was, may well have contributed very little to the accident, since scaffold boards were provided and these were not used. Nevertheless, it would to some small extent, I think, have affected the proportions. For the provision of special gear is in itself

F some incentive to its use.

It is necessary, therefore, to see whether the contention of counsel for the plaintiff that the defendants failed to provide crawling boards is made out. The Regulations of 1948, counsel argues, are addressed to the trade and must be construed in the light of that fact. LORD ESHER, M.R., said in *Unwin v. Hanson* (3) ([1891] 2 Q.B. 115 at p. 119):

G "If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

H

All the trade evidence shows that "crawling boards" are boards with battens on them. Mr. Seepes, who had been the plant superintendent of Messrs. John Mowlem & Co., said that a "crawling board" was a board with battens on it.

I He had never heard a plain board called a "crawling board". Mr. Gray, a skilled slinger for many years, said that the term "crawling board" in his trade meant a board fourteen inches wide with battens placed nine inches apart. He would not consider a plank nine inches in width a crawling board. In cross-examination he said that on a flat roof one would have scaffold boards only, not crawling boards. Mr. Lumbrell, the foreman of the defendants' maintenance department, said, as I understand it, that the boards available were scaffold boards. He said that duck boards with battens had at times been used and that battens could have been put on the scaffold boards, though one would not

normally spoil a scaffold board by doing that. He understood a crawling board to be the same as a duckboard, namely, a flat piece of wood with battens traversing it. The defendants' witnesses Mr. Hutson and Mr. Brooks were not asked their views on what a crawling board was. It was only Mr. Harrington, the defendants' architect (who did not think boards were necessary for the work) who said that a crawling board could be a board without battens. He said:

"A crawling board is any board laid over a roof on which you can crawl. Its suitability depends on the pitch of the roof . . . On a steep slope it requires slats placed across it."

In cross-examination he was asked: "Does a 'crawl board' convey to your mind a specific type of article?" He answered:

"Yes, I think it conveys to everybody's mind a duck board; by a duck board I mean a board with slats across, but I say a crawl board is a board on which you can crawl. The slats are not necessarily part of a crawl board."

One is inclined to comment that, if a "crawl board" conveys to everybody's mind a board with slats across, that, rather than the meaning which it conveys to Mr. Harrington personally, is more likely to be the meaning which the regulations intended.

The view of all the witnesses (other than Mr. Harrington) who gave their views on the matter, is shared and confirmed by the defendants themselves. The inspector of factories wrote to them saying:

"I understand that at the time of the accident suitable and sufficient ladders, duck ladders, or crawling boards were not being used on the roof through which [the deceased] fell."

To that the defendants replied, *inter alia*:

"The earlier receipt of a number of leaflets recommending the use of crawling boards is also acknowledged and the provision of a number of these for the use of our staff has had serious consideration."

It would have been easy to say: "We have plenty of crawling boards since scaffold boards can be used as such."

Finally, it is odd that the regulations say crawling boards if they mean boards. Against this, counsel for the defendants argues that crawling boards need not have battens so long as they are suitable: on flat roofs battens are unnecessary and may be a nuisance; on steep roofs they have to have battens to comply with the test of suitability. It would be absurd, says counsel, to prescribe battens when they are, if anything, undesirable, and his interpretation is, he says, the more reasonable one: moreover, where there was a conflict the learned judge was entitled to accept the evidence of Mr. Harrington. In my view, however, Mr. Harrington was really agreeing with the other witnesses that crawling boards connoted battens, in the mind of everybody, and his own view of what the regulations meant was irrelevant.

I naturally hesitate to differ from a judge who has obviously given such careful consideration to the matter, but I find myself driven to the conclusion that by "crawling boards" the regulations mean something other than boards; they mean boards with battens on them. In my view, had the judge come to that conclusion he would probably have assessed the deceased's share of responsibility at two-thirds and that of the defendants at one-third. That is, in my view, the fair proportion. Counsel for the plaintiff urges that the whole or the greater blame rests on the defendants. I do not agree. The deceased was a man of great experience and he took a risk which he knew he should not take.

There remains the question whether the judge should have taken into account the pension which the plaintiff has been receiving from the defendants. It was a voluntary payment by them and the aggregate amount paid up to the date

A of trial was £914. The evidence as to its origin is exiguous and consists of very few and vague answers by the plaintiff. In examination she was asked:

“ Q.—I think that since the death of your husband [the defendants] started by paying you a sum of money of £10 10s. a week? A.—Yes. Q.—Did they pay that until Feb. 18, 1956? A.—Yes. Q.—I have got particulars here; in fact it was until Feb. 24. Since then have they reduced it and have they been paying you £5 a week? A.—Yes.”

In cross-examination she was asked:

“ Q.—And [the defendants] have done their best to look after you since [your husband's] death, have they not? A.—Yes. Q.—And they have paid to you because of your husband's death the sum of first of all £10 10s. and now £5, which has gone right on until today's date? A.—Yes. Q.—That was not on any sort of life insurance, it was a payment to you because your husband had died in their service, was it not? A.—Yes.”

There is thus no evidence as to the defendants' practice with regard to widows of old employees in general and in particular with regard to those (if any) whose husbands have died as a result of some accident during their work.

The problem starts with the words of the Fatal Accidents Act, 1846, s. 2:

“ . . . and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . ”

Subsequent cases have made it clear that, in estimating that injury, gains as well as losses must be taken into account to arrive at the net loss. In *Baker v. Dalglish S.S. Co., Ltd.* (4) ([1922] 1 K.B. 361), this court held that the pension of the widow of a naval petty officer, although it was voluntary and she had no legal right to it, must be taken into account; but that the fact that it was voluntary was important on quantum. SCRUTTON, L.J., said (*ibid.*, at p. 372):

“ On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right . . . the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death.”

Difficulty has arisen on the facts of various cases in deciding what benefits can be properly said to have resulted from the death. In *Peacock v. Amusement Equipment Co., Ltd.* (5) ([1954] 2 All E.R. 689), this court held that a benefit did not result from the death and, therefore, should not be taken into account in the following circumstances. The plaintiff recovered damages in respect of the death of his wife, who had children by a former marriage to whom she left her shop and her home above it, so that the plaintiff had to go to live elsewhere. The step-children sold the business and premises and, as a voluntary act of generosity, paid one-third of the proceeds of sale to the plaintiff. SOMERVELL, L.J., said (*ibid.*, at p. 692):

“ . . . I think it would be only in very unusual circumstances that a voluntary payment would be taken into account when there was no expectation of it at the time of the death. It seems to me that that indicates for itself that there is a nova causa interveniens and, therefore, the payment was not made in consequence or as a result of the death. I would say that this payment was not made as the result of the deceased's death. Of course, it would not have been made unless the wife had died, but I would say that

it was made as the result of the stepchildren's consideration, and, perhaps, affection for their stepfather."

On the other side of the line was a decision in *Mead v. Clarke Chapman & Co., Ltd.* (6) ([1956] 1 All E.R. 44). This court there took some account of the benefit to a child (whose father had been killed) of having a stepfather who had married her widowed mother and supported the child. SINGLETON, L.J., said (*ibid.*, at p. 47):

"I do not think that it is right to say that no regard should be paid to the fact that the child has a stepfather who is kind and good to her. It is the duty of the judge in assessing damages, to pay regard to all relevant facts and, as far as we know, the child did not suffer any damage between the time of the second marriage and the date of trial, but it should not be assumed that of necessity the position will remain the same for all time."

JENKINS, L.J., said (*ibid.*, at p. 48):

"In this state of affairs, counsel for the plaintiff invites us to hold that all we should regard is the loss which the child has sustained by the death of her father, and not the compensating gain she has received in the shape of an affectionate stepfather. Counsel arrives at that result in this way: He says that injuries on the one hand and benefits on the other are only to be regarded if they are the result of, or the consequence of, the death in question. Here, he says, the marriage, from the point of view of the child, has no causal connexion at all with the accident; that, from the child's point of view, the marriage is irrelevant; it does not give her any rights of maintenance against the stepfather. Therefore, he says, to take into account what the child has gained in the form of the prospect of being maintained by the stepfather would be doing what was held to be wrong in *Peacock v. Amusement Equipment Co., Ltd.* (5), that is to say, lightening the burden of the wrongdoers (namely, the defendants), on the strength of the generosity of the stepfather, as it is in this case, or the stepchildren, as it was in *Peacock v. Amusement Equipment Co., Ltd.* (5). In my view, that is not the right way of regarding the child's acquisition of a stepfather. Clearly, if the father had not died, the mother could not have re-married and the child could never have acquired a stepfather. She could not have the advantage of being protected by two fathers at one and the same time; so that the financial advantage to her of the protection of the stepfather was something that she could not have enjoyed but for the death of her father. In my view, there is a sufficient causal connexion here to make it proper to take into account the financial consequences to the child of the re-marriage of her mother."

Problems of causation often give difficulty. The temptation to secure a more precise principle for application to the facts may obscure rather than clarify the problem. The distinction between *causa causans* and *causa sine qua non* does not help here. For clearly the death was not the *causa causans* of the child acquiring a stepfather. And if benefits can be taken into account in cases where the death was merely the *causa sine qua non*, that would have justified the taking into account of the benefits received from the generosity of the stepchildren in *Peacock's* case (5). I do not think that any more precise principle or formula can be obtained than the original words of the Act "resulting from such death". That, as it seems to me, is the approach of JENKINS, L.J., in the passage which I have quoted, when he said ([1956] 1 All E.R. at p. 48):

"In my view, there is a sufficient causal connexion here to make it proper to take into account the financial consequences to the child of the re-marriage of her mother."

It must be remembered that the Act expressly laid the task of assessment on a jury and defined it in broad and simple terms.

A Approaching this case as a jury would approach it, did this pension result from the death of the deceased? Had the pension come from the generosity of some third party who was in no way concerned with the accident, one might well say that it did not result from the death but from that generous impulse. Here, however, the employers paid the pension to the widow of a man whose whole working life had been spent in their service and who had met his death while working on the roof of their premises. It is true that there is no evidence as to their motives or their usual practice or the machinery by which they instituted the pension. As PARKER, L.J., pointed out in *Mead v. Clarke Chapman & Co., Ltd.* (6) ([1956] 1 All E.R. at p. 49), the onus is on the defendants to show that the pension should be taken into account. But the chain of causation is so direct and so strong on the few facts which are known to us, and any inferences that would break or weaken that chain are so unlikely and remote that, in my view, the pension should be taken into account as "resulting" from the death.

B Since the pension is voluntary and the evidence as to its terms is so nebulous, I think that it would be wrong to attribute any great future value to it. The defendants could at once determine it on the day that judgment was given, if they felt it unjust that they should go on paying it. Nevertheless, it is right to put some value on the chances of its continuing. As £914 had been paid up to the date of trial when the assessment fell to be made, I should value the benefit at the figure of £1,100. That sum, therefore, should be deducted from the total sum of damages before the proportion is calculated. An argument was put forward in favour of deducting the whole of it from the plaintiff's proportion of the damages, but I can see no ground of legal principle or justice for so doing. The amount of the judgment when the calculation has been done remains unaltered.

E **LORD EVERSHED, M.R.:** I have had the advantage of seeing in advance the judgment which PEARCE, L.J., has delivered, and I agree entirely with his conclusions and with the reasons he has given for them. I only venture to add a few observations of my own because, although the final result for the plaintiff is the same, nevertheless we have arrived at that result in some respects by a different route, and in these respects we have differed from the opinion of the learned judge.

F In his judgment, the learned judge considered with great care and, as he himself said, with anxiety, the problems before him, including the question—and this is one of the questions on which we have ventured to come to a different view from his—of the meaning in the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (3) (a), of the formula "crawling boards". The end of the matter is stated thus by the judge:

G "I have been very much exercised here as to what remains, in those circumstances, of the obligation on the defendants . . . It is said by [counsel for the defendants] that having found, as I now have found, that there was no breach of the obligation here on the part of the defendants to provide suitable crawling boards, and that the failure to use them was the act of the deceased man, I should exonerate the defendants from liability."

H I do not need to go again over the evidence which PEARCE, L.J., has analysed in the course of his judgment. I bear in mind that I have not, as had GORMAN, J., the advantage of hearing the witnesses; I bear also in mind that, as counsel for the defendants observed in the course of his reply, the witnesses were at times, to say the least, in some degree of confusion between what were ladder boards, duck boards and crawling boards. None the less, like PEARCE, L.J., I find it incapable, after a close reading of all the evidence, to conclude otherwise than that all the evidence, even that of Mr. Harrington, was to the effect that by "crawling boards" would be understood by those versed in the appropriate trades (and, therefore, so intended by Parliament) boards which were supplied

with transverse struts or bars. I also draw attention, as did PEARCE, L.J., to the circumstances that, unless such a view is taken, the word "crawling" in reg. 31 (3) (a) would appear to me to be entirely otiose. It follows, therefore, that, with all respect to the learned judge, I part company from him in this matter, in that I would conclude that here the defendants were in breach of their obligation to provide suitable crawling boards. It does not necessarily follow from that that the defendants are to any greater extent responsible for the death of the deceased; but again I find it impossible to put from my mind the point which was put by PEARCE, L.J., expressed briefly thus: that the provision of proper crawling boards would have been, at least according to the ordinary expectation, an incentive to their use. Moreover, I cannot read the relevant pages of the judgment of GORMAN, J., and not conclude that, if the learned judge had taken the view which I venture to think he should have taken on this question of the provision of suitable crawling boards, he would have attached some greater share of the blame to the defendants; it seems to me that no other view really is consistent with the sense and general tendency of his language. On the other side I do not forget the important point that the deceased was a man of long experience, naturally careful in his ways, who, as was proved, knew quite well that he must not in any circumstances allow his weight to go on the fragile roofs or ceilings.

For those reasons I do not think it would be right to increase to a preponderating share the blame of the defendants. But I repeat that, consistently with the general tenor of the conclusions of GORMAN, J., I think that there must be some increase, and that proposed by PEARCE, L.J., seems to be a fair one, namely from one-quarter to one-third.

I turn now to the second question, a difficult question which is of some general interest, namely, that of the extent to which there should be taken into account by the plaintiff what JENKINS, L.J., in *Mead v. Clarke Chapman & Co., Ltd.* (6) ([1956] 1 All E.R. 44 at p. 48), called the "compensating gain" of the voluntary pension which she has so far received from the defendants. As PEARCE, L.J., has observed, the question depends on the effect of s. 2 of the Fatal Accidents Act, 1846; it is, as was said, a jury point, and the court, acting in that way, has to give such damages as it may think "proportioned to the injury resulting from such death". An examination of the decided cases may, I think, lead to the conclusion that no clear definitive principle can be enunciated which will cover every kind of case, and it may be said that the matter has been obscured, rather than illuminated, by the use of the Latin language in such phrases as *causa causans*, *causa sine qua non*, and so on. Treating each case as one to be judged by the sort of common-sense standard which a jury would apply according to the particular facts, the question must be whether, in a true, real and accurate sense, what is sought to be taken into account results from the death. In the chain of events which ends with the compensating gain the death plays an essential part to the extent that, unless the man had died, nothing would have been paid. In *Peacock v. Amusement Equipment Co., Ltd.* (5) ([1954] 2 All E.R. 689) this court founded itself on the view that the compensating gain which the widower received from his stepchildren was, in a real, true and accurate sense, the result, not of his wife's death, but of his stepchildren's generosity. On the other side is *Mead v. Clarke Chapman & Co., Ltd.* (6), and, if the language of JENKINS, L.J. ([1956] 1 All E.R. at p. 48), that "there [was] a sufficient causal connexion" is given the fullest possible scope, it might be said to be wider than I for my part think that the learned lord justice would have intended. It is to be observed that in that case, as I follow it, the learned judge in the court below had taken such account of the stepfather's kindness to Christine, the infant child of the deceased, that he had reduced Christine's damages to £36. This court thought that the compensating gain of the stepfather's regard and care for the child could not be, as counsel for the plaintiff submitted, excluded altogether from consideration; but, unlike the judge, they thought that they

A could not give it such effect that financially the child had suffered no loss at all—in other words, as though there had been no death. Therefore, the child's damage was increased from £36 to £200.

The present case, to my mind, is a stronger one for the argument that the sum paid should be taken into account. This is a case in which, albeit the evidence of the circumstances is deficient, the defendants may be taken to have made this payment in recognition of what I ventured to call during the course of the argument an obligation of humanity towards the widow of an old and well tried servant, who had been killed in their service; and to my mind, that being so, there clearly is, in the phrase of JENKINS, L.J., a sufficient causal connexion with the death of the deceased to entitle the defendants to have their bene-faction taken into account. In other words, no less than the plaintiff's financial loss when her husband was killed does she have a compensating gain “resulting from [the] death” in the form of the pension which she has received. I add that to hold otherwise in such a case as the present would appear to me not to be in the interests of public policy, since it would inevitably be likely to discourage voluntary payments of this kind which considerate employers might feel some conscientious obligation or inclination to make.

D The question of estimation of the amount is a matter of some difficulty. It was pointed out that the mere fact that the pension is voluntary should not make the estimation nil. It is conceded that the estimate was to be made at the time of the judgment; at that time £914 had been received, and I cannot accept nor do I understand the ingenious claim of counsel for the plaintiff for some process of discount. Viewing the matter as at the date of the trial, E I think that the judge would have assumed in the circumstances the likelihood, or the probability, of some continuance, and such an assumption has in fact been borne out by subsequent payments. So that if one adds the full amount of the subsequent payments and arrives at £1,110, it seems to me that one reaches a fair estimate which the judge could have made of the value, financially, of that compensating gain.

F It will, of course, be observed that the result in the end is the same exactly as the conclusion of the learned judge—the sum of damages, namely, £4,440, being reduced to £3,330, but, the plaintiff being now entitled to a third of the smaller sum, arithmetically the result is the same. That is coincidental, but in my judgment it happens to be just, and in the circumstances, therefore, I agree that in effect the order made stands as the learned judge made it. Indeed, G subject to counsel's arguments about it, it would appear that the only variation necessary is to excise the recital of the apportionment and let the judgment stand in other respects as it is drawn up.

Judgment varied, but not as regards quantum.

Solicitors: *Clifford-Turner & Co.* (for the defendants); *W. H. Thompson* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DAVIES v. PERPETUAL TRUSTEE CO. (LTD.) AND OTHERS. A

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Somervell of Harrow and Lord Denning), February 5, 9, 10, 11, April 7, 1959.]

Privy Council—Australia—New South Wales—Charity—Education—Gift to the Presbyterians, the descendants of those settled in the colony hailing from or born in the north of Ireland—Public benefit—Benefit to the community or a section of the community. B

A codicil, dated Apr. 3, 1895, to the will, which was made in 1894, of a testator, who died in New South Wales in 1897, provided: "I give and devise Block 70B . . . to the Presbyterians the descendants of those settled in the colony hailing from or born in the north of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures." It was agreed that this gift was invalid if it was not charitable. C

Held: the gift was not charitable because it lacked the necessary element of public benefit, as the beneficiaries were not the community or a section of the community, the nexus between them being simply their personal relationship to several propositi, i.e., certain persons living at the date of the testator's death. D

Verge v. Somerville ([1924] A.C. 496) and *Oppenheim v. Tobacco Securities Trust Co., Ltd.* ([1951] 1 All E.R. 31) applied. E

Re Tree ([1945] 2 All E.R. 65) distinguished.

Appeal allowed.

[As to gifts for the education of a particular class not being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 218, para. 497; and for cases on the subject, see 8 DIGEST (Repl.) 326-330, 91-121.]

Cases referred to: F

(1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, 1.

(2) *Verge v. Somerville*, [1924] A.C. 496; 131 L.T. 107; sub nom. *Verge v. Somerville, A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173; 8 Digest (Repl.) 347, 282.

(3) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, 55. G

(4) *Re Compton, Powell v. Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 8 Digest (Repl.) 330, 123.

(5) *Re Tree, Idle v. Hastings Corpn.*, [1945] 2 All E.R. 65; [1945] Ch. 325; 114 L.J.Ch. 247; 173 L.T. 42; 8 Digest (Repl.) 351, 306.

Appeal. H

Appeal by special leave by Beatrice Alexandra Victoria Davies from part of a decretal order of the Full Court of the Supreme Court of New South Wales (FRING and GORDON, J.J., and LANGER OWEN, A.J.), dated Sept. 26, 1949, made on appeal to it from a decretal order of the Supreme Court of New South Wales in Equity (HARVEY, J.), dated Dec. 20, 1948. The respondents were the Perpetual Trustee Co. (Ltd.), Nina Eva Vida Jones, Mary Eileen Harris and the Permanent Trustee Co. of New South Wales, Ltd., who were representing those interested in the testator's estate, the University of Sydney, representing all institutions interested, and the Attorney-General in and for the State of New South Wales. The last-named respondent only appeared on the appeal. The facts are set out in the judgment of the Board. I

K. S. Jacobs, Q.C., and D. E. Horton (both of the Australian Bar) for the appellant.

A *Condon Wallace, Q.C., R. W. Fox* (both of the Australian Bar) and *J. G. Le Querrec* for the respondent, the Attorney-General in and for the State of New South Wales.

B LORD MORTON OF HENRYTON: The only question arising for decision on this appeal is whether a devise contained in a codicil to the will of George Harris is or is not a valid charitable devise. The parties are in agreement that the devise is invalid unless it can be upheld as being charitable. It is in the following terms:

C "I give and devise Block 70B upon which stands Ultimo House to the Presbyterians the descendants of those settled in the colony hailing from or born in the north of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures."

D The testator lived at Ultimo, Sydney, New South Wales, and died on Jan. 21, 1897. By his will dated Apr. 18, 1894, the testator devised Block 70B to his wife for her life and thereafter to his nephew John Harris for life and thereafter to the next surviving eldest son of his brother John for life until the death of the last survivor of his nephews the sons of his brother John and then to his heir-at-law bearing the name of Harris. By the said codicil, which was dated Apr. 3, 1895, the testator revoked the ultimate devise to his heir-at-law and substituted the devise already set out. He also revoked several provisions of his will as to the destination of the ultimate residue of his estate and gave that residue to the college to be founded pursuant to the said devise, directing that it be "held at interest and this latter added to the income annually". The last of the life tenants interested in Block 70B died on Apr. 19, 1957. At that date Block 70B, which had been resumed by the Government of the State of New South Wales, was represented by investments representing the proceeds of sale thereof worth approximately £53,000, and the value of the residue was F £286,750.

G On Oct. 26, 1918, one John Harris, who was then the sole trustee of the will, issued an originating summons in the Supreme Court of New South Wales in Equity, for the determination of a number of questions. Question 10 (a) asked whether the devise of Block 70B (and another devise not material for the present purposes) were valid devises. At the hearing of the originating summons by HARVEY, J., counsel for certain of the defendants (who were among the next of kin of the testator) and counsel for the University of Sydney submitted that the devise in question was void for uncertainty and was not charitable as it was confined to a restricted class. These submissions were replied to by counsel for the Attorney-General. After the Attorney-General's address, the learned judge made the following note, on Dec. 18, 1918.

H "Subject to affidavit by Attorney-General as to Presbyterian children, I answer 10 (a) in affirmative as being vested remainder for a good charitable object."

I Next day an affidavit was sworn by one William Wood, and it appears from the learned judge's further note that this affidavit was put in evidence before him. The deponent stated that he was the Financial Secretary of the Presbyterian Church of Australia in the State of New South Wales, that he had occupied that position for over twenty-five years and that he had an intimate knowledge of the affairs and constitution of the Presbyterian Church in that state. He then deposed to the fact that

"Amongst the members of the Presbyterian Church in this state in the year 1897 there were numerous persons descendants of Presbyterian settlers in this state and hailing from or born in the north of Ireland, and at the

present time there are still a considerable number of adherents or members of the said Church similarly descended."

This was the only evidence before the learned judge as to the existence or otherwise of persons of the class required by that devise, and he was apparently of the opinion that it satisfied the condition which he had imposed when answering question 10 (a) in the affirmative. In his formal judgment delivered on Dec. 20, 1918, HARVEY, J., said:

"I have already held that the effect of the codicil is to revoke both devises in the will in favour of the testator's heir-at-law but that the life interest in Ultimo House in favour of his widow and nephews and the life interest in the residuary real estate in favour of his nephews are not disturbed by the codicil. I have also held that the trust for founding a Presbyterian College is a good charitable trust being an immediately vested remainder waiting only for the determination of the antecedent life estates of the sons of John Harris. When this remainder falls in it will become necessary to settle a scheme for the administration of this trust."

This decision was upheld on appeal by the Full Court of the Supreme Court of New South Wales. In delivering the judgment of that court, LANGER OWEN, A.J., said, with reference to the devise now in question:

"HARVEY, J., held that it amounted to a trust for founding a Presbyterian College, and it is a good charitable trust for the purposes mentioned in the codicil, and we agree with him. We think that it should be construed as a devise for the benefit of Presbyterians descended from those settled in New South Wales hailing from or born in the North of Ireland to be held by trustees for the purpose of establishing a college for the education of their youth according to certain religious standards. It is not a devise to or for the Presbyterian Church of Australia as constituted by the Presbyterian Church of Australia Act, 1900. It is a devise for the benefit of certain individuals who are Presbyterians, and who come within a certain description, and the object is to afford facilities for religious education. It may be that, when the time arrives for carrying this charitable trust into effect, it may be found impracticable to do so. In that event there is nothing in our decision, and there should be no expression inserted in the decree, to prevent the beneficiaries under the will and codicil from contending that the *cy près* doctrine is not applicable to these devises."

The decree of the Full Court, so far as material, stated that the devises of Block 70B (and of another property not material for the present purpose) were valid charitable devises for the respective purposes contained in the codicil, and continued:

"but this declaration is without prejudice to the right of the beneficiaries or any of them under the said will to contend that the *cy près* doctrine is not applicable to these devises or either of them if the said purposes are incapable of taking effect when the respective funds become available for the said purposes. The said devise of Block 70B in the said codicil is subject to the prior life estates therein given by the said will in favour of the widow and certain nephews of the testator the sons of his brother John."

After the death of the last of the life tenants interested in Block 70B, on Apr. 19, 1957, special leave to appeal was granted to the present appellant, as representing the testator's next of kin. So it is that this appeal comes before their Lordships' Board nearly forty years after the decision of the courts in Australia.

The main contentions of counsel for the appellant were, first, that the element of "public benefit" was lacking in the trust created by the codicil, and, secondly, that the gift was void for uncertainty as to the persons for whose benefit the trust was created, the uncertainty arising from the meaning of the words "the Presbyterians", coupled with the words "those" and "their youth".

A Their Lordships now turn at last to considering the construction of the gift in the codicil. It is a gift to a body of trustees described as "the Presbyterians the descendants of those settled in the colony hailing from or born in the north of Ireland". For reasons which will later appear, their Lordships will assume, without so deciding, that the words "the Presbyterians" in this context can be given a definite meaning. As the codicil speaks from the testator's death,

B it is plain that the class of "Presbyterians" must be ascertained as at Jan. 21, 1897, but it is not every Presbyterian living at that date who is selected as a trustee. A Presbyterian to qualify must be a descendant of Presbyterians—the word "Presbyterians" must clearly be implied after the word "those"—settled in the colony and either hailing from or born in the north of Ireland. The phrase "hailing from" is not very explicit, but may be taken to refer to persons

C who were resident in the north of Ireland at the time when they embarked for New South Wales. The persons to be educated at the college are limited to "their youth"; that is, as their Lordships interpret the words, the children and remoter issue of the persons to whom as trustees the gift is made. Thus the class of persons eligible to attend the college is defined simply by relationship to one or more of a number of persons living on Jan. 21, 1897. A boy would only be eligible if (i) he was descended from a Presbyterian living at that date, and (ii)

D that Presbyterian was himself descended from a Presbyterian who had settled in the colony, and (iii) that settler either hailed from or was born in the north of Ireland. Curious results follow if it be imagined that the college is founded in 1959 and it has to be ascertained whether particular boys belong to the class of "their youth". Boy "A" is the son of members of a Presbyterian Church, but neither of his parents was living in 1897 and his ancestors then living were not Presbyterians. Boy "B" is the son and grandson of Presbyterians, but his Presbyterian ancestors living in 1897 were not descended from Presbyterian settlers, but themselves adopted Presbyterianism. Boy "C" is a descendant of Presbyterians living in 1897 and these Presbyterians were descended from Presbyterian settlers, but the Presbyterian settlers came from England or Scot-

E land. No one of the three boys in question is within the class of beneficiary defined by the settler. Boy "D's" parents have no religion at all, but he has one grandparent who was living in 1897, was then a Presbyterian, and was descended from Presbyterian settlers who "hailed" from northern Ireland. He is within the class of beneficiaries.

The law relating to charitable trusts must now be applied to these facts. In

G the course of his argument on behalf of charity, counsel for the Attorney-General invited the Board to put a construction on the gift which would amount, in effect, to disregarding the words "the descendants of those settled in the colony hailing from or born in the north of Ireland". This is a tempting invitation, but it must be rejected. To follow such a course would be to make a new and, perhaps, a better codicil for the testator, instead of construing his words. It

H is to these words, as they have already been construed, that the principles laid down by the relevant authorities must now be applied.

It is to be observed at once that the object of the testator's bounty is *prima facie* a charitable object within the well-known classification in *Income Tax Special Purposes Comrs. v. Pemsel* (1) ([1891] A.C. 531 at p. 583), being concerned

I both with education and with the advancement of a particular religious faith. It is, however, now well established that an element of public benefit must be present even in such gifts, if they are to stand in the privileged position of a charitable gift. This aspect of the law relating to charitable trusts has been more fully discussed and developed by the Board and in the House of Lords since the decision of the Full Court in the present case. Thus in *Verge v. Somerville* (2) ([1924] A.C. 496 at p. 499), LORD WRENBERY said, in delivering the judgment of the Board:

"To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."

In *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3) ([1951] 1 All E.R. 31 at p. 33), LORD SIMONDS said:

"It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community . . . With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to LORD MACNAGHTEN'S division in *Income Tax Special Purposes Comrs. v. Pemsel* (1), and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class 'other purposes beneficial to the community'. This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal. In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it."

No question of the relief of poverty arises in the present case. LORD SIMONDS observed (*ibid.*, at p. 34):

"A group of persons may be numerous, but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes",

and later he added (*ibid.*):

"It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established."

LORD NORMAND said (*ibid.*, at p. 35):

"No general rule has yet been formulated by which to distinguish trusts which have this essential element of public benefit and those which have not, and the valiant attempts of counsel to arrive at a rule have failed to convince me. I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the trustor as the objects of his bounty. That seems to me to follow from the principle that the trust purpose must be directed to the benefit of the community or a section of the community: TUDOR ON CHARITIES (5th Edn.), p. 11, approved by LORD GREENE, M.R., in *Re Compton, Powell v. Compton* (4) ([1945] 1 All E.R. 198 at p. 200). The trustor may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined."

Their Lordships find it unnecessary to refer to any other authorities. The principles thus laid down must be applied to the facts of each particular case, and their Lordships have not found it easy to decide on which side of the line falls the trust which the testator desired to establish. They will assume that the

- A college to be established was intended to provide a general education and not only to give education to the standards of the Westminster Divines. Even so, they are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not "the community", for the testator has been at pains to impose particular and somewhat capricious qualifications on the persons who are to benefit from this education. Nor can these persons, in their Lordships' opinion, be "a section of the community" in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply "their personal relationship to several *propositi*", viz., certain persons living at the death of the testator. And these persons are not themselves, in their Lordships' view, a section of the community. They are certain Presbyterians who can establish a particular descent. Moreover the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator has in mind. It cannot be said that boys whose Presbyterian ancestors (living on Jan. 21, 1897) trace their descent from emigrants from Northern Ireland are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) are descended from emigrants from, e.g., England or Scotland. In their Lordships' opinion, the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than a "fluctuating body of private individuals", and the gift must fail because the element of public benefit is lacking. This being so, they need not consider further the argument as to uncertainty already mentioned. Counsel for the respondents relied strongly on *Re Tree, Idle v. Hastings Corpn.* (5) ([1945] 2 All E.R. 65). That case is, however, distinguishable from the present case on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent.
- F Their Lordships will humbly advise Her Majesty that this appeal should be allowed and that it should be declared, in answer to question 10 (a) of the originating summons, that the devise of Block 70B contained in the codicil of Apr. 3, 1895, was not a valid charitable devise. The costs of all parties to this appeal, as between solicitor and client, must be paid out of the funds representing the proceeds of sale of Block 70B. The order of the Full Court as to the costs of the proceedings before it will not be disturbed.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray* (for the appellant); *Light & Fulton* (for the respondent, the Attorney-General in and for the State of New South Wales).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

DUN v. DUN AND ANOTHER.

[PRIVY COUNCIL (Viscount Simonds, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning), February 18, 19, April 7, 1959.]

Privy Council—Australia—New South Wales—Family provision—Provision for widow—Application to modify provisions of testator's will—Whether court should have regard to facts as existed at date of application or to facts as existed at date of testator's death—Testator's Family Maintenance and Guardianship of Infants' Act, 1916-1954 (New South Wales), s. 5 (1).

By his will dated Aug. 18, 1919, a testator bequeathed to his widow household and personal effects, pecuniary legacies amounting to £2,000 and an annuity of £600 per annum. By a codicil dated May 16, 1942, he increased the widow's annuity to £800 per annum free of tax. The testator bequeathed the residue of his estate to his brothers and sisters. On Sept. 10, 1942, the testator died and at the time of his death his estate was valued at £22,216. His wife, who survived him, was entitled in her own right to land, towards the cost of which the testator had contributed £3,066, and to other property which was sold before the present application for £4,600. The widow made no application to the court for further provision to be made for her out of the estate (on the footing that the testamentary provision was inadequate) within the period of one year of the grant of probate as prescribed by the New South Wales Testator's Family Maintenance and Guardianship of Infants' Act, 1916, s. 5, and until 1954 there was no power in the court to extend that period. By the Administration of Estates Act, 1954, a new sub-section was introduced into s. 5 of the Act of 1916 enabling the court to extend the time for making application. By 1955 the testator's estate consisted almost entirely of liquid assets worth £82,000, and the widow's position had deteriorated, she then having property of her own worth £4,300. On her application in June, 1955, the widow was given further time in which to apply under the Act of 1916, and in 1956, when her application under that Act was heard, the court ordered that she be paid an additional legacy of £5,000, and, as from July 1, 1956, an annuity of £1,500 in lieu of the annuity and income tax benefits provided by the will. The question arose whether the court, in deciding the adequacy of the provision made by the testator, should have regard to the facts as they existed at the date of the testator's death, or as they existed at the date of the application. It was not disputed that if, in such an application, the court should have regard to the facts as they existed at the date of the testator's death, the court should take into account not only the events which had already occurred, but also such events as the testator might reasonably be expected to have foreseen immediately before he died.

Held: the widow's application ought to be dismissed because the material date under the Act of 1916 for determining whether the widow was left without adequate provision was the date of the testator's death; and on the facts (following the view of the majority of the High Court of Australia) it could not be said that the testator ought to have foreseen the effect of the war of 1939-45 and post-war conditions leading to the situation in which the widow found herself at the date of the application.

Bosch v. Perpetual Trustee Co., Ltd. ([1938] 2 All E.R. 14) applied.

Re Forsaith ((1926), 26 S.R.N.S.W. 613) overruled.

Coutts v. National Trustees, Executors & Agency Co., Ltd. ((1956), 95 C.L.R. 494) approved.

Appeal dismissed.

A [The English statute corresponding to the New South Wales Testator's Family Maintenance and Guardianship of Infants' Act, 1916-1954, is the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952.]

As to family provision, see 16 HALSBURY'S LAWS (3rd Edn.) 455-465, paras. 911-930; and for cases on the subject, see 44 DIGEST 1289, 1290, and SECOND

B DIGEST SUPPLEMENT thereto Nos. 11,163*a* et seq.

For the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 139.]

Cases referred to:

- (1) *Re Forsyth*, (1926), 26 S.R.N.S.W. 613; 43 N.S.W.W.N. 171; 44 Digest 1290*m*.
- C** (2) *Re Pichon*, (1947), 47 S.R.N.S.W. 186.
- (3) *Coates v. National Trustees, Executors & Agency Co., Ltd.*, (1956), 95 C.L.R. 494.
- (4) *Re Gerloff*, [1941] S.A.S.R. 156; 2nd Digest Supp.
- (5) *Re Wheare*, [1950] S.A.S.R. 61; 2nd Digest Supp.
- D** (6) *Re Molloy*, (1928), 28 S.R.N.S.W. 546; 45 N.S.W.W.N. 142; Digest Supp.
- (7) *Bosch v. Perpetual Trustee Co., Ltd.*, [1938] 2 All E.R. 14; [1938] A.C. 643; 107 L.J.P.C. 53; 158 L.T. 395; Digest Supp.
- (8) *Re Allen, Allen v. Manchester*, [1922] N.Z.L.R. 218.
- (9) *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1933] All E.R. Rep. 52; [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; Digest Supp.
- E** (10) *Re Cathcart, Ex p. Campbell*, (1870), 5 Ch. App. 703; 23 L.T. 289; 22 Digest (Repl.) 406, 4370.
- (11) *Royal Crown Derby Porcelain Co., Ltd. v. Russell*, [1949] 1 All E.R. 749; [1949] 2 K.B. 417; 30 Digest (Repl.) 217, 598.

Appeal.

F Appeal by special leave by Eleanor Jessie Dun from an order of the High Court of Australia (DIXON, C.J., McTIERNAN, WILLIAMS, KITTO and TAYLOR, J.J.), dated Dec. 19, 1957, allowing an appeal by the respondents, Francis Boyne Dun and Charles Edwin Dun from an order of the Supreme Court of New South Wales in Equity (ROPER, C.J. in Equity), dated Aug. 30, 1956. The facts are set out in the judgment of the Board, p. 137, letter C, post.

G *Gordon Wallace, Q.C.* (of the Australian Bar), and *Anthony Cripps, Q.C.*, for the appellant.

K. S. Jacobs, Q.C., and *D. E. Horton* (both of the Australian Bar) for the respondents.

LORD COHEN: This appeal raises a short but important point under a New South Wales statute, the Testator's Family Maintenance and Guardianship of Infants' Act, 1916-1954. This Act is one of a series of similar, though not identical, Acts which were introduced in New Zealand and in each of the Australian States to enable the court to modify the provisions of the will of a testator who, in the opinion of the court, had not made adequate provision for the maintenance, education or advancement in life of his or her widow, husband or children by ordering such provision for that purpose as the court might think fit. The question which has now to be decided is whether, on an application under the Act by or on behalf of a dependant of a testator, the court, in deciding on the adequacy of the provision, should have regard to the facts as they existed at the date of the application or to the facts as they existed at the date of the testator's death. It was not disputed that, if the latter were the correct date, the court should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

Before going into the facts of the case, it will be convenient to consider the New South Wales statutes which affect the matter. The first statute was introduced in 1916. Section 3 (1) of the Act (which has remained unchanged throughout) was in the following terms:

"If any person (hereinafter called 'the testator') dying or having died since Oct. 7, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

The original Act contained no power to make additional provision for a dependant in the case of intestacy where the court was of opinion that the Wills, Probate and Administration Act, 1898, did not make adequate provision for such dependant. That power was conferred by an amending Act in 1938* which added the following new sub-section to s. 3:

"(1A) If any person (hereinafter called the 'intestate') dies wholly intestate after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, and, in consequence of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may, at its discretion and taking into consideration all the circumstances of the case, upon application made by or on behalf of such widow, or children, or any of them, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of such person."

Sub-section (2) and sub-s. (3) of s. 3 contain provisions relating to the exercise of the power conferred by sub-s. (1). They read as follows:

"(2) The court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as to disentitle him to the benefit of such an order.

"(3) In making an order the court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical, or other payments."

Section 4 enacts that every provision made under the Act shall, subject to the Act, take effect as if it were a codicil executed immediately before the death of the testator.

Section 5 of the Act of 1916 contains limitation provisions requiring the application to be made in the case of a testator dying before the passing of the Act within three months of the date of such passing, and in any other case within twelve months of the grant of probate of the will of the testator. When, in 1938, applications were made possible in the case of an intestacy, a new sub-section was added to s. 5 requiring any such application to be made within twelve months of the grant of letters of administration. Until 1954 there was no power to extend the time limits thus fixed, but in that year power to extend the time was conferred by the Administration of Estates Act, 1954, which (inter alia) introduced into s. 5 the following new sub-section:

* The Conveyancing, Trustee and Probate Act, 1938 (No. 30 of 1938), s. 9. Section 3(1A) of the Testator's Family Maintenance and Guardianship of Infants' Act was also further amended by the Administration of Estates Act, 1954 (No. 40 of 1954), s. 4.

A (2A) Notwithstanding anything in sub-s. (1) and sub-s. (2) of this
section: (a) The time for making an application under either of those
sub-sections may be extended for a further period by the court, after
hearing such of the parties affected as the court thinks necessary, and
this power extends to cases where time for applying has already expired,
B including cases where it has expired before the commencement of the
Administration of Estates Act, 1954; but every application for extension
shall be made before the final distribution of the estate, and no distribution
of any part of the estate made before the application shall be disturbed by
reason of the application or of an order made thereon."

C Their Lordships turn now to the facts of the present case. The applicant
(the present appellant) was the widow of Thomas Fitzgerald Dun who died on
Sept. 10, 1942. By his will made on Aug. 18, 1919, he bequeathed to the
appellant certain household and personal effects and pecuniary legacies aggregating
£2,000. He also bequeathed to her an annuity of £600 per annum.
D By a codicil made May 16, 1942, he increased this annuity to £800 per annum,
and directed that it should be paid free of tax. Subject to certain minor
bequests and in the events which happened, the testator devised and bequeathed
the residue of his estate on trust for such of his brothers and sisters as should
be living at the date of his death in equal shares. The respondents are the
present trustees of the testator's will.

E At the time of the death of the testator, his estate was valued at £22,216.
The appellant at that date owned land with a building on it towards which the
testator had contributed £3,066. She also owned other property which she
had sold for £4,600 before the date of the application herein. Having regard to
these figures, it is not surprising that the appellant made no application under
s. 3 within twelve months of the grant of probate of the testator's will. By
the time that the amending Act of 1954 had become law the position had altered.
F In 1955, the testator's estate consisted almost entirely of liquid assets, and their
value was said to be £82,000. On the other hand, the appellant's position had
deteriorated. All that was left of her assets was the former matrimonial home,
said to be worth £8,500 but subject to a mortgage to secure the repayment
of the sum of £4,200.

G Taking advantage of the new sub-s. (2A) of s. 5 of the Act, the appellant
applied for an extension of the time allowed for making an application under
s. 3 (1) of the Act of 1916, and on June 3, 1955, MYERS, J., extended the time
until June 17, 1955. On June 16, 1955, the appellant made the substantive
application under s. 3 (1). This came before the Chief Judge in Equity (ROPER,
C.J.) and on Aug. 16, 1956, he granted the application, ordering that, in addition
to the provisions made for her in the will and codicil of the testator, the appellant
be paid a legacy of £5,000 payable on Sept. 30, 1956, and that, as from July 1,
H 1956, in lieu of the annuity and income tax benefits provided in her favour,
the appellant be paid an annuity of £1,500 per annum.

I In reaching his conclusion, ROPER, C.J. in Equity, said that he thought it
was clear that, had the appellant brought her application within twelve months
of the grant of probate, and had that application been heard within the normal
reasonable time thereafter, it must have failed whether the time for considering
the circumstances had been taken as the date of death or as the date of hearing
the application. He called attention, however, to the subsequent change in
circumstances both of the testator's estate and of the appellant to which their
Lordships have already referred, and said that he had now to decide which was
the correct date to apply. Basing himself on *Re Forsyth* (1) ((1926), 26 S.R.
N.S.W. 613), he held that the time at which the existing circumstances should
be considered is the date on which the court hears the application. He said
that that decision had stood for thirty years and that, although the number of
cases in which a material difference exists between the results of considering

the circumstances existing at the hearing on the one hand and at the date of death on the other is relatively few, there must have been a number of them, and he referred to *Re Pichon* (2) ((1947), 47 S.R.N.S.W. 186). He recognised that a different view had been taken in cases under similar statutes in Victoria, in Queensland and in Tasmania, but he said that there were slight but important differences between the Acts in force in those states and the New South Wales Act. He also pointed out that, under the South Australia Act, which, so far as the point under consideration is concerned, is almost identical with the New South Wales Act, the principle of *Re Forsaith* (1) had been adopted. Having reached the conclusion that the material time was the date of the hearing of the application, he held that the appellant qualified for an order and made the order which their Lordships have stated.

Unfortunately, unknown to the Chief Justice in Equity, the correctness of the decision in *Re Forsaith* (1) had been considered by the High Court of Australia in *Coates v. National Trustees, Executors & Agency Co., Ltd.* (3) ((1956), 95 C.L.R. 494). Judgment in that case had been given on June 6, 1956. Since the decision in *Coates' case* (3) formed the basis of the High Court decision in the present case, their Lordships must consider it at some length. In that case the relevant statutory provision in Victoria was s. 139 of the Administration and Probate Act, 1928, as amended by the Administration and Probate (Testator's Family Maintenance) Act, 1957. This section as so amended reads, so far as material, as follows:

"If any person . . . dies . . . leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's widow widower or children the court may in its discretion on application by or on behalf of the said widow widower or children order that such provision as the court thinks fit shall be made out of the estate of the testator for such widow widower or children."

It is unnecessary to refer to the facts of the particular case under consideration in *Coates' case* (3); it is sufficient to say that the High Court by a majority consisting of DIXON, C.J., WEBB, J., and KITTO, J., came to the conclusion that the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined according to the circumstances existing not as at the date of the hearing of the application but as at the date of the death of the testator although, if the question be answered in the affirmative, the court, in exercising its discretionary power to make such provision as it thinks fit, must take into account the facts as they exist at the time of making its order.

In reaching his conclusion, DIXON, C.J., referred to decisions in New Zealand and some of the Australian states in cases arising under similar statutes. He pointed out that, in New Zealand, Tasmania, Victoria and Queensland, the view had been taken that the question was to be determined as at the date of the death of the testator or testatrix, whereas in New South Wales and South Australia the view had been adopted that the sufficiency of the provision in the will must be determined as at the time when the court is dealing with the question. Referring to *Re Forsaith* (1), he cited the observation of HARVEY, C.J. in Equity, in that case (26 S.R.N.S.W. at p. 614) that "looking at the words of the Tasmanian statute there is no loophole of escape from that construction", i.e., a construction adopting the date of death as the crucial date. DIXON, C.J., continued (95 C.L.R. at p. 507):

"In spite of the difference in language between the New South Wales Act and the Tasmanian and for that matter the Victorian, it may be doubted whether the distinction taken by HARVEY, C.J. in Equity, is well founded. The legislation of the various states is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided."

A Accordingly, he preferred the Victorian view that the material date was the date of the death, but he pointed out that the question what is proper maintenance and support involves the future of the dependant to be maintained or supported and that, accordingly, the testator must be presumed to take into account contingent events as well as what may be considered certain or exceedingly likely to happen.

B KITTO, J., summed up his reason for agreeing with the chief justice in the following passage (*ibid.*, at p. 528):

C "It remains only to say explicitly that once an applicant establishes that the case falls within the class in which the court is given jurisdiction, the circumstances as they then exist may and should receive full consideration by the court in deciding what provision it thinks fit to make for the proper maintenance and support of the applicant. It is true to say that in the light of all those circumstances the court will do what it considers wise and just for the purpose. But this has no bearing upon the question which is before the court at the preliminary stage—the question whether the case is shown to be within the limits which the legislature has seen fit to set to the extraordinary jurisdiction it has conferred on the court. At D that stage the court must be satisfied, before commencing to think what provision it would be wise and just to make in the circumstances as they then exist, that the testator's will did not operate to make such a provision for the applicant's maintenance and support as would have been made if a complete knowledge of the situation and a due sense of moral obligation with respect to those matters had combined to dictate a new will to the E testator immediately before he died."

F Having regard to the decision in *Coates'* case (3), the respondent executors appealed to the High Court of Australia in the present case, and the High Court by a majority of three (DIXON, C.J., KITTO, J., and TAYLOR, J.) to two (McTIERNAN, J., and WILLIAMS, J.) allowed the appeal and dismissed the application. Their Lordships all agreed that, in view of the decision in *Coates'* case (3) the material time in deciding whether the court had a discretion to vary the will must be taken to be the date of the testator's death. They also agreed that, in reaching its decision, the court was entitled to take into account circumstances which should have been foreseen by the testator at the time of his death, but they differed in the application of this principle to the facts of the present case. The majority said:

G "But there is nothing in the case to suggest that the vast increase in the value of the estate could have been foreseen; indeed, it may well be thought that if the events which produced this result could reasonably have been foreseen their actual occurrence would not have occasioned such a marked and rapid increase in the value of the estate. Looking at the H circumstances as they existed at the death of the testator we think it is impossible to say that the provision made by him for the applicant was ungenerous, and, when regard is had to the incidence of death and estate duties and testamentary expenses, it is clear that it cannot be characterised as inadequate. On the contrary, if, as the testator appears to have thought, it was desirable that the main provision for his widow should consist of I an annuity, he may well have considered that the annuity provided by his codicil was as much as his estate would be able to provide. As already appears it is clear that ROPER, J., would have dismissed the respondent's application if he had been aware that *Re Forsaith* (1) had been overruled. We agree that such a result would have been inevitable and, accordingly, the appeal should be allowed and the order of the Supreme Court set aside."

WELB and WILLIAMS, JJ., took the opposite view. Since their conclusion is that which counsel for the appellant invited their Lordships to adopt it will be convenient to cite the material passage from the judgment of WILLIAMS, J.:

"What he [the testator] did not appear to foresee, but he reasonably might have foreseen, was that the longer the war continued the more serious its economic consequences would be upon the value of money and the cost of living and therefore upon the financial position of people with fixed incomes. He evidently foresaw that it would probably not be advisable to sell his farm or produce business for some time after his death, presumably because he considered that it was likely that the income and assets of his estate would be built up by continuing these businesses, and he must evidently have contemplated that this would assist his widow because he provided that no sale was to take place for five years after his death without her consent. The only vital thing that he appears to have overlooked in deciding what would be adequate for the proper maintenance of his widow in the future stretching forward from his death, which it can be said that as a wise husband he should have been able to foresee, was the danger of providing for his widow, then only forty-two years of age, mainly by leaving her a fixed income. The testator in his wisdom should have realised as Mr. Wallace submitted, that the only safe course would be to leave her at least the income or a proportion of the income of his estate, but with a proviso that if her income fell below a certain amount it should be supplemented out of capital, either as of course or possibly at the discretion of his trustees. As he had no children his widow was the only person with any real moral claim upon his bounty."

From the decision of the High Court, the appellant, by leave granted by Order in Council made June 3, 1958, appealed to this Board. Counsel on her behalf submitted that: (i) Whatever be the true construction of the statutes dealing with similar subject-matter in other jurisdictions than New South Wales, the New South Wales statute must be construed according to its own language and, so construed, the material date for all purposes under s. 3 (1) was the date of hearing the application. (ii) Even if the date of death was the material date, the correct conclusion as to what the testator should have foreseen was that indicated by WILLIAMS, J., and on this ground the judgment of the trial judge should be restored.

On the first point, counsel relied on the decision of HARVEY, C.J. in Equity, in *Re Forsaith* (1). The learned judge in that case based his conclusion on two points (i) the omission in the Victorian statute of the words "upon his death" which in the Tasmanian statute follow on the words "in such manner that", and (ii) the use of the words "are left", bearing in mind that the section applies not only to persons dying after the passing of the Act but also to persons who died between Oct. 7, 1915, and the passing of the Act. His Honour said (26 S.R.N.S.W. at p. 614):

"I think in the cases of such wills the court would be forced to the conclusion that the period of time which was to be considered was the date on which the court was dealing with the matter, and the same construction, therefore, must apply in the case of all wills which are the subject of the section."

Neither of these points carry conviction to their Lordships' minds. On the first point their Lordships agree with counsel for the appellant that the court's first duty is to consider the meaning of the language used in the particular statute under consideration, but, quite apart from decisions on other statutes, their Lordships are of opinion that the natural construction of a section dealing with the question whether a testator's dependants "are left" without adequate provision is to look at the date when he left them, i.e., the date of his death. Nor do their Lordships think that this conclusion is affected by the fact that the section applies to testators who died between Oct. 7, 1915, and the passing of the Act on Sept. 18, 1916. Their Lordships can see no reason why,

A in deciding whether such a testator had made adequate provisions for his dependants, the court should not look at the position as it was on the date of the testator's death. The case of a testator who died before Sept. 18, 1916, is not before their Lordships, but their Lordships as at present advised prefer the date of the death in the case of such a testator to the date suggested by KITTO, J., in *Coates' case* (3), viz., the date of the commencement of the Act: see 95 C.L.R. at p. 525.

B *Re Pichon* (2) does not carry the matter any further. In that case the testatrix had made no provision for her only child and left the whole of her estate to her executor M. beneficially. The executor died before the application under s. 3 (1) came on for hearing. On these facts, quite apart from the fact of the death of M., there was a *prima facie* case of inadequate provision for the daughter. C In exercising his discretion as to the amount of the provision to be made, ROYER, J., would clearly have been entitled to take into account the fact that the only beneficiary named in the will was dead.

The two South Australian cases to which their Lordships' attention was called also carry the matter no further. In *Re Gerloff* (4) ([1941] S.A.S.R. 156), RICHARDS, J. (*ibid.*, at p. 161), refers to *Re Forsaith* (1) with approval, but D expressly says he did not find it necessary to express a definite opinion on the question of date. In *Re Wheare* (5) ([1950] S.A.S.R. 61), PAINE, A.J., follows *Re Forsaith* (1) and adds (*ibid.*, at p. 66):

"there is too, I think, another provision in our Act which warrants that decision. Section 5 (4) of our Act enables the court 'at any time and from E time to time' to 'rescind or alter any order'."

It is not clear whether the learned judge thought that this section would enable a provision already made to be increased. The corresponding section in the New South Wales Act is s. 6 (4). Their Lordships do not think this section would enable a provision made by a previous order to be increased, as was F pointed out in *Re Molloy* (6) ((1928). 28 S.R.N.S.W. 546); its purport is to enable a provision made under the Act to be reduced or cancelled. So, also, s. 8 enables the court to reduce or discharge an order for periodic payments where the circumstances of the dependant in whose favour the order was made improve. Their Lordships do not think, therefore, that these provisions throw any light on the question they have now to decide.

G Counsel for the appellant's sheet anchor on his first point was the judgment of FULLAGAR, J., in *Coates' case* (3), in which, while agreeing with the order which was made, he dissented on the question of the material date. The main grounds of his dissent were: (i) that to take the date as the date of hearing the application would be more in accord with the general object of the legislation and would give the court a freer hand in the exercise of a wide discretion; H (ii) it is more realistic; (iii) it avoids an unnecessary question—what must the testator be taken to foresee—which savours of artificiality and which often cannot be satisfactorily answered. Their Lordships recognise the force of these observations, but do not think that they can justify a disregard of what their Lordships consider to be the plain meaning of the statute. Moreover, I their Lordships think that the intention of all the statutes in this field was to enable the court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependant: it would be contrary to this intention to judge a testator not by the position as it was at the time of his death but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognise that it may sometimes be difficult to determine what the testator should have foreseen, but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge.

Reference was made in the course of the argument to the decision of this Board in *Bosch v. Perpetual Trustee Co., Ltd.* (7) ([1938] 2 All E.R. 14), a decision on the section which their Lordships are now considering. The question of the material date in deciding whether the court had jurisdiction was not in issue, but their Lordships think that the observations of LORD ROMER, delivering the decision of the Board, as to the proper approach of a judge dealing with an application of an Act are of assistance. LORD ROMER said (*ibid.*, at p. 21):

" Their Lordships agree that in every case the court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than as a fond and foolish, husband or father. This no doubt is what the judge meant by a just but not a loving husband or father. As was truly said by SALMOND, J., in *Re Allen, Allen v. Manchester* (8) ([1922] N.Z.L.R. 218 at p. 220): ' The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances '."

If that be, as their Lordships think it is, the correct approach it seems to their Lordships necessarily to involve that the court must look to the position as at the date of the testator's death.

Counsel for the appellant also relied on the amending Acts of 1938 and 1954 as supporting his argument. The first of those Acts introduced s. 3 (1A) dealing with cases of intestacy, and their Lordships are unable to see any reason for thinking that the court, in deciding the question of jurisdiction in cases of intestacy, should look at any other date but the date of the death of the intestate. The provisions of the Act of 1954 on which counsel relied were those enabling the court to extend the time within which application may be made for provision under s. 3 (1) or (1A). He submitted that the intention must have been to enable the court to look at the position as it might be at the date of the hearing of the application for an extension of time in deciding whether to grant an extension, and that it followed that, if leave were granted, the court, in dealing with the substantive application, must look at the date of hearing of that application for all purposes. Their Lordships do not agree; they think that counsel for the respondents gave the right answer when he said that the section in question was purely procedural, and could not have been intended to effect an alteration in substantive law or to enable an applicant to improve her position by being dilatory in making her application. Counsel for the appellant sought to meet this argument by saying that Parliament, when it passed the Act, must be taken to have known of the decision in *Re Forsaith* (1), and to have intended that the court should proceed on the basis that that decision was correct. He said that *Re Forsaith* (1) had stood unchallenged for thirty years and more. He relied on a passage in the judgment of LORD BUCKMASTER in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.* (9) ([1933] All E.R. Rep. 52), where he said (*ibid.*, at p. 53), citing JAMES, L.J., in *Re Cathcart, Ex p. Campbell* (10) ((1870), 5 Ch. App. 703 at p. 706):

" ' Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them '."

A Their Lordships accept without question this statement of the law, but the facts of the present case do not make the principle applicable.

Their Lordships desire to refer also on this point to the observations of DENNING, L.J., in *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (11) ([1949] 1 All E.R. 749), where he said (*ibid.*, at p. 755):

B "The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms, but if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled."

C In the present case, Parliament has not re-enacted the relevant section in the same terms; it has only left it unamended. Moreover, for the reason which their Lordships have given, they consider that the decision in *Re Forsyth* (1) has been shown to be wrong.

D For the reasons which their Lordships have stated, their Lordships consider that counsel for the appellant's first submission must be rejected, and that the material date in determining whether a dependant was left without adequate provision is the date of the testator's death.

E It remains to consider whether the majority of the High Court were right in rejecting his alternative submission that the testator ought to have foreseen the events which in fact occurred and, if he had done, must have made more ample provision for the appellant. Two things seem clear, (i) that, if the facts as at the date of his death were the only things relevant, the provision made was such that he could not be said to have made inadequate provision for her, (ii) that he did take into account what he thought might be the effect of the war, for in May, 1942, he made a codicil increasing the amount of his wife's allowance and made it payable free of tax. Ought he to have foreseen the actual result of the war and post-war conditions? On this point their Lordships are not prepared to differ from the majority of the High Court. It seems to their Lordships that this is just the kind of point on which judges familiar with conditions in Australia are more likely to reach a correct conclusion than their Lordships sitting in London. They would add that, on the facts of this case, they think they would have reached the same conclusion as the majority of the High Court.

G For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The circumstances are very special and, having regard to them, their Lordships will make a similar order as to costs to that made by the High Court, namely, that the costs of both the appellant and the respondents be taxed as between solicitor and client and paid and retained out of the estate of the testator.

Appeal dismissed.

Solicitors: *Light & Fulton* (for the appellant); *Bell, Brodrick & Gray* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

PRACTICE NOTE

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

*Divorce—Practice—Summons—Counsel summonses—Place of hearing.**Probate—Practice—Summons—Counsel summonses—Place of hearing.*

On and after Apr. 27, 1959, it will no longer be possible to arrange for those probate and divorce registrar's summonses which are to be attended by counsel to be heard at the Royal Courts of Justice. Such summonses will in future be heard at the Registry at Somerset House, but will continue to be specially fixed.

Apr. 14, 1959.

B. LONG,
Senior Registrar.

PRACTICE NOTE

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Donovan and Salmon, J.J.),
April 13, 1959.]

Criminal Law—Sentence—Consecutive terms—Form of further sentence where prisoner already subject to consecutive sentences—Note whether prisoner subject to consecutive sentences to be added to list of previous convictions.

LORD PARKER, C.J.: Attention has been drawn to a difficulty which sometimes arises when a sentence is expressed to begin "at the expiration of the term of imprisonment you are now serving", or words to the same effect. If, as sometimes happens, the prisoner is already subject to two or more consecutive terms of imprisonment the effect of such a formula is that the new sentence will begin at the expiration of the term that he is *then* serving which may be the first of two consecutive terms. This will often not be the intention of the court giving the new sentence.

It is suggested that the simplest course would be to use some such formula as "consecutive to the total period of imprisonment to which you are already subject". The only exception to the use of such a formula would be if the intention was that the new sentence should be concurrent with one of the previous sentences.

It has been arranged that prison governors should in appropriate cases add to the list of previous convictions supplied to the court a footnote indicating that the prisoner is already subject to consecutive sentences and giving details of them.

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

BARBEY AND OTHERS v. CONTRACT & TRADING CO. (SOUTHERN), LTD.

(COURT OF APPEAL (Lord Evershed, M.R., and Pearce, L.J.), March 11, 12, 1959.)

Currency Control—Bill of exchange—Holder in due course—Resident outside scheduled territory—No Treasury permission obtained—Claim for recovery of amount due—Exchange Control Act, 1947 (10 & 11 Geo. 6 c. 14), s. 33 (1), Sch. 4, para. 4.

The plaintiffs, who were holders in due course of bills of exchange of which the defendants were the acceptors, were resident outside the "scheduled territories" for the purposes of the Exchange Control Act, 1947. The plaintiffs issued a writ claiming the amount due on the bills and applied for summary judgment. The defendants did not dispute that apart from the effect of that Act they would be liable to pay the sum claimed by the plaintiffs. The Act was not expressly excluded in any respect by the bills. No permission of the Treasury to make payment was obtained by the defendants under s. 6 (1) of the Act. By para. 4 (1) of Sch. 4 to the Act a plaintiff's claim might not be defeated "by reason only of the debt not being payable without the permission of the Treasury". The defendants contended that para. 4 (1) did not avail the plaintiffs because by s. 33 (1) terms were implied in the bills that payment should not be made without the Treasury's permission and these prevented the plaintiffs from recovering, since para. 4 (1) should be confined to contracts where there would be no such implied terms, viz., contracts within the proviso to s. 33 (1) which excluded the implication.

Held: the plaintiffs were entitled to judgment because para. 4 (1) of Sch. 4 to the Exchange Control Act, 1947, applied to cases within s. 33 (1) and was not limited to cases within the proviso to that sub-section (see p. 148, letters E and F, p. 150, letter F, and p. 151, letters C, E and F, post).

Cummings v. London Bullion Co., Ltd. ([1952] 1 All E.R. 383) followed.
Appeal dismissed.

[For the Exchange Control Act, 1947, s. 33, and Sch. 4, para. 4, see 16 HALSBURY'S STATUTES (2nd Edn.) 593, 607.]

Cases referred to:

- (1) *Cummings v. London Bullion Co., Ltd.*, [1952] 1 All E.R. 383; [1952] 1 K.B. 327; 17 Digest (Repl.) 457, 184.
- (2) *Davie v. New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346.
- (3) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.

Appeal.

This was an appeal by the defendants from an order of McNAIR, J., in chambers, on Feb. 26, 1959, dismissing the defendants' appeal from the order of Master JACOB, dated May 23, 1958, and ordering that the defendants do bring the sum of £8,700 into court within fourteen days.

R. I. Kidwell for the defendants.

N. C. Tapp for the plaintiffs.

LORD EVERSLED, M.R.: This appeal raises a question of the effect, in circumstances which I will mention, of the provisions of the Exchange Control Act, 1947, and more particularly the effect of a decision of this court under that Act in *Cummings v. London Bullion Co., Ltd.* (1) ([1952] 1 All E.R. 383).

There is no dispute of fact between the parties. The plaintiffs are individuals carrying on in Switzerland a business known as Lombard Odier & Compagnie, and the defendants are an English company. The action is brought on bills of exchange of which the plaintiffs have become the holders in due course and of which the defendants were the acceptors. For the purposes of this appeal

there is no other relevant matter, and the defendants as acceptors, if I follow the matter aright, do not dispute that apart from the Exchange Control Act, 1947, they would now be liable to pay on the bills. The total sum claimed is £8,700. There is no special term in the contract consisting of the bills which excludes in any way the operation of the Exchange Control Act, 1947. A

I turn accordingly to that Act. By s. 6 (1) of the Act, which is in Part 2, it is provided: B

"Except with the permission of the Treasury, no person resident in the United Kingdom shall, subject to the provisions of this section, make any payment outside the United Kingdom to or for the credit of a person resident outside the scheduled territories."

There is no doubt that on its terms that sub-section applies so as to prevent payment by the defendants, being persons resident in the United Kingdom, to the plaintiffs, who are persons resident outside the United Kingdom, or outside the scheduled territories, unless permission is first obtained from the Treasury; and at the present time, for reasons which are not relevant to this matter, the permission has not been granted. If the matter stood there, it would appear that the answer to the suit brought by the plaintiffs against the defendants would be that they could not pay because by an Act of Parliament which was binding on them they were prevented from making any payment, and indeed that it would be illegal on the face of that sub-section for them to attempt so to do. But certain other provisions of the Act have also been discussed, and I will refer to them. C D

It should be borne in mind that the Exchange Control Act, 1947, covers a number of transactions: it is not confined merely to cases of contracts to pay sums of money. Thus, as counsel for the plaintiffs pointed out, securities and the issue of securities are the subject of Part 3, and in Part 4 there are restrictions on imports, exports and the like. Part 6 of the Act is headed "Supplemental", and I think it true to say broadly of it that it is concerned with the mechanics of the main subject-matter of the Act. Section 33 appears in Part 6, and sub-s. (1), which has been mainly the subject of debate before us, provides: E F

"It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required . . ." G

It will be observed that the terms of the sub-section are not confined to the case of a money payment: they cover on their face any case where performance of the term of a contract is one prevented by the terms of the Act save with Treasury permission, and paraphrasing the sub-section slightly, it is intended to achieve this, that where the performance of any term—e.g., payment of a sum of money—cannot be made without permission, then a term is to be understood to be introduced into that contract that the performance is not to take place until the permission is given. I should think that the primary object of that sub-section was to prevent its being said that, because of this requirement as a condition of the contract, therefore in cases in which permission has not been given, or cannot be obtained, an end was automatically put to the contract. it, so to speak, preserves the contract by reading into it a condition to cover the difficulty created by the Exchange Control Act, 1947. That being, as I think, the purpose and meaning of the sub-section, it is not perhaps surprising that a proviso follows in these terms: H I

"Provided that this sub-section shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."

A Counsel for the plaintiff contended that the proviso was limited in purpose and in effect to saying that a contract on which it is, on the face of it, illegal to pay—and he cites an example of a positive contract in contravention of the Act—then sub-s. (1) is not to convert an illegal contract into a legal one. It is not in the events as narrated here necessary for me to express final conclusions on this matter, but since the question has been argued, I ought to say that I am

B unable as at present advised to accept that view of the proviso; I think that its natural sense is a rider, and a not unnatural rider, to my construction of the purpose of the sub-section. It may cover the case where, without the proviso, an illegal contract would be made legal. I say no more about that; but if that had been the sole intention, there is a well-known formula in Acts of Parliament which might have been adopted. I should have thought that it

C was intended to cover a number of cases where, e.g., it would not be right, having regard to the express intention of the parties, to preserve a contract by implying the term stated in the sub-section, when the true intent would be that, given the absence of permission, the contract would come to an end; and in that connexion I refer to the last five words of the proviso “or for any other reason.”

D I next refer to s. 33 (2), which applies to the particular type of case of which this is an example, viz., a case relating to bills of exchange. It provides:

“Notwithstanding anything in the Bills of Exchange Act, 1882, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Treasury under this Act, shall be

E deemed to prevent any instrument being a bill of exchange or promissory note.”

That sub-section has no special significance to the present argument. Then comes sub-s. (3), which incorporates into the section the provisions of Sch. 4. It provides:

F “The provisions of Sch. 4 to this Act shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings . . .”

I, therefore, turn to Sch. 4. In the copy before me, there appears in the margin “Section 33”; in its opening paragraph there is a reference to the provisions of Part 2 of this Act, in which s. 33 is not contained, but that is neither here

G nor there; it says that the provisions of Part 2 shall apply to sums required to be paid by any judgment, etc. Part 2 includes s. 6, which I have already read, and the first and the next two paragraphs are particularly concerned with the case of a man who has obtained a judgment, and the Exchange Control Act, 1947, comes into operation and provides that it shall have the effect stated when the debt is a judgment debt. I can pass over the first three paragraphs, therefore,

H and go to para. 4; on which particularly counsel for the defendants has addressed an attractive and forceful argument. Paragraph 4 (1) provides:

“In any proceedings in a prescribed court [and the Supreme Court is such a court] a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked.”

I It is convenient that I should make my references at once to two other paragraphs of the schedule, because I think that they have a bearing on the argument. The first is para. 5 (1), which provides:

“In any bankruptcy, in the winding-up of any company or in the administration of the estate of any deceased person . . . a claim for a sum not payable without the permission of the Treasury shall, notwithstanding that the permission has not been given or has been revoked, be admitted to proof as if it had been given and had not been revoked. . . .”

Then in para. 6 it is provided:

"A debt for the payment of which the permission of the Treasury is required under this Act shall, if in other respects it complies with the requirements of sub-s. (1) of s. 4 of the Bankruptcy Act, 1914, be allowed to be a good petitioning creditor's debt, notwithstanding the said requirement, if and to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account."

The argument of counsel for the defendants is to this effect: He says—and so far there is no doubt that he says rightly—that the contract here sued on, namely, the bill of exchange, is a contract, the performance of the term of payment whereof requires Treasury permission, and there being no expressed inconsistency of intention that is made by implication a condition of the contract for performance. So, says he, considering para. 4, it is not true to say that in these proceedings the claim of the plaintiffs for recovery of their £8,700 is defeated by reason *only* of the debt not being payable without permission of the Treasury and of that permission not having been given. He says that it is defeated not only for that reason but also because, as permission is required, it is a term of the contract by implication that until the permission has been obtained, the performance is not due.

When counsel for the defendants first put the point, it seemed to me, I must say, one of attraction, because the formula "by reason only of the debt not being payable without permission" seems to be something different, at any rate to a lawyer, from a case where by virtue of an express sub-section of the Act there is added an implied term of the contract in reliance on which counsel for the defendants can say performance is not yet due by the terms of the contract itself. I am bound to say, however, that having carefully considered the case, with the assistance of counsel on both sides and in the light of the general scope and purpose of the Act, and particularly of the other two paragraphs in Sch. 4 to which I have referred, para. 5 and para. 6, my own present view is against the contention of the defendants. Having regard to *Cummings v. London Bullion Co., Ltd.* (1) ([1952] 1 All E.R. 383), it is not, strictly speaking, necessary that I should express any view of my own; but I do say, though I think the case is not free from difficulty, that my own inclination is that the paragraph cannot have intended to make a fine distinction between what I might call the ordinary case where a term is implied (in order, as I think, to prevent possible frustration of the contract) and what I should assume to be the rarer case where the parties to a contract have by express language or otherwise shown that they do not intend s. 33 (1) to apply.

I am assisted in my inclination in that direction by the terms of para. 5 and para. 6: for it would appear to me to be somewhat odd that if counsel for the defendants' argument is right, a creditor in the position of the plaintiffs here should not be able to invoke para. 4 (being in that respect in a worse position than the parties to a contract, who have been at some pains to evade the Act) but should none the less be entitled to rely, as the terms of the paragraph seem to me plainly to indicate, on both para. 5 and para. 6: that is to say, he could rely on his claim to support a winding-up petition or by way of proof in a winding-up, and he could rely on it in bankruptcy proceedings, though he could not, according to the argument, take any step under the schedule aimed at getting payment into court. In other words, he would be entirely without redress, while at the same time he could rely on it in these cases under para. 5 and para. 6. It would appear to be a strange anomaly; but what I have said about being without redress brings in the decision in the *Cummings* case (1).

It was plainly the view of all three of the judges of this court in *Cummings v. London Bullion Co., Ltd.* (1) that a person in the position of the plaintiff (i.e., one who had a money claim, but where the proviso of s. 33 (1), had not been brought into operation and it was an implied term that until permission

A was obtained the performance was not strictly due) in such an action was not without redress; that he could invoke the provisions of Sch. 4 by getting a judgment, the effect of which was to compel payment into court. That view, to my mind, seems to conform, as I have already indicated, to the tenor of the Act and of Sch. 4, and certainly with the justice of the case. It is the submission of counsel for the defendants that that view was obiter; that it was not a

B necessary part of the decision, and, therefore, does not bind us.

Cummings v. London Bullion Co., Ltd. (1) was a case in which a London firm under a contract of sale were liable to make a repayment in dollars to an American citizen on the return to them of a certain piece of jewellery, a brooch. At the date when the brooch was returned the sum of dollars which was repayable, namely, 3,200 dollars, when converted into sterling at the then rate of exchange

C was equivalent to £796 0s. 8d. The defendants could not pay then, because they had not obtained Treasury sanction. The date which I have mentioned, when the brooch was returned, was Aug. 15, 1949; they did obtain the Treasury sanction some six weeks later on Sept. 29, 1949, but in the interval between those two dates there had been what is commonly called a devaluation of sterling in relation to dollars, so that the amount of dollars, namely, 3,200, translated

D into sterling on the later date was not £796 0s. 8d., but £1,142 17s., considerably more. The argument between the parties was—which was the right figure? The plaintiff sought to recover, and in the end succeeded in recovering, the larger sum of £1,142 17s. The learned judge at first instance had concluded in the defendants' favour that the calculation must be carried out when, according to the terms of the contract, the sum should have been repaid and the brooch

E had been returned, that is to say, on Aug. 15; but this court held that that was not right, and that having regard to s. 33 (1), the contract itself with its implied terms made Sept. 29 the performance date and not Aug. 15, with the consequence that £1,142 17s. was the right figure.

It is, however, quite plain that in the course of the argument the court was invited to consider, and did consider, what on that view was the effect of Sch. 4

F which is introduced into s. 33 by sub-s. (3). That invitation arose in this way. Learned counsel for the defendants said: "If SLADE, J.'s view is wrong; if, that is to say, the performance date for the purpose of calculating the amount to be paid awaits permission from the Treasury, then if permission is not obtained, the plaintiff has no remedy at all and there is nothing he can do; we have in those circumstances to treat the contract as so amended

G that he is left without any redress." To that argument the court replied: "No, he has redress; he can apply for judgment, and by the terms of Sch. 4 the date on which the debt would become payable is the date on which the debtor could pay the debt into court, namely, as soon as the writ was served on him." That argument will necessarily carry with it the view that para. 4 of the schedule was applicable in such a case as that which was

H before the Court of Appeal, viz., the case in which s. 33 (1) had implied the term into the contract: in other words, that para. 4 was not limited to a proviso case. All that, I think, is made quite clear by certain passages from the three judgments, to which I refer because of the contention of counsel for the defendants that all this can be disregarded as mere obiter. I would observe that these were reserved judgments. The leading judgment was delivered by SOMERVELL,

I L.J., and he said (*ibid.*, at p. 387):

"It was rightly pointed out that, if a writ is issued before permission is given, a further problem arises if the learned judge was wrong in holding that Aug. 15 was the date for the conversion. The combination of s. 33 and Sch. 4 produces a novel position. Until a writ is issued, the person liable cannot legally make the payment in dollars. Once a writ is issued, he can legally discharge his obligation by payment of whatever is the appropriate sum in sterling into court. This is an obligation created by the

statute on the issue of a writ. We have not got to decide that point on this appeal. It was, however, suggested that it sets a problem incapable of solution, unless one applies the principle adopted by the learned judge . . . If, however, he pays into court, or if the case goes to judgment, I, at any rate, see no difficulty or illogicality in taking the date when the obligation could have been discharged by a payment into court as the proper date for conversion."

DENNING, L.J., deals with the same point as follows ([1952] 1 All E.R. at p. 388):

"The present is an illustration of a divergence. The cause of action here arose on Aug. 15, 1949. That is shown by the fact that at any time thereafter the creditor could have brought an action in the English courts and recovered judgment: see Sch. 4, para. 4 (1), to the Act of 1947."

Even more specific perhaps for the present purposes is the language of ROMER, L.J. (*ibid.*, at p. 389):

"I appreciate the force of the contention of counsel for the defendants (which impressed the learned judge) that on the view above expressed the defendants, although in possession of the brooch, would never become liable to repay to the plaintiff the purchase price if Treasury consent to the payment was withheld. The plaintiff would not, however, be wholly without redress. The defendants' inchoate or conditional liability to the plaintiff under the express terms of the contract is, for many purposes, treated as a 'debt' by Sch. 4 to the Act and sufficiently preserves the character of a debt to enable the plaintiff to sue. On obtaining judgment in such an action, the sterling equivalent of the money (to be converted, I agree, in accordance with the principle which SOMERVELL, L.J., has indicated) would be brought into court and thus kept safely for the plaintiff, who could have then applied for the consent of the Treasury to payment out to himself."

It cannot be doubted that all three of the judges applied their minds to this point and all three must have interpreted para. 4 of the schedule as applicable to a s. 33 (1) case. I am quite unable to accept the view that this part of the reasoning of the three lords justice can fairly be described as "per incuriam". It is quite true—or I will assume it to be true, though the arguments are not reported—that the possibility of limiting para. 4 of the schedule to what I will call a proviso case was not debated or considered. None the less the court expressed the clearest possible view that para. 4 of the schedule covered a case of which the present is an example, and that the conclusion was one which was deliberately reached. It is said that it was obiter, that it was not really the ratio of the decision; but I am not quite sure that I agree with that either. It was apparent that the view that the plaintiffs would be, or might be, without redress and that an anomaly would be presented as regards dates unless the earlier date were taken was a ground on which particularly SLADE, J., had decided the case as he did in favour of the defendants. It is also clear that this court, in arriving at a conclusion in favour of the later date, and to that extent therefore differing from the grounds which had found favour with the learned judge, went into this question and reconciled the apparent divergence by construing, and pronouncing on the effect of, the relevant parts of the schedule. Whether, therefore, it could strictly be described as part of the ratio of the judgments is perhaps less important than the fact that this court undoubtedly did express—and did so deliberately in reserved judgments—a clear view on the very matter which is now being debated before us.

Counsel for the defendants referred us to *Davie v. New Merton Board Mills, Ltd.* (2) ([1959] 1 All E.R. 346). In that case the House dealt among other things with the significance which should be attached to language of LORD WRIGHT in a much earlier case,* language on which JENKINS, L.J., in this court had strongly relied.

* *Thomson v. Cremin* (3) ([1953] 2 All E.R. 1185).

A As appears, for example, from LORD REID's speech (*ibid.*, at pp. 366, 367), that noble Lord concluded that what LORD WRIGHT had said ought to be regarded as obiter, as being not necessarily for the particular decision which he was then expressing. Problems of the extent to which particular reasoning is or is not part of the ratio of the decision sometimes do give rise to difficulty; but putting it at its very lowest, the view which this court took of the effect of Sch. 4 was undoubtedly part of its reason for being able to differ from the learned judge as regards the date without creating as a consequence an anomaly or even worse. I, therefore, feel in this case no doubt that it is the duty of the court on this occasion to follow the reasoning in *Cummings v. London Bullion Co., Ltd.* (1), and that it would create altogether unjustifiable uncertainties in law if we were now to express a quite contrary view in another, and for all practical purposes entirely analogous, situation.

B Whatever, then, be the correct view of the meaning of Sch. 4 on which I have expressed my own inclination, I am quite satisfied that the answer in the present case is that we should regard ourselves as bound to follow the view expressed by this court in the *Cummings* case (1). That was the view taken by Master JACOB, when the matter first came before him on an application for summary judgment, and it was also the view of McNAIR, J., on appeal from the master. In my view the learned master and the learned judge were both correct in the conclusion at which they arrived, and in conformity with that view it follows that the appeal should, in my judgment, be dismissed.

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PEARCE, L.J.: I agree with all that my Lord has said. Although the matter is not free from difficulty, I do not feel satisfied by the ingenious argument of counsel for the defendants that the joint effect of the words of s. 33 and those of para. 4 of Sch. 4 to the Exchange Control Act, 1947, defeats the plaintiffs' claim in this case. I do not find it easy to accept the view that para. 4 of Sch. 4 is limited in its effect to contracts within the proviso to s. 33 (1), and that it does not affect the contracts coming within the positive provisions of that sub-section. In any event, however, the joint effect of those words has been considered by this court in reserved judgments in *Cummings v. London Bullion Co., Ltd.* (1) ([1952] 1 All E.R. 383). In my opinion we ought, for the reasons that my Lord has given, to consider ourselves in this case bound by the reasoning and the view expressed unanimously in that case. I would therefore dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Lipton & Jefferies* (for the defendants); *Markby, Stewart & Wadesons* (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

Re HOLLEBONE'S AGREEMENT.
HOLLEBONE v. W. J. HOLLEBONE & SONS, LTD.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.J.J.), February 18, 19, March 4, 5, 23, 1959.]

Indemnity—Sale of business—Purchaser agreeing to discharge all the liabilities of the vendor “in relation to” the business—Vendor continuing business as agent for the purchaser and entitled to be indemnified accordingly—Vendor assessable to income tax and surtax by reason of profits made on sale to purchaser, and by reason of profits while carrying on business as purchaser’s agent—Whether vendor entitled to be indemnified in respect of such tax.

B

Under an agreement for the sale of a business made and completed on July 14, 1952, the sale was to be treated as having taken effect from Mar. 31, 1952. Clause 4 of the agreement provided that the purchaser should “undertake to pay satisfy discharge and fulfil all the debts liabilities contracts and engagements of the vendor in relation to the said business and indemnify him against all proceedings claims and demands in respect thereof”. The agreement further provided, by cl. 8, that the vendor should “be deemed as from Apr. 1 last to have been carrying on . . . the said business as agent for the [purchaser] and he shall account and be entitled to be indemnified accordingly”. It was conceded, in relation to cl. 8, that the purchaser was liable to indemnify the vendor against income tax and surtax attributable to his having continued the business as agent of the purchaser from Apr. 1 to July 14, 1952. The stock-in-trade was included in the sale at £20,000 more than the value placed on it in the balance sheet of the business as at Mar. 31, 1952, and the vendor became assessable to additional income tax and surtax (by virtue of the Income Tax Act, 1952, s. 143 (1)*) by reason of this profit.

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Held: (i) on the true construction of cl. 4 the vendor’s liability to income tax, but not his liability to surtax, by reason of the £20,000 profit on stock-in-trade was a liability “in relation to” the business sold, against which the vendor was entitled to be indemnified by the purchaser (see, e.g., p. 156, letter I, post; and p. 159, letter C, post).

F

Stevens v. Britten ([1954] 3 All E.R. 385) applied.

Observations of SINGLETON, L.J., in *Conway v. Wingate* ([1952] 1 All E.R. at p. 785) applied.

G

(ii) the indemnity conferred by cl. 8 was, on its true construction, limited to such liabilities as the vendor incurred by reason of his having carried on the business as agent for the purchaser between Apr. 1 and July 14, 1952, and did not extend to any liability for income tax or surtax attributable to the £20,000 profit on the stock-in-trade which the vendor, acting as principal, sold to the purchaser.

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Adams v. Morgan & Co. ([1923] 2 K.B. 234; *affd.* C.A., [1924] 1 K.B. 751) distinguished.

Appeal dismissed on (i) but allowed on (ii) above.

[For forms of contract for the sale of a business to a private company, see 4 ENCY. FORMS AND PRECEDENTS (3rd Edn.) 59-63, Forms 22, 23; *cf.* 3, 6 (alternative) of Form 23 are directed to matters such as those with which cl. 4, 8 of the agreement in the present case were concerned, but cl. 3 of Form 23 illustrates the limiting of the liabilities to those subsisting on a specified date.

I

As to the extent of liability under a contract of indemnity, see 18 HALSBRYS’ LAWS (3rd Edn.) 534, para. 980; and for cases on the subject, see 26 DIGEST 233, 234, 1821-1827.]

* Section 143 (1) is printed at p. 155, letter I, post.

A Cases referred to:

(1) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1950] 1 All E.R. 969; *reversd.* H.L., [1952] 1 All E.R. 531; [1952] A.C. 401: 3rd Digest Supp.

(2) *R. v. Vaccari*, [1958] 1 All E.R. 468.

(3) *Stevens v. Britten*, [1954] 3 All E.R. 385; 3rd Digest Supp.

B (4) *Watcham v. A.-G. of East Africa Protectorate*, [1919] A.C. 533; 87 L.J.P.C. 150; 120 L.T. 258; 17 Digest (Repl.) 48, 563.

(5) *Radio Pictures, Ltd. v. Inland Revenue Comrs.*, (1938), 22 Tax Cas. 106; Digest Supp.

(6) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; [1950] 1 K.B. 107; 2nd Digest Supp.

C (7) *Conway v. Wingate*, [1952] 1 All E.R. 782; 3rd Digest Supp.

(8) *Adams v. Morgan & Co.*, [1923] 2 K.B. 234; 92 L.J.K.B. 714; 129 L.T. 446; *affd.* C.A., [1924] 1 K.B. 751; 93 L.J.K.B. 382; 130 L.T. 792; 28 Digest 113, 707.

Appeal.

D The defendant company, the purchaser of a business, appealed from a judgment of UPJOHN, J., dated July 11, 1958, on an originating summons by the plaintiff, the vendor of the business, as to the true construction of the sale agreement. The facts, and the relevant parts of the agreement, which are summarised in the headnote, are set out in the judgment of JENKINS, L.J.

F. N. Bucher, Q.C., and *E. I. Goulding* for the company.

E *Charles Russell, Q.C.*, and *P. M. B. Rowland* for the vendor.

Cur. adv. vult.

Mar. 23. The following judgments were read.

JENKINS, L.J.: This is an appeal by the defendant company, W. J. Hollebone & Sons, Ltd. (hereinafter called "the company") from a judgment of UPJOHN, J., dated July 11, 1958, whereby he decided substantially in favour of the plaintiff, Ernest Charles Hollebone (hereinafter called "the vendor"), a dispute concerning the incidence as between the vendor and the company of certain income tax and surtax on the sale by the vendor to the company under the agreement, to which I am about to refer, of the stock-in-trade and other assets of the business of a wholesale wine and spirit merchant theretofore carried on by the vendor. Also before the court is a respondent's notice served by the vendor stating his intention to contend that the learned judge's order should be varied in certain respects in which, as it stands, it is adverse to the vendor.

G By an agreement dated July 14, 1952, and made between the vendor of the first part, the company of the second part, and Shorts Ltd. (who are not concerned in the present dispute) of the third part, after recitals (inter alia) "A", that the vendor had for many years past carried on business as a wholesale wine and spirit merchant at 19, Southampton Place, Bloomsbury, in the County of London, under the style or firm of W. J. Hollebone & Sons, and "B", that the company had been formed under the Companies Act, 1948, with a view, amongst other things, to the acquisition of the property thereby agreed to be sold, it was (so far as material for the present purpose) agreed as follows:

I " (1) The vendor shall sell and the company shall purchase the whole of the tangible assets (including without prejudice to the generality of that expression all the stock-in-trade implements utensils plant fixtures and fittings and vehicles and the leasehold premises known as 19 Southampton Place and 21 Barter Street (adjoining) and including cash in hand or at the bank as on Mar. 31, 1952) belonging to the vendor in connexion with the said business and all the book and other debts due to him in connexion therewith and the full benefit of all securities therefor together with the

exclusive right to use the name W. J. Hollebhone & Sons as part of the name of the company and the exclusive right to represent the company as carrying on business in continuation of and as successor to the vendor and all trade marks connected with the said business and the full benefit of all pending contracts engagements and orders in connexion therewith."

By cl. 2 it was provided that part of the consideration for the said sale should be the sum of £52,536 0s. 4d. which should be paid and satisfied (a) as to the sum of £22,536 0s. 4d. in cash payable (together with interest thereon at the rate of five per cent. per annum from Apr. 1, 1952, to the date of actual payment) forthwith on the signing of the agreement, and (b) as to the balance of £30,000 by the issue of certain debentures carrying interest at the rate of five per cent. per annum as from Apr. 1, 1952. By cl. 4 it was provided that

"as the residue of the consideration for the said sale the company shall undertake to pay satisfy discharge and fulfil all the debts liabilities contracts and engagements of the vendor in relation to the said business and indemnify him against all proceedings claims and demands in respect thereof."

By cl. 6 it was provided that the purchase should be completed on Aug. 14, 1952, and by cl. 8 that

"Possession of the premises hereby sold shall be retained by the vendor until the date of actual completion of this agreement and in the meantime he shall carry on the said business in the same manner as heretofore so as to maintain the same as a going concern but he shall be deemed as from Apr. 1 last to have been carrying on and he shall henceforward carry on the said business as agent for the company and he shall account and be entitled to be indemnified accordingly."

By cl. 10 it was provided that the whole of the consideration aforesaid was

"the consideration for the sale of the goods chattels and other effects capable of manual delivery and forming part of the purchased property."

The sale was actually completed on July 14, 1952, that is to say, on the same day as the signing of the agreement. Whoever was responsible for the preparation of that unfortunate document appears to have performed his task by the wholesale adoption of a well known common form without due regard to the circumstances of the particular case. The result has been to involve the parties in an interminable dispute, which, nearly seven years after the signing of the agreement, is still unresolved. It is clear from the terms of the agreement that as between the vendor and the company, the sale was to be treated as taking effect as from Mar. 31, 1952, and I think that it is legitimate and, indeed, necessary to have regard to the contents of the balance sheet of the business as at that date as part of the surrounding circumstances by reference to which the agreement is to be construed. That balance sheet shows the following assets at the following amounts or values respectively: stock at cost £28,196 15s. 6d. (including a small item of £11 10s. stock of fodder in stables); fixtures £250; cash at office and at bank £3,909 6s. 2d.; and book debts £774 12s. 7d.; Total £33,130 14s. 3d. On the liabilities side the items to be noticed are: debts owing at Mar. 31, 1952, £594 13s. 11d.; income tax due July 1, 1952, £960 16s. 6d., and executors of the late H. W. Hollebhone £11,200. The purchase price appears on these figures to have been arrived at by deducting from the total assets of £33,130 14s. 3d. the amount owing to creditors £594 13s. 11d. (which left £32,536 0s. 4d.) and then adding £20,000 to the balance sheet value of the stock, thus making the value of the stock £48,196 15s. 6d., and the total assets £52,536 0s. 4d., this last figure, together with the company's undertaking contained in cl. 4 (which admittedly extended to the debts of £594 13s. 11d. above referred to), being taken as the consideration for the sale.

A The purchase consideration so arrived at clearly included a profit to the vendor of £20,000 on the figures appearing in the balance sheet of Mar. 31, 1952, by reason of the addition of that amount to the value placed on the stock in such balance sheet. The item of £960 16s. 6d. in respect of income tax appearing in the balance sheet of Mar. 31, 1952, was described by the vendor in his affidavit in support of the originating summons as the second instalment of the income tax on the profits of the business for the year of assessment ended Apr. 5, 1952, based on the profits for the year ended Mar. 31, 1951. This sum the vendor paid out of his own pocket on July 15, 1952, having already paid the first instalment of the income tax in question on a date prior to Mar. 31, 1952. There was no evidence of the origin of the item of £11,200 shown in the balance sheet as due to the executors of the late H. W. Hollebhone, but I understand it to represent a sum, or the balance of a sum, payable by the vendor in respect of the interest of some predecessor of his in business. Be that as it may, this sum, like the sum due for income tax, was excluded from the calculation of the purchase price. The statement of the consideration for the sale attached by the company to the agreement when sent to the Stamp Duty Office for stamping contained no reference to the £960 16s. 6d. or to any other liability for income tax or surtax.

D Counsel for the company relied on the payment by the vendor of the £960 16s. 6d. out of his own pocket, and on the omission of any reference to income tax or surtax in the statement to which I have just referred as showing that neither party regarded income tax or surtax as included in the liabilities which the company by cl. 4 of the agreement undertook to discharge. These matters undoubtedly point to that conclusion, though it is to be remembered that the sum due for income tax was a debt for which the vendor was personally liable to the Revenue. There is, however, no claim for rectification. The case, accordingly, depends entirely on the true construction of the agreement, and I agree with the learned judge that for the purposes of construction, these matters must be regarded as wholly irrelevant.

F The notional back-dating of the sale to Mar. 31, 1952, provided for by the agreement, of course had no foundation in fact, though it was an arrangement which the vendor and the company could, as between themselves, readily carry out by appropriate adjustments in their accounts. It was, however, an arrangement which could not affect the position as between the vendor and the Revenue with respect to income tax and surtax. From the point of view of the Revenue the liability of the vendor to income tax on the profits of the business is to be computed in accordance with the actual facts of the case. In actual fact the vendor carried on the business as his own from Mar. 31, 1952, down to July 14, 1952, and discontinued it on the later date when the sale to the company was completed. In these circumstances the tax position as between the vendor and the Revenue was that the vendor was liable under s. 130 of the Income Tax Act, 1952, to be charged with tax on the amount of the profits or gains of the period beginning on Apr. 6 in the year of assessment 1952-53 and ending on the date of discontinuance (viz., July 14, 1952). Moreover, the vendor on such discontinuance in fact sold the stock-in-trade of the business as it then stood for £48,196 15s. 6d. as compared with the figure of £28,196 15s. 6d. at which the stock-in-trade as at Mar. 31, 1952, appeared in the balance sheet of that date. The importance of this appears from s. 143 of the Income Tax Act, 1952, which provides by sub-s. (1) as follows:

I "In computing for any income tax purpose the profits or gains of a trade which has been discontinued, any trading stock belonging to the trade at the discontinuance thereof shall be valued as follows—(a) in the case of any such trading stock—(i) which is sold or transferred for valuable consideration to a person who carries on or intends to carry on a trade in the United Kingdom; and (ii) the cost whereof may be deducted by the purchaser as

an expense in computing for any such purpose the profits or gains of that trade, the value thereof shall be taken to be the amount realised on the sale or the value of the consideration given for the transfer; (b) in the case of any other such trading stock, the value thereof shall be taken to be the amount which it would have realised if it had been sold in the open market at the discontinuance of the trade."

The relevant part of the sub-section for the present purpose is sub-s. (1) (a). The effect of those provisions appears to be that in the computation of the vendor's tax liability for the period from Apr. 6, 1952, to July 14, 1952, the stock-in-trade at the end of the period falls to be brought into account at the value of £48,196 15s. 6d. so as to produce a trading profit for tax purposes of £20,000 plus the proceeds of sales of stock made during the period less purchases of stock made during the period. Thus in view of the method of computation prescribed by s. 143 the profit of £20,000 realised by the vendor on the sale of the stock to the company, less any excess in value of purchases over sales during the period, must constitute an addition to the taxable profit for the period. For convenience I will refer to this addition as "the £20,000 profit". The inclusion of the £20,000 profit in the computation for tax purposes of the vendor's income for the period from Mar. 31 to July 14, 1952, increases his liability for income tax and consequentially for surtax in respect of that period to a formidable total, and the question whether on the true construction of the agreement the vendor is entitled to require the company to discharge wholly or in part the tax for which the vendor is, or is ultimately found to be, liable in respect of the profits of the business down to July 14, 1952 (including the amount shown as outstanding in the balance sheet of Mar. 31, 1952), has been strenuously argued before the learned judge and in this court.

The question turns entirely on the construction of the agreement and, in particular, cl. 4 and cl. 8 thereof. Under cl. 4 the company undertook to

"pay satisfy discharge and fulfil all the debts liabilities contracts and engagements of the vendor in relation to the said business [and to] indemnify him against all proceedings claims and demands in respect thereof."

Counsel for the company says that this language, considered in the context of this agreement, does not include income tax and, a fortiori, does not include surtax. He refers us to *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1) ([1950] 1 All E.R. 969, *reversd.* H.L., [1952] 1 All E.R. 531), and *R. v. Vaccari* (2) ([1958] 1 All E.R. 468), as showing that the income tax exigible on the profits of a trade is a liability attaching to those profits when made and not an expense of the trade or a debt contracted for the purposes of the trade. He says that in the present context the "debts liabilities contracts and engagements of the vendor in relation to the said business", to which cl. 4 refers, are confined to debts, liabilities, contracts and engagements incurred or contracted by the vendor in the course of carrying on the business, and that on the authorities to which I have just referred, income tax does not answer that description. It is not, says counsel for the company, a liability incurred in the carrying on of the business, but a liability attaching to any profits resulting from the carrying on of the business.

With some reluctance, I find it impossible to accept this argument. The words "all the . . . liabilities of the vendor in relation to the said business" are of wide import. The income tax for which the vendor is liable to the Revenue in respect of the profits of the business is undoubtedly a liability of the vendor, and inasmuch as it is a liability attributable to the profits of the business, I do not see how it can escape inclusion in the category of liabilities of the vendor "in relation to" the business. The language used is, according to its ordinary meaning, apt to include income tax on the profits of the business, and I apprehend that any sum due in respect of such tax would ordinarily be included as a liability

A in the accounts of a business, as indeed the £960 16s. 6d. due in respect of the second instalment of income tax for the year 1951-52 was included in the balance sheet of Mar. 31, 1952, in the present case.

B Some support for the view that cl. 4 includes the vendor's liability to income tax on the profits of the business is to be found in *Stevens v. Britten* (3) ([1954] 3 All E.R. 385), in this court, to which reference was made by the learned judge. That was, it is true, a partnership case and the words to be construed, which were contained in a deed of dissolution, were:

"The continuing partner . . . will (a) duly pay and satisfy all debts and liabilities of the said partnership and will at all times hereafter keep the retiring partner indemnified against the said debts and liabilities . . ."

C SIR RAYMOND EVERSHERD, M.R., said this (*ibid.*, at p. 387):

D "In these circumstances was this sum which the plaintiff paid within the ambit of cl. 4 (a) of the deed? I find it impossible to come to any other conclusion than that it was; for the amount due to the Crown for income tax was a liability of the two partners jointly and as such it was a partnership debt in the ordinary usage of words. It seems to me, therefore, to follow that the phrase 'all debts and liabilities of the said partnership' must comprehend a debt of this kind for which both partners were liable and which, let it be added, was a debt which owed its existence wholly and exclusively to the trading operations of the two partners without regard to what their private resources might have been . . . I am, however, satisfied in my mind that it is impossible, whatever may have been in the mind of the defendant, to read cl. 4 (a) so as not to include an indemnity for this sum. I think it could be done only by reading into the clause the words 'other than income tax' and it need not be said that, according to ordinary principles of construction, only the most cogent and powerful reasons to be derived from an examination of other parts of the deed and the surrounding circumstances could possibly justify such an insertion into the written terms of the document. I think there is no basis which would justify such a reading into the plain language."

F Then I would also refer to this passage from the judgment of ROMER, L.J. (*ibid.*, at p. 388):

G "Indeed, counsel for the defendant himself was somewhat impressed, as the discussion proceeded, with that view and attempted to take the point that as a matter of construction of the dissolution agreement one could read the phrase 'all debts and liabilities of the partnership' as being confined to ordinary trading debts and liabilities, or, at all events, such debts and liabilities as do not depend in any way in their ultimate evaluation on any personal characteristic or qualification of an individual partner. To do that, however, would be to take such liberties with the terms of the document as no canon of construction of which I have heard can justify. Where one finds language which is plain and unequivocal as, in my opinion, is cl. 4 (a), in relation to the debts and liabilities of the partnership, no court has any right to inject into the language used something which is not there merely because one of the partners against whom the clause according to its ordinary language operates thinks it operates harshly and unfairly."

I In view of the differences between the two cases it cannot well be said that the present case is actually governed by *Stevens v. Britten* (3), but the passages I have quoted do afford some support for the conclusion that in the absence of words indicative of an intention to exclude income tax, "the liabilities . . . of the vendor in relation to the said business" referred to in cl. 4 of the present agreement should be construed as including income tax.

I have already referred to counsel for the company's argument based on the payment by the vendor of the £960 16s. 6d. income tax out of his own pocket

on July 15, 1952, and the absence of any reference to tax in the statement sent to the Stamp Duty Office. As I have said, I agree with the learned judge in regarding these matters as irrelevant, in the absence of any claim for rectification. In support of this part of his argument counsel for the company referred us to *Watcham v. A.G. of East Africa Protectorate* (4) ([1919] A.C. 533), and *Radio Pictures, Ltd. v. Inland Revenue Comrs.* (5) ((1938), 22 Tax Cas. 106), in support of the proposition that any ambiguity in a written agreement could legitimately be resolved by recourse to extrinsic evidence of the intention of the parties as manifested in their conduct or course of dealing, but I do not think the circumstances of this case are such as to warrant the application of that principle. There is to my mind no ambiguity here, and I think the vendor's action in paying out of his own pocket the £960 16s. 6d. was, to say the least, equivocal, in that this was a debt due from the vendor personally to the Revenue which he was obliged to pay irrespective of its ultimate incidence as between himself and the company. I would, moreover, advert to the observations of COHEN, L.J., in *Gaisberg v. Storr* (6) ([1949] 2 All E.R. 411), as to the caution with which the principle now invoked by counsel for the company should be applied.

Counsel for the company's strongest argument on cl. 4 of the agreement lies in his submission to the effect that, even if contrary to his contentions cl. 4 includes income tax, it only extends to tax the liability to which arises in respect of profits made by the carrying on of the business and not to tax the liability to which arose from the sale and discontinuance of the business. He points out that the vendor sold the stock to the company at a profit of £20,000 and that the effect of s. 143 of the Income Tax Act, 1952, was in substance to bring this profit into account in the computation of the profits of the business for the purposes of the vendor's assessment to income tax for the period from Apr. 6, 1952, to July 14, 1952. Therefore, says counsel for the company, the tax exigible as between the vendor and the Revenue in respect of the terminal period, so far as attributable to the £20,000 profit, is in effect as between the vendor and the company tax on the profit made by the vendor on the sale to the company, the liability to which arose solely by virtue of the fact that the price agreed on included a profit to the vendor of £20,000. Thus, says counsel for the company, the company on this basis will be paying not merely the tax arising from the carrying on of the business at a profit, but also tax on the profit included in the price which the company had to pay for the business. He says that it is unreasonable to place on cl. 4 a construction which results in giving the vendor the profit of £20,000 on the sale while saddling the company with the tax attributable to the element of profit in the purchase price, thereby in effect increasing the price agreed on. This argument to my mind is fallacious. Once it is held that on the true construction of cl. 4 the liabilities of the vendor to which it extends includes his liability for income tax on the profits of the business down to July 14, 1952, it appears to me that the income tax for which the company assumes liability under cl. 4 can be nothing more nor less than the whole of the income tax outstanding or remaining to be assessed on the vendor on July 14, 1952, in respect of the profits of the business down to that date ascertained in accordance with the relevant statutory provisions, and in particular s. 143 of the Income Tax Act, 1952. It is not right to say that this involves casting on the company a liability for income tax on the profit realised by the vendor on the sale. It is true that the statutory method of calculating the profits of the business down to the discontinuance brought about by the sale does bring into account the stock-in-trade at the date of discontinuance at the price at which it was then sold, but the figure arrived at by applying this method of calculation is simply the profit attributable for income tax purposes to the carrying on of the trade, calculated as the statute says it is to be calculated. Once cl. 4 is construed as casting on the company the liability for income tax on the profits of the business down to discontinuance

A it seems to me impossible to hold that the income tax for which the company is made liable is to be ascertained otherwise than in accordance with the statutory method of calculation. Once that basis is departed from, I fail to see how any other basis can be adopted without reading into cl. 4 qualifications and restrictions on its comprehensive language which simply are not there, and which cannot be read into it without departing from the elementary principles of construction. I would again refer to the observations of ROMER, L.J., in *Stevens v. Britten* (3) ([1954] 3 All E.R. at p. 388).

B Accordingly, I agree with the learned judge that cl. 4 does extend to income tax and I also agree with him that this conclusion is not to be displaced by the argument adduced by the company to the effect that the payment of tax by the company would be tantamount to an addition to the price of the stock attracting tax in its turn, and so on ad infinitum. I am not persuaded that this result would ensue, and I do not think that the theoretical possibility that it might is relevant to the construction of cl. 4.

C As to the question whether cl. 4 extends to surtax, I find myself again in agreement with the learned judge, who held that it does not; and I am content to adopt the reasoning, including the observations of SINGLETON, L.J., in *Conway v. Wingate* (7) ([1952] 1 All E.R. 782), which led him to that conclusion*.

D I turn next to cl. 8 of the agreement. On this part of the case counsel for the company says in effect that the obligation to account and right to be indemnified are imposed and conferred with reference to the notional agency under which the vendor is to be deemed to have been carrying on the business. To refer again to the language of cl. 8, it provides:

E " Possession of the premises hereby sold shall be retained by the vendor until the date of actual completion of this agreement and in the meantime he shall carry on the said business in the same manner as heretofore so as to maintain the same as a going concern but he shall be deemed as from Apr. 1 last to have been carrying on and he shall henceforward carry on the said business as agent for the company and he shall account and be entitled to be indemnified accordingly."

F Counsel for the company points out that the notional agency constitutes the vendor the agent of the company for the purpose of carrying on the business so as to maintain it as a going concern, and that the vendor's obligation to account and right to be indemnified are limited to transactions within the scope of that notional agency. The vendor is to be "deemed to have been carrying on the said business as agent for the company and he shall account and be entitled to be indemnified accordingly". Counsel for the company stresses the word "accordingly" as indicating that the obligation to account and right to be indemnified are thus limited. He concedes that the indemnity extends to all income tax and surtax properly attributable to the carrying on of the business as a going concern, but says that it does not extend to any income tax or surtax attributable to the element of profit included in the price at which the business was sold to the company. The purchase price was not a sum received by the vendor as agent for the company under cl. 8. It was a sum received by the vendor as principal and for his own use and benefit. Obviously he was under no obligation to account for it to the company. Conversely, the addition to the vendor's tax liability attributable to the element of profit in the purchase price was not a liability incurred by him as agent for the company under the notional agency. I think that this argument is well founded. It takes a point which did not arise in *Adams v. Morgan & Co.* (8) ([1923] 2 K.B. 234; *affd.* C.A., [1924] 1 K.B. 751). Except to the extent of counsel's admission

I * The relevant passage from the judgment of Ungoed-Thomas, J., is printed at p. 162, letter L to p. 163, letter D, post.

so far as it relates to surtax*, I do not think that cl. 8 adds anything to the company's liability under cl. 4.

In the result, I think that the learned judge's conclusion as regards the company's liability for the vendor's income tax under cl. 4 is right. I think that he is also right in holding that the company's liability under cl. 4 does not extend to the vendor's surtax: I differ from him, however, as regards the effect of cl. 8, which in my judgment is narrower than and adds nothing to the company's liability under cl. 4, save in so far as it brings in the surtax for which counsel for the company admits liability, and which in my judgment is not included in cl. 4 inasmuch as that clause does not in my view extend to surtax. I see no reason to dissent from the learned judge's view that such surtax as is included in cl. 8 should, as regards its rate, be treated as provided out of the "top slice" of the vendor's income.

The order under appeal should, accordingly, in my view be varied so as to give effect to the conclusions above expressed so far as they differ from those of the learned judge.

ROMER, L.J.: I agree. The first question which arises in this case is whether the expression in cl. 4 of the agreement, "all the debts liabilities contracts and engagements of the vendor in relation to the said business" includes within its scope income tax payable by the vendor in respect of the profits which the business earned whilst he himself was carrying it on. The learned judge took the view that "as a matter of ordinary language" that question requires an affirmative answer and regarded the decision of this court in *Stevens v. Britten* (3) ([1954] 3 All E.R. 385) as supporting that view.

It seems to me that the question is purely one of construction of the agreement as a whole and of cl. 4 in particular. The subject-matter of the agreement for sale was the business of a wholesale wine and spirit merchant which was being carried on as a going concern at the date of the agreement. The consideration for the sale was (a) £52,536 0s. 4d. to be satisfied as provided by cl. 2 of the agreement, and (b) the undertaking and indemnity contained in cl. 4. The precision with which the monetary consideration under cl. 2 was assessed shows clearly enough that it was calculated in accordance with some statement of assets and liabilities, and there can be little doubt but that that statement was in fact the balance sheet of the business as at Mar. 31, 1952. The learned judge thought that that was so, and I agree with him. The assets of the business, as shown in that balance sheet, amounted to £33,130 14s. 3d., and on the debit side appeared a sum of £594 13s. 11d. for trade debts, and it would seem that the parties arrived at the figure of £52,536 0s. 4d. by deducting the trade debts from the assets and adding a sum of £20,000 as profit to the vendor. The company was clearly liable under cl. 4 to indemnify the vendor against the £594 13s. 11d. trade debts, but he claims to be indemnified also against all income tax which was referable to the profits of the business and for which he was or would become liable, including the sum of £960 16s. 6d. shown in the balance sheet as "Income tax due July 1, 1952".

If the intention of the parties was that the company should assume liability for the vendor's relevant income tax as well as for his trade debts, it is perhaps surprising that the latter were deducted from the value of the balance sheet assets for the purpose of calculating the £52,536 0s. 4d. consideration, whereas the sum of £960 odd for tax was not. It is not, however, permissible to attribute much weight to this fact because the balance sheet was not a contractual document, nor was any reference made to it in the agreement itself. Nor do I attach any weight to the further fact, to some extent relied on by counsel for the company, that after the agreement was signed, the vendor paid out of his own moneys the sum of income tax shown in the balance sheet as due on July 1,

* This concession is stated at p. 159, letter H, ante.

A 1952, a sum which as between himself and the Revenue he was legally bound to pay. Accordingly, as I have already said, the issue between the parties arising on cl. 4 is simply one of construction of the agreement itself.

Counsel on behalf of the vendor contended that the words "all liabilities of the vendor in relation to the business" extend in their natural and ordinary meaning to income tax which, but for the vendor's relation with the business, he would not have been liable to pay. He submitted that such decisions as *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1) ([1950] 1 All E.R. 969, *reversd.* H.L., [1952] 1 All E.R. 531) and *R. v. Vaccari* (2) ([1958] 1 All E.R. 468) are irrelevant to the construction of cl. 4. Those cases decided that income tax is not a liability incurred in the course of operating a business but is money spent out of profits which have been earned, the Crown's share of those profits after they have been ascertained. Counsel for the vendor contended that cl. 4 is not confined to trade debts and liabilities, but is concerned in wide terms with all liabilities which the vendor incurred in relation to his business; and that the income tax to which he was assessed in respect of profits of the business cannot be excluded from that category of liabilities. I see no way of rejecting these submissions without introducing into cl. 4 a limitation or qualification which is not to be found in its language; and I therefore accept them, though they bring about a result which I am far from satisfied was present to the minds of either of the contracting parties when they entered into the agreement. I would add that the judgments in *Sterens v. Britten* (3) seem to support counsel for the vendor's argument on this matter, though the decision itself was principally directed to the terms of s. 144 of the Income Tax Act, 1952, in relation to the covenant to discharge partnership liabilities which the court was considering. As, therefore, the vendor's income tax is, in my judgment, within the scope of cl. 4, it seems to me necessarily to follow that the tax which became payable under the provisions of s. 143 of the Income Tax Act, 1952, cannot be excluded. That section is only one part of the fiscal machinery for ascertaining the global profit of a business for a given period, and it is difficult to see any intelligible ground for disregarding that part of the machinery whilst giving effect to the rest. I think myself that the result is in substance to pass on to the company the tax on a profit which belonged solely to Mr. Hollebone as vendor, but it is a result which cannot, in my opinion, logically be avoided.

I am in agreement with the learned judge that cl. 4 does not extend to the surtax which the vendor had to pay in respect of the profits of the business, and I have nothing to add to what he said on that point*. With respect, however, I differ from him with regard to the effect which he attributed to cl. 8 of the agreement. As to this, it is quite clear to my mind that the indemnity which the company agreed to give the vendor by that clause was limited to such liabilities as he might have incurred on the hypothesis that from Apr. 1, 1952, until completion of the sale he had been and would be carrying on the business as agent for the company. He was bound to account to them for such profits as he might make during that period, and the natural corollary of this would be that he should be indemnified by the company against the liabilities which he incurred in earning them. Counsel for the company concedes that if the vendor became liable, *vis-à-vis* the Crown, to pay income tax and surtax on these profits, such liability would fall within the indemnity; and this must clearly be so. But, says counsel for the company, the profit which the vendor made on the sale of the business to the company was a profit which he made as principal and not as agent, and he is not accountable for that profit to the company; and accordingly the tax referable to such profit and exigible under s. 143 of the Income Tax Act, 1952, is altogether outside the ambit of cl. 8 of the deed.

It seems to me that counsel for the company is right in this contention. The sale transaction between the vendor and the company was a transaction as

* See p. 162, letter I, to p. 163, letter D, post, where the relevant passage is printed.

between principal and principal and no question of agency entered into it at all. The liability of the company to indemnify the vendor was essentially linked with his own liability to account to the company for profits made by him as their agent and on his behalf. The liability of the company cannot, in my judgment, be regarded as extending to tax on profit which he made, not as agent but as principal, and which he was entitled to retain for himself. *Adams v. Morgan & Co.* (8) ([1923] 2 K.B. 234; *affd.* C.A., [1924] 1 K.B. 751) was wholly different from the present; for the supertax for which the plaintiff was liable to the Crown in that case was assessed on profits for which he was accountable to the defendants as their agent and, as I have said, the vendor in this case is in no way accountable to the company for the profit which he made on the sale to it of the business. I am, therefore, of opinion that the vendor cannot render the company liable under cl. 8 for the surtax referable to that profit.

I accordingly agree that the order of the learned judge should be varied in the manner which my Lord has indicated.

ORMEROD, L.J.: I agree. The question which arises in this appeal is whether on the proper construction of cl. 4 and cl. 8 of the agreement between the parties, made on July 14, 1952, for the sale of his business by the vendor to the company, the liability for the payment of income tax and surtax should fall on the company (the purchaser) or the vendor. So far as the construction of cl. 4 is concerned, I have nothing to add to what has already been said by my Lords. The relevant words "all the debts liabilities contracts and engagements of the vendor in relation to the said business" must in my judgment include a liability for income tax on profits arising from carrying on the business, and *Sterens v. Britten* (3) ([1954] 3 All E.R. 385) if not conclusive, does certainly offer considerable guidance on the point. But I agree, for the reasons already given, that the terms of the clause are not sufficiently wide to include the liability to surtax.

With regard to cl. 8, it is clear that the vendor is entitled to be indemnified against any liability for income tax on the profits of the business for the period from Apr. 1 to July 14, 1952, when he was to be deemed to be carrying on the business as agent for the company. The learned judge, relying on the decision in *Adams v. Morgan & Co.* (8) ([1924] 1 K.B. 751), has found that he should also be indemnified against liability to surtax on the sum of £20,000. Counsel on behalf of the company argued that this should not be so. He agrees that his clients should accept liability for any tax on profits arising from transactions in which the vendor was acting as their agent, but not for a profit arising from the sale of the business. In this transaction, says counsel for the company, the vendor was acting as principal and not as agent, and such profit as he made on the transaction was not one for which he was liable to account to the company. This argument is in my view well founded, and affords a distinction between this case and *Adams v. Morgan & Co.* (8).

I agree that the appeal should be allowed in respect of this claim, and that the order of the learned judge should be varied accordingly.

Appeal allowed in part. Leave to appeal to the House of Lords refused.

Solicitors: *Slaughter & May* (for the company); *Trower, Still & Keeling* (for the vendor).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

The following is an extract from the judgment of UPJOHN, J., in the present case, *Re Hollibone's Agreement*, delivered on July 11, 1958, being the passage showing the reasoning adopted by the Court of Appeal (see p. 159, letter D, p. 161, letter G, ante):—

UPJOHN, J.: Surtax, of course, is quite a different tax from income tax, although it is perfectly true, as was urged on me by counsel for the vendor, that it is a deferred instalment of income tax. I think, however, on this matter that the observations of

A SINGLETON, L.J., in *Conway v. Wingate* (7) ([1952] 1 All E.R. 782), are of some help. The covenant in that case was different. It mentioned certain taxes, such as income tax, excess profits tax and property tax, but it did not mention surtax, and there is no doubt that circumstance formed one of the reasons why the Court of Appeal came to the conclusion they did. However, during the course of his judgment SINGLETON, L.J., said this (*ibid.*, at p. 785):

B "The question, however, is one of construction. Does this clause in fact, or in law, cover surtax? The covenant is to pay and discharge the debts and liabilities of the partnership business and all liabilities for income tax, excess profits tax, and property tax of and relating to the said partnership. Income tax, excess profits tax, and property tax arise from the business; surtax has nothing to do with it. True, surtax is, in one sense, an additional income tax, but it is levied on the individual and not on the partnership. Surtax is in no sense a liability of the partnership, nor is it anything that can be said to be covered by the words 'of and relating to the said partnership'. That by itself leads me to think that surtax was not intended to be covered by a clause which deals with liability arising out of or related to the partnership business."

D I have already pointed out that the judgment went in part on the existence of certain words which I have not in the clause before me. It is also perfectly true that that was the case of a partnership, and it is true to say that surtax has nothing to do with a partnership, and this was the case of a sole trader. Nevertheless, I do gain some support from those words in expressing the view, as I do, that even in the case of a sole trader it is not really accurate to describe his liability, of course quite unknown to the purchaser, to surtax as being "a debt liability contract or engagement of the vendor in relation to the said business". In my judgment, therefore, cl. 4 does not compel the purchaser to discharge surtax.

PRACTICE NOTE

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Petition—Form of petition—Children or issue—Reference to there being no other children of the family.

G If a petition for divorce, nullity or judicial separation filed on or after Jan. 1, 1959, refers to "issue", "children of the marriage", etc., without saying that there are no other children of the family, the registrar's certificate will in future be refused until the petition has been suitably amended. A certificate from the petitioner's solicitors will no longer be accepted.

Apr. 16, 1959.

B. LONG,
Senior Registrar.

GOUGH v. NATIONAL COAL BOARD.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning), March 9, 10, 11, 12, April 16, 1959.]

Coal Mining—Statutory duty—Breach—Security of working place—Fall of coal from coal face—Duty to make “secure” sides of a working place—Whether duty is applicable to coal face—Coal Mines Act, 1911 (1 & 2 Geo. 5 c. 50), s. 49.

The appellant was employed by the respondents as an underground worker in one of their coal mines. On Dec. 2, 1955, he was working on a coal face which was one hundred and fifty yards long and approximately six feet high, and which was being worked on the long-wall system. Until the accident, the system was worked with three shifts. During the first shift, a cut by a mechanical cutter was made into the face of the seam to a depth of about four and a half feet, the cut being about six inches from the ground. The function of the second shift was filling-off, i.e., their job was to win and bag the coal that had been cut by the first shift. The third shift had the job of advancing the rails and roof and generally clearing up after the second shift. The appellant, who was working as a ripper, was a member of the third shift. On the day of the accident, owing to a fault in the conveyor, the second shift had not completed the task of filling-off the coal, and the deputy in charge of the third shift decided to complete the task. The appellant, with others, was directed to go along the face and help fill-off the coal. After he had gone some fifty yards along the face, a piece of coal, about twelve feet long by two feet six inches thick, came away from the top of the coal face and injured him. In an action for damages against the respondents, the appellant alleged that they were in breach of their statutory duty under the Coal Mines Act, 1911, s. 49*, in that they had failed to make secure the roof and sides of every travelling road and working place and had caused the appellant to walk along the coal face to get coal when the face had not been made secure. By their defence the respondents denied that s. 49 applied and, alternatively, pleaded that, if they were in breach of their statutory duty, they would rely on s. 102 (8)† of the Act of 1911 by which they would be under no liability if it were shown that it was not reasonably practicable to avoid or prevent the breach. The trial judge, having held that there had been no breach of statutory duty by the respondents, was not asked to make and did not make a finding on the alternative defence. It was admitted that the place where the appellant was struck was a working place within the meaning of s. 49.

Held: (i) the respondents were in breach of their statutory duty under s. 49 of the Act of 1911 because the coal face of the working place was a “side” of the working place which the section required to be made secure.

Elliot v. National Coal Board (1956 S.C. 484) disapproved.

(ii) (by LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD DENNING) the word “secure” in s. 49 meant in such state that there would be no danger from accidental falls (see p. 170, letter F, p. 167, letter E, and p. 169, letter F, p. 171, letter I, and p. 175, letter B, post).

(iii) (LORD MORTON OF HENRYTON and LORD SOMERVELL OF HARROW dissenting) the case should not be remitted for re-hearing on the defence based on s. 102 (8) of the Act of 1911 because, on the evidence before the trial judge, the respondents had not discharged the onus of proving the defence and, further, had not asked the trial judge to make a finding on that defence.

Decision of the COURT OF APPEAL ([1958] 1 All E.R. 754) reversed

* The terms of s. 49 are printed at p. 165, letter I, post.

† The terms of s. 102 (8) are set out at p. 165, letter I, to p. 166, letter A, post.

A [**Editorial Note.** The Coal Mines Act, 1911, was repealed (except as respects Northern Ireland) on Jan. 1, 1957: see the Mines and Quarries Act, 1954, s. 189, s. 194, s. 195 (2) and Sch. 5, and the Mines and Quarries Act, 1954 (Commencement) Order, 1956 (S.I. 1956 No. 1530). Section 49 of the Act of 1911 is replaced by s. 48 (1) of the Act of 1954, but the terms of the two enactments are somewhat different, although each deals with the duty to make "secure" the working places in a mine. Under s. 48 (1) of the Act of 1954, for example, the duty of a manager of a mine includes taking "such steps by way of controlling movement of the strata in the mine . . . as may be necessary for keeping the . . . working place secure . . ."

B For the Coal Mines Act, 1911, s. 49, see 16 HALSBURY'S STATUTES (2nd Edn.) 133; for the Mines and Quarries Act, 1954, see 34 HALSBURY'S STATUTES (2nd C Edn.) 514.]

C Cases referred to:

- (1) *Elliot v. National Coal Board*, 1956 S.C. 484.
- (2) *Penny v. National Coal Board*, (Jan. 27, 1955), unreported.
- (3) *Marshall v. Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; 3rd Digest Supp.
- D (4) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 1912 S.C. (H.L.) 33; 81 L.J.P.C. 97; 106 L.T. 161; 34 Digest 218, 1809.
- (5) *Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 34 Digest 740, 1168.

Appeal.

E Appeal by Richmond Gough, an underground worker employed by the respondents the National Coal Board, from an order of the Court of Appeal (LORD GODDARD, C.J., MORRIS, L.J., and McNAIR, J.), dated Feb. 28, 1958, and reported [1958] 1 All E.R. 754, affirming an order of SALMON, J., dated June 21, 1957, and reported [1957] 3 All E.R. 368. The appellant had brought an action against the respondents for damages for personal injuries suffered by him on F Dec. 2, 1955, when he was working on a coal face, which he alleged were due to breaches by the respondents of their statutory duty under s. 49 and s. 50 (2) of the Coal Mines Act, 1911, or alternatively, to negligence on the part of the respondents. The facts are set out in the opinion of LORD MORTON OF HENRYTON, p. 166, letter D, post.

G *Gerald Gardiner, Q.C.*, and *A. E. James* for the appellant.
John Thompson, Q.C., and *G. K. Mynett* for the respondents.

Their Lordships took time for consideration.

Apr. 16. The following opinions were read.

H **LORD MORTON OF HENRYTON:** My Lords, in this case the appellant, plaintiff in the action, claims damages for breach of statutory duty by his employers, the respondent board. Alternatively he claims damages for negligence at common law. The statutory duty in question is imposed by s. 49 of the Coal Mines Act, 1911. This section is the first of a group of four sections which appear under the cross-heading "Support of Roof and Sides", and is as follows:

I "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

With this section should be read s. 102 (8)* of the Act, which provides:

"The owner of a mine shall not be liable to an action for damages as for

* Section 102 (8) of the Act of 1911 is replaced, with amendments, by s. 157 of the Mines and Quarries Act, 1954.

breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

Section 50 (1) and (2) of the Act, as amended*, should also be quoted. They are as follows:

"(1) Where props or props and bars or chocks are used to support the roof at the working face, the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported, and the props or chocks shall be set at such regular intervals and in such manner as may be specified in the Support Rules.

"(2) Holing props or sprags shall be set as soon as practicable, and shall be set at such regular intervals and in such manner as may be specified in the Support Rules, and shall not be removed until the coal is about to be taken down and before the roof supports (if any) have been advanced in the manner specified in such rules."

The facts of the case, as found by the learned trial judge, SALMON, J., were as follows:

"The [appellant] . . . was an underground worker in the [respondents'] coal mine at the Granville Colliery. He was employed there as a ripper and had many years' experience underground at the time of the accident. He met with an accident on the day shift on Dec. 2, 1955, in circumstances which I shall, in a moment, describe.

"At this pit there was a coal face known as B panel double face, and it was being worked on what is described as a long-wall system. There was, I find, one hundred and fifty yards of this coal face approximately six feet high being worked in this mine. Prior to the accident the system had been to have three shifts. There was what is known as the afternoon shift, which worked approximately from three till ten-thirty p.m., and which was known as the cutting shift. During that shift a cut by mechanical cutter was made into the face of the seam to a depth of about four and a half feet, and the cut was about six inches from the ground.

"The second shift was the night shift, which came on at about ten-thirty in the evening until seven o'clock in the morning. The function of that shift was filling-off; that is to say, their job was to win and bag the coal that had been cut by the afternoon shift. Then the third shift was known as a day shift. It came on at about seven o'clock in the morning and worked till about three in the afternoon. That shift had the job of advancing the rails and the roof and generally clearing up after the night shift. The [appellant] was a member of the third shift, the day shift.

"On the day in question, Dec. 2, 1955, it appears that owing to some fault in the conveyor the night shift had not completed the task of filling-off the coal, and the deputy in charge of the day shift, a man called Reece, decided—and rightly decided—to complete their task. He detailed the [appellant], amongst others, to go along the face and help fill-off the coal. I find that the [appellant] came along what has been described as the approach road, which is shown on Exhibit P.1, turned to his right and walked along the face for a distance of about fifty yards. He was walking about four feet from the face of the coal. After he had gone a distance of fifty yards, or thereabouts, a piece of coal about twelve feet long by two feet six inches thick came away from the top of the coal face. I find that it came away from a point two feet six inches from the roof. He was buried by this coal and suffered quite a serious injury."

* Section 50 of the Act of 1911 has been replaced, with amendments, by s. 49 and s. 54 of the Mines and Quarries Act, 1954, and the Coal and Other Mines (Support) Order, 1956 (S.I. 1956 No. 1763).

A The first question arising for decision by the learned judge was whether the coal face, from which this large piece of coal fell, was a "side of a working place", within the meaning of s. 49 of the Act. If so, it was clear that it had not been "made secure", since the fall occurred. The learned judge held ([1957] 3 All E.R. at p. 370) that this section

B "... cannot be intended to apply to the coal face because the whole object of mining is to take down the coal face, and, therefore, a section which refers to an obligation to make secure the sides of a working place, and prohibits anyone from working in such a place which has not been so made secure, cannot, in my judgment, be intended to apply to the coal face itself."

C He then reviewed the evidence and held that the respondents had not been negligent and dismissed the action, but assessed the damages at £600, if they had been recoverable. The Court of Appeal, by a majority (LORD GODDARD, C.J., and McNAIR, J., MORRIS, L.J., dissenting) affirmed the decision of the learned judge on both points.

D My Lords, to my mind the question whether a working coal face can be a "side" within the meaning of s. 49 of the Act of 1911 is one of great difficulty. The view that it cannot was powerfully put by LORD CAMERON in *Elliot v. National Coal Board* (1) (1956 S.C. 484) and by McNAIR, J. (with whose judgment LORD GODDARD agreed), in the present case. In the end, however, I came to the contrary conclusion, and I was in course of putting my reasons on paper when I had the privilege of reading in print the speech which is about to be delivered by my noble and learned friend, LORD REID. I entirely agree with his reasoning and conclusion on this point and I shall not detain your Lordships by stating the same reasons in different words. In my opinion, the coal which injured the appellant fell from a "side" of a "working place" and there was a breach by the respondents of their statutory duty to make that side secure. This being so, the question arises whether it has been shown by the respondents that "it was not reasonably practicable to avoid or prevent the breach" within s. 102 (8) of the Act. Paragraph 4 of the defence of the respondents was in the following terms:

F "If (contrary to their contention) the [respondents] were in breach of their statutory duty they will rely on s. 102 (8) of the said Act that it was not reasonably practicable to avoid or prevent such breach."

G The respondents were asked to give, and did give, particulars under this paragraph. SALMON, J., made no finding on this point, which did not arise because he held that there has been no breach of statutory duty by the respondents. The point had to be dealt with, however, by MORRIS, L.J., since he thought, as your Lordships do, that there had been a breach of s. 49. That learned lord justice expressed the view ([1958] 1 All E.R. at p. 760) that there should be a further hearing, presumably by the learned trial judge, in order to decide the question arising on s. 102 (8). My Lords, I entirely agree with that view. Your Lordships are all of opinion, as I am, that the evidence failed to establish a case of common law negligence against the respondents. Thus the result of this appeal depends entirely on the question whether or not it was reasonably practicable to avoid or prevent the breach of s. 49 which resulted in injury to the appellant. If the answer is "Yes" the appeal succeeds and the appellant is entitled to £600 damages. If the answer is "No" the appeal should be dismissed. This question is one of fact for the learned trial judge, on which oral evidence, conflicting to some extent, was given before him, but it did not become necessary for him to express an opinion on it. I cannot attach blame to the respondents or their counsel for failing to ask the judge to determine a question which did not arise in view of his decision on other points, and he

might quite properly have refused to determine it. It is, in my view, impossible to say what view he would have formed on the question arising on s. 102 (8), and that question now comes, for the first time, into the forefront of the case.

I would remit the case to the learned trial judge to find whether or not it was reasonably practicable for the respondents to avoid or prevent the fall of coal whereby the appellant suffered damage. As I take this view, it would not be right for me to make any comment on the evidence bearing on this issue. No final order should be made on this case until the learned judge has made this further finding.

LORD REID: My Lords, this is an action for damages for injuries sustained by the appellant on Dec. 2, 1955, in Granville Colliery, Shropshire. The appellant's injury was caused by a large piece of coal falling on him while he was walking along the coal face. The depth of the seam at this point was about six feet and the face was about one hundred and fifty yards long. It was being worked on the long-wall system with coal cutters. The work was done by three shifts; the cutting shift undercut the coal, then the filling shift brought down the coal which had been undercut and removed it by a conveyor, and then the ripping shift made the necessary preparations for the next cutting shift. The appellant was working on the ripping shift. On this occasion, owing to some difficulty with the conveyor, the filling shift had not completed their work and this had to be finished by the ripping shift before their normal work could start. The appellant had been told to go along the face to a point where he was to bring down some of the coal which had been left there. It was on this journey that he was struck by the piece of coal which injured him. It fell from some point on the face.

The appellant alleged both breach of statutory duty and negligence at common law. He failed on both grounds at the trial before SALMON, J., and his appeal was dismissed by the Court of Appeal (LORD GODDARD, C.J., and MCNAIR, J., MORRIS, L.J., dissenting). On the first ground breach of s. 49 of the Coal Mines Act, 1911, is alleged. It is in these terms:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

Admittedly, the place where the appellant was walking when he was injured was a working place within the meaning of this section, and his case is that the face from which the coal fell was a "side" of that working place within the meaning of the section, and that that "side" had not been made secure as the section required. It is well established that the duty under s. 49 is an absolute duty*, so, if, on a proper interpretation, the face was a "side" of the working place at the time when the accident occurred, this appeal must succeed unless the respondents can establish the statutory defence to which I shall refer later; but if the face was not a "side" within the meaning of the section, the appellant could only succeed if negligence has been proved. The reasoning which led the majority of the Court of Appeal to hold that the face was not a "side" is briefly and clearly stated by MCNAIR, J. ([1958] 1 All E.R. at p. 763):

"It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure. The fallacy in the [appellant's] argument seems to me to lie in the false assumption that every working place underground has a roof and four sides. In truth, the coal

* See, e.g., *Edwards v. National Coal Board* ([1949] 1 All E.R. 743).

A face on which he is operating is part of his working place itself and does not cease to be part of his working place if, in the process of breaking in, he makes a hole in the face and then proceeds to work either way to the boundaries of his stint. No doubt, in the progress of his work at the face, he will, according to prudent mining practice, insert props and sprags to provide temporary security from the risks of falls from above him or from his sides, but such props or sprags would not be put up in discharge of the [respondents'] obligation to make the roof and sides of the working place secure. The cutter who makes the initial cut in the face, thus rendering the face insecure, his mate who inserts the holing props under the undercut coal, the shot-firer who in cases of necessity still further reduces the stability of the face, are all working in a working place, but it would be absurd, as I see it, to hold that the statute imposes on the [respondents] in all these cases the absolute obligation of making the face secure."

There is also a number of fairly recent unreported cases and one reported case (*Elliot v. National Coal Board* (1) 1956 S.C. 484), in all but one of which a similar decision was reached for similar reasons. The exception was *Penny v. National Coal Board* (2) (Jan. 27, 1955), where BYRNE, J., held that the face was a "side". He said:

"... at all times there will be maintained in that place where he works four sides, one of them being the coal that he is cutting out. It seems to me that if any other construction were to be put upon this section it would follow that the coal face of any mine—and I think the evidence in this case was that the coal face was about ninety yards long—could be left without any support of any kind without committing a breach of the statute."

At first sight the reasoning of McNAIR, J., is convincing, but on further consideration I have come to think that it is inadequate to deal with a variety of cases that can arise under the section and that it proceeds on a misinterpretation of the word "secure". The argument was put by counsel in the form that the section requires you not to send men to knock down anything to which the section applies and, therefore, if a face has to be brought down, the section cannot be applied to it. I would agree with this argument to the extent that Parliament cannot have intended altogether to prevent the winning of coal, and that nothing in the Act can be read in such a way as to produce this result. But before coming to what I think is the true interpretation of the section, I think it well to look at some of the consequences of reading it in the way in which it has been read.

First let me take the face at a time when it has not been undercut and when no work has been done on it. On the long-wall system that will normally be the position during the ripping shift. Men will be moving the conveyor adjacent to the face and their working place, which I may call a long gallery, will be bounded on one hand by the face and on the other by the waste. Stone or other material will have been packed in the waste, and, if a piece of that material falls on a man and injures him, undoubtedly there is a breach of s. 49, but, according to the respondents' original argument—it was somewhat modified in this House—the statute does not apply if a piece of coal falls from the face because the face is not a "side" of the working place. If it is not a "side" for the purposes of s. 49, it cannot be a "side" for the purposes of any of the other statutory safety provisions, not even for the provisions requiring inspection, and it would seem to me to require very strong reasons to justify such a conclusion.

Then let me take the method of working known as pillar and stall or stoop and room. There large pillars of coal are left unworked and the miner works forward getting out the coal between the pillars. He will then have in front of him the face on which he is working and on either side one of these pillars.

Are the faces of these pillars to be regarded as sides of his working place? It may be intended to work the faces of the pillars at some future time, but I would find it impossible to hold that they are not "sides" of his working place merely for that reason, and if a face, which in the ordinary use of the language would be called a "side", does not cease to be a "side" because it is to be worked in the more distant future, why should it cease to be a "side" because it is to be worked tomorrow? The need for safety provisions is just the same. A

Finally, let me take the roof. It appears to me that the statutory obligation to make secure must be of the same character with regard to roofs as it is with regard to sides. As I have said, the argument is that s. 49 prohibits sending men to bring down anything which it requires to be made secure. But the evidence in this case shows that every day travelling roads must be advanced as the face recedes. These roads have a higher roof than what I have called the gallery along the face and to advance a travelling road it is necessary to bring down a part of the roof of that gallery. And there are other cases where it may be necessary to bring down a roof. Can it be said that a part of a roof which has to be brought down in the immediate future is not within the protection of s. 49, or can it even be said that it ceases to be a roof as soon as work preparatory to bringing it down begins? I did not understand it to be argued that there never could be a working place under, or nearly under, a roof on which such preparatory work had begun, and, if this is so, then, again, statutory protection ceases when it is most necessary. B C D

I see nothing to prevent a face or roof being within the protection of s. 49, at least down to the time when work with a view to bringing it down begins. Does it then cease at that time to be a side or roof within the meaning of the section? If it did there was no breach of the section in this case, because the face from which the coal fell had already been undercut before the accident. But the consequences of this view would be a very severe limitation of the scope of the statutory provisions of the Act, and I do not think that we are driven to an interpretation which would have that result. E

In my judgment, the respondents' argument involves an erroneous assumption as to the meaning of the word "secure" in this context. The purpose of this part of the Act is to prevent accidents, and to my mind "secure" here means in such a state that there will be no danger from accidental falls. The word cannot mean in such a state that the side or roof will stand up against deliberate attack, for no part of a mine can be secure in that sense. I can see nothing inconsistent in saying that a side or roof shall be made secure against accidental falls at a time when steps are being taken to bring it down deliberately. Indeed, the evidence in this case was that proper mining practice requires that great care should be taken at that stage and the statute is not silent on that matter, e.g., s. 50 (2) prescribes precautions to be taken at that stage. The appellant's case at common law is that, in fact, insufficient precautions were then taken. F G

It may be that it is more difficult to make the face secure after working on it has begun, but that is a very different thing from saying that Parliament cannot have intended the provisions of s. 49 to continue to apply during the progress of such work. It may be that such work will cause an accidental fall greater than was intended and that this could not have been prevented. Absolute liability in such a case might seem unreasonable, and so it would be if it was unqualified, but s. 102 (8) qualifies these absolute duties. It provides: H I

"The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

Under the earlier legislation there was no absolute duty; for example, s. 49 of the Coal Mines Regulation Act, 1887, sets out rules to be observed so far

A as reasonably practicable and one of these, viz., r. 21, was in terms identical with those of s. 49 of the Act of 1911. I doubt whether the change of form with regard to civil liability made any real change of substance, and any apparent difficulty about the existence of an absolute liability to make a face secure while it is being brought down is, I think, met by the provisions of s. 102 (8). In this case the respondents seek to rely on s. 102 (8), but they are under the
B handicap that their evidence does not appear to have been led with the requirements of this sub-section in view, and the trial judge was not asked to make any finding under it. If the respondents sought to rely on s. 102 (8), it was for them to prove their case. I agree with those of your Lordships who are of opinion that no order or finding in favour of the respondents should be made on this matter and that this defence fails.

C The respondents are, therefore, in my judgment liable in damages in respect of a breach of s. 49 and it is unnecessary to deal with the appellant's case at common law. SALMON, J., said that he would assess the total damages at £600. This appeal ought, therefore, to be allowed and £600 damages should be awarded to the appellant with costs.

D **LORD TUCKER:** My Lords, the question for decision on this appeal is whether the working face in a coal mine is "a side" within the meaning of s. 49 of the Coal Mines Act, 1911, which provides that:

E "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

Including the judges who have dealt with this particular case this question has been the subject of consideration by nine different judges, two Scottish and seven English, which has resulted in a majority of seven to two in favour of the view that a working face is not a side within the meaning of the section.
F It is true that, in two of these cases, the question was not the subject of actual decision. The basis of these decisions can be summarised by reference to the judgment of LORD CAMERON in the Outer House in *Elliot v. National Coal Board* (1) (1956 S.C. 484) in which he said (*ibid.*, at p. 486):

G "... the whole purpose of the long-wall method of mining is to cut coal by advancing the face and to do so by progressive destruction and removal of the face itself, a process which is the complete antithesis of supporting and making the face secure and . . . consequently the condition as well as the function of the face in long-wall working is totally different from that of the sides proper or the rear or waste of the working place."

H This reasoning, which commended itself to SALMON, J., the trial judge in the present case, and to LORD GODDARD, C.J., and McNAIR, J., in the Court of Appeal, seemed to me so much in accord with common sense that I would have accepted it had I not been persuaded to the contrary view in the course of the hearing of this appeal.

I My reasons can be quite shortly stated. The word "side" must, I think, have a geographical connotation. It cannot be a side at one moment and not a side at another. It seems to me impossible to say that the face is not geographically a side between shifts when, as in the present case, the working place is being used as a thoroughfare by men proceeding to their places for the third shift to make the necessary preparations for the next cutting of the face by the cutting shift. What, then, is the solution of the dilemma? It lies, I think, in the meaning of the word "secure". Security from what? I would say security from accident or unintentional collapse or falls, as distinct from security from the natural consequences of the deliberate assaults inherent in the operation of mining to which both the face and the roof are subjected from time to time.

In *Marshall v. Gotham Co., Ltd.* (3) ([1954] 1 All E.R. 937), I had occasion A
to refer to the word "secure" in a regulation identical with s. 49 and said
(*ibid.*, at p. 943):

"I agree that the word 'secure' does not involve security from the effects
of earthquake or an atom bomb, but I think it must include security from
all the known geological hazards inherent in mining operations." B

I do not desire to qualify in any way what I said in that case, but would only
observe that deliberate assault on the mine face was not within my contem-
plation as a geological hazard.

For these reasons, I agree that the appeal succeeds.

With regard to the order for a new trial whether the respondents could rely C
on s. 102 (8) which MORRIS, L.J., would have ordered, I am of opinion that
such an order should not be made in the present case. The trial judge was not
asked to make a finding on this issue, and the matter was not even argued before
him, counsel contenting himself with formally taking the point so as to preserve
his position on appeal. In these circumstances, I think counsel must accept
the evidence as it stands, and content himself with endeavouring to persuade D
your Lordships that, on such evidence, the respondents have discharged the
onus that lies on them under s. 102 (8), and, so far as I am concerned, he has not
succeeded in so doing. I would, therefore, allow the appeal and enter judgment
for the appellant for the sum of £600 as assessed by the trial judge.

LORD SOMERVELL OF HARROW: My Lords, can a working face, E
at any rate when any part of it is being worked on, be a "side" within s. 49 of
the Coal Mines Act, 1911? I think the Act itself gives the answer "Yes". I
read s. 50 not as widening the ambit of that which has to be supported or made
secure, but as applying the special procedure of specification in a notice to certain
of the measures which are covered by the general words of s. 49. As s. 50 (2) F
deals with the measures which are to be taken after a working face has been
undercut, it follows that a working face being worked on is within s. 49. This
view is confirmed by the cross-heading, though I do not base my opinion on it.
If I am wrong, and there is no ground for restricting s. 50 to measures within
s. 49, s. 50 (2) at any rate shows that the words "shall be made secure" can
have application to a working face because the purpose of the holing props
or sprags is to make secure. The trackway down which the appellant was G
walking when the accident happened is, according to the plan in evidence,
nearly a hundred yards long and eight to ten feet wide. The working face is a
side of the trackway in the ordinary sense of the word. The trackway is a
working place. It was common ground that it is not a travelling road.

The difficulty arises from the fact that the duty imposed by s. 49 is one of
support, and the object of a coal mine is to bring down the working face. How H
can one support what is to be brought down? Two rival solutions have been
put forward. The respondents in the present appeal did not argue that a working
face could never be a side. They submitted that it ceased to be a side when it
is being knocked down. In the present case there was no evidence that anyone
was knocking down or getting coal in the stint where the fall occurred or in its
immediate neighbourhood. It was at one time suggested that it ceased to be a
side as soon as it became undercut. This seems to me at any rate doing violence I
to the language, especially when it is recognised on all sides and by the statute
that measures to make secure must follow immediately in the wake of the
undercutter. The other solution which I accept I would put in this way. The
working face in the present case was, and remained, a side. As it was cut away
it remained a side of the working place. Section 49 must, however, be applied,
subject to the fact that the object of mining is to get coal. To make secure is
normally to support. The Act cannot be construed so as to compel the support

A of that which is to be brought down. On the evidence there would appear to me to be no difficulty in applying s. 49 on this basis to the working face.

B In the cutting shift the face was looked at to see that it was safe before the cutter started. If there were any overhanging bits they would be spragged up or knocked down. The holing props were put at regular intervals in the wake of the cutter. After the cutter had been along, the coal face would be further
C spragged if necessary and inspected by the deputy at the end of the shift. The next shift would fill-off or bring down the coal. Further spragging is, one of the witnesses said, automatic when coal is being brought down. At the end of this shift the face would again be inspected to see if it was safe for the third shift which does the advancing of the roads and the conveyor. In the present case, the filling shift were not able to fill-off all the coal. It was inspected by
D the deputy who sounded it with his stick, saw that the holing props were in position, and that sprags were in position if and where necessary. So far as he could recollect, no sprags other than the holing props were necessary. He came to the conclusion that it was safe. The fall occurred at a place where the deputy had not anticipated any danger. I have given this short summary of the evidence because that evidence makes it clear to my mind that there is no difficulty in applying s. 49 to a working face, having regard and subject to the main purpose of getting coal. It was suggested for the appellant that a convenient formula would be to imply the words "against unintended falls" after the words "made secure". I do not quarrel with this formula, but, as it is so difficult to forecast the circumstances of borderline cases, I would myself leave it in the general form in which I have stated it in the previous sentence.

E On this view there was a fall from a part of the side of a working place which should have been made secure. The respondents are, therefore, liable unless they can show that it was not reasonably practicable to avoid or prevent the fall (s. 102 (8)). This defence was pleaded in the alternative. The main defence which succeeded was that the working face was not a side of the working place. The learned judge was not asked to make a finding whether the respondents
F could rely on s. 102 (8), assuming s. 49 was applicable to the place of the fall. MORRIS, L.J., who came to the same conclusion as I have come to on the construction and application of s. 49, would have ordered a rehearing on the defence based on s. 102 (8). I think that this should be done for the reasons and on the terms set out by my noble and learned friend, LORD MORTON OF HENRYTON.

G LORD DENNING: My Lords, s. 49 of the Coal Mines Act, 1911, was not new in 1911. It was first enacted in 1872 as one of the general rules which were to be observed "so far as is reasonably practicable" in every coal mine; and it was re-enacted in 1887 in the same words: see s. 51, r. 16, of the Act of 1872 and s. 49, r. 21, of the Act of 1887. When Parliament in 1911 omitted
H the words "so far as is reasonably practicable", it might be thought that a greater liability was placed on the mine owners. But a study of the relevant provisions has satisfied me that the responsibility of the mine owners has remained the same after 1911 as it was before. Their *criminal* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that they have taken all reasonable means to prevent the contravention: see the last paragraph of s. 51 of the Act of 1872, s. 50 of the Act of 1887, and s. 75 of the Act of 1911, as
I explained by LORD KINNEAR in *Butler (or Black) v. Fife Coal Co., Ltd.* (4) ([1912] A.C. 149 at pp. 164, 165). Their *civil* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that it was not reasonably practicable to prevent the breach: see, on the wording before 1911, *Britannic Merthyr Coal Co., Ltd. v. David* (5) ([1910] A.C. 74) and *Marshall v. Gotham Co., Ltd.* (3) ([1954] 1 All E.R. 937); and after 1911, s. 102 (8) of the Act of 1911.

What, then, is the meaning of these words which have come down to us A
unaltered for eighty-seven years: "The roof and sides of every travelling road
and working place shall be made secure". "Working place" means, I think,
every place at which men are working or may be expected to work. It certainly
included the area hard by the working face—one hundred and fifty yards long
and two and a half yards wide—the stretch along which the appellant was walking B
at the time of his accident. But what was the "roof" of that working place?
And what were the "sides" of it? The "roof" was, I should have thought,
the exposed surface over the appellant's head as he walked along; and the
"sides" were the exposed surfaces on either hand, the working face on his
left hand, the packing on his right hand and the rib sides at the far ends before
and behind him.

It is clear, I think, that, for the purposes of this Act, a working face is a C
"side". Take the pillar and stall method of getting out coal. The coal is extracted
by driving headings and cross-headings leaving blocks of coal to support the
roof. These blocks of coal are extracted later. Meanwhile the sides of these
blocks are working faces. Parliament cannot have intended that they should be D
left insecure. Next take the long-wall method, and consider the position during
the day shift whilst the men are moving up the conveyor, and so forth. The
working face is all the time a working place. It surely must be made secure
for the men doing the work. This view is supported by the provisions for a
pre-shift report. It is the duty of a deputy to make an inspection to see if
the place is safe for the men coming on duty in the next shift. This duty is E
contained in s. 64 (1) of the Act*, as substituted by S.I. 1951 No. 848. The deputy
is put, by s. 64 (5)* as substituted, under a duty to make a pre-shift report
specifying the condition of the "roof and sides". If any proper degree of
safety is to be attained, "sides" here must include the working face. And the
respondents have recognised this in their printed form on which the deputy
is to make his report. It contains this significant instruction:

"Condition of Roof and Sides

"State actual condition of (a) working faces and (b) roads, with location
of any unsafe place and action taken."

But what does s. 49 mean when it says that these sides are to be "made G
secure"? If a coal mine were to be regarded as a permanent structure under-
ground, like the tunnels and station of an underground railway, then an obliga-
tion to "make secure" the roofs and sides would mean make them *permanently*
secure, so that they would last indefinitely as a protection against falls of material,
always excepting, of course, earthquakes and atom bombs. But a coal mine is
not a permanent structure underground. It is always on the move. The work- H
ing face goes forward. The travelling roads get longer. The obligation to
make the roof and sides secure cannot mean permanently secure, but only secure
for the time being. Take the ripping roof. It is the roof of a working place.
It must be made secure for the time being, although it is very soon to be ripped
down to extend the travelling road. Consider the working face during the day
shift when the men are moving up the conveyor. It is the side of a working I
place. It must be made secure for that shift at least, even though on the
afternoon shift the cutter is going to cut along it.

But now comes the question: Does the obligation to make secure come to
an end as soon as men begin to knock down the ripping roof or cut into the

* Section 64 of the Act of 1911 is re-enacted, with amendments, by the Coal and Other
Mines (Managers and Officials) Order, 1956 (S.I. 1956 No. 1758), which have effect
as if they were regulations under the Mines and Quarries Act, 1954, s. 141.

A working face? Does the obligation cease from the time that the cutter starts at one end of the long-wall of one hundred and fifty yards? and not rise again until the day shift have filled-off all the coal from the cut? I cannot think this is correct. I do not think the obligation to make secure ceases for any length of time at all. Whenever the roof is knocked down or sides are cut into, the portion which remains standing must immediately be made secure. It must be made secure from unintended falls. During the night shift, as soon as the cutter goes along, nogs must be inserted in the cut and the face props reset. During the day shift, as soon as coal is removed, temporary props must be erected to support the roof. And so forth. It may happen, of course, that, on occasion, more coal comes down than is intended. This is no breach by the mine owner so long as it was not reasonably practicable to avoid it. But, save for such exceptions, the obligation to render the face secure is a continuing obligation to make it secure, that is, free from danger of unintended falls. So, in this case, when a portion of the face remained standing after the cutter had cut underneath it, it was the obligation of the mine owners to make it secure. If nogs were not sufficient, sprags should have been put up to buttress the face. Only in that way could men like the appellant be protected whilst at their working place.

There remains, however, the question: Was it reasonably practicable for the respondents to avoid the breach? The burden in this respect was on the respondents and they have no finding on it in their favour. I should not be prepared on the transcript to hold that they had discharged it. And I do not myself feel disposed to send the case back for a re-trial so as to give them the opportunity of getting a finding on it now. They should have asked the judge to find it at the trial. I would, therefore, allow the appeal and direct that judgment should be entered for £600, the damages assessed by the judge.

Appeal allowed.

Solicitors: *Stafford Clark & Co.*, agents for *Hooper & Fairbairn*, Dudley (for the appellant); *Donald H. Haslam*, agent for *F. W. Dawson*, Dudley (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

GRANADA THEATRES LTD. v. FREEHOLD INVESTMENT (LEYTONSTONE) LTD.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.J.J.), February 9, 10, 11, 12, 13, March 23, 1959.]

Landlord and Tenant—Repair—Covenant—Construction—“Structural repairs of a substantial nature.”

By cl. 2 (3) of a lease of a cinema, the tenants covenanted to keep the demised premises in good and substantial repair and condition and properly decorated “but nothing in this clause contained shall render the [tenants] liable for structural repairs of a substantial nature to the main walls roof foundations or main drains of the demised building”. By cl. 3 (2) the landlords covenanted, except so far as the tenants were liable under their covenants, to “repair maintain and keep the main structure walls roofs and drains of the demised premises in good structural repair and condition”. The front elevation of the cinema was a nine inch brick wall with a cement rendering. The bricks had deteriorated and the rendering had come away from the wall, taking with it a considerable proportion of the outer ends and sides of the bricks. This loose rendering was liable to fall, and so was dangerous. To make good the frontage it was necessary to make good the defective brickwork and replace the rendering. The roofs of the cinema were leaking, and to put them right it would be necessary at least to provide or refix 350-500 slates. The total number of slates on the roof was 12,000.

Held: the effect of the covenants was to render the landlords liable for structural repairs of a substantial character to the main walls and roof (see p. 180, letter A, post); both the repairs necessary to the front elevation (the bricks and the cement rendering together constituting the front elevation for this purpose) and the repairs necessary to the roof were structural repairs and each, in view of its extent, amounted to structural repairs of a substantial nature, for which the landlords would accordingly be liable under their covenant (see p. 182, letter D, p. 185, letter I, and p. 187, letter D, post).

Decision of VAISEY, J., on these points ([1958] 2 All E.R. 551) affirmed.

Landlord and Tenant—Repair—Landlord’s covenant—Notice of intention to do repairs—Sufficiency.

Landlord and Tenant—Repair—Landlord’s covenant—Repairing prevented by tenant—Whether tenant entitled to damages for breach of covenant to repair.

The tenants, who had taken an assignment of the lease on Dec. 13, 1954, served on the landlords on Jan. 31, 1955, a schedule of dilapidations, including the items of repair to a leaking roof. The landlords denied liability to do the work, but eventually, on July 7, 1955, the landlords’ architect wrote to the tenants’ architect, that, subject to the landlords’ approval, he recommended that “a reputable firm of builders should be employed to overhaul both the roofs, replacing broken and cracked slates and refixing where slipped”. The tenants, who considered more extensive repairs to the roof to be necessary, asked to be told when the landlords’ approval was given, and to see the specification of the work proposed. On July 29, 1955, the landlords’ architect wrote that he was obtaining an estimate for the landlords’ approval for making the roof watertight and was “proceeding with the matter in all haste recognising the urgency of the situation”. On Sept. 5, 1955, the tenants, having heard no more from the landlords, wrote to the landlords that unless they submitted within seven days “details of the work you propose doing, stating completion date, and [our architect] is satisfied with your proposals, we will . . . have the work carried out . . . and charge you

A with the cost ". The landlords replied that the matter would be dealt with immediately after Sept. 8, and refused to let the tenants have work carried out at the landlords' expense. On Sept. 13, 1955, the tenants, having heard no more from the landlords, wrote to the landlords that the tenants had ordered the repairs to be done. The same day the landlords instructed a builder to do the work that the landlords considered necessary, and the next day wrote to the tenants that work would commence the following week and forbade them to do repairs themselves. The tenants replied that the landlords had not given them a "specification of work you propose doing, any specific date for completion, or indicated how the work would be done to allow the cinema to... remain open... We see no reason for cancelling the order we have placed " for the work to be done. On Sept. 19, 1955, the landlords' builder commenced work, but the same day, when he had done about a quarter of what he considered necessary, he was turned away by the tenants. After further fruitless correspondence the tenants had the more extensive repairs which they considered necessary carried out. In an action by the tenants for the cost of these repairs as damages for breach of the landlords' repairing covenant, it being assumed that the repairs proposed to be done by the landlords were adequate and satisfactory,

D **Held** (JENKINS, L.J., dissenting): (i) by the letters of July 7 and Sept. 14 the landlords gave the tenants sufficient notice of what the landlords proposed to do and when they proposed to do it (see p. 186, letter H, and p. 188, letter D, post).

E (ii) accordingly (on the assumption above stated) the tenants, by preventing the landlords from doing this work, and then, by the work the tenants themselves did, putting it out of the landlords' power to perform the covenant by doing the work, had themselves prevented the landlords from performing the landlords' repairing covenant and so were not entitled to damages for the landlords' non-performance of the covenant (see p. 187, letters B and C, and p. 188, letter G, post); but

F (iii) (per ORMEROD, L.J.) if the work which the landlords had proposed to do would not have been a sufficient performance of this covenant, the landlords would be liable in damages to the tenants for the sum which would have been necessary to put the roof in the covenanted state of repair (see p. 188, letter G, post), and

G (iv) therefore, the case would be referred to the trial judge to determine whether the repairs proposed to be carried out by the landlords would, if completed, have complied with the covenant.

Decision of VAISEY, J., on these points reversed.

H Observations as to the information which a landlord without an express right of entry must give the tenant before the landlord is entitled to enter to repair (see p. 184, letter E, p. 185, letter D, p. 186, letters E and F, and p. 187, letter H, post).

[**Editorial Note.** A convenient summary by JENKINS, L.J., of certain principles relating to the law applicable to the circumstances of such a case as the present, where tenants carry out repairs for which the landlords are alleged to be liable, is at p. 184, letters A to F, post.

I As to covenants by a landlord to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 586, para. 1268 and as to remedies for breach of covenants by a landlord to repair, see *ibid.*, 591, para. 1277; and for cases on the subject, see 31 DIGEST (Repl.) 344, 345, 4752-4766.]

Cases referred to:

(1) *Terry's Motors v. Rinder*, [1945] S.A.R. 167.

(2) *Palser v. Grinding, Property Holding Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; 31 Digest (Repl.) 651, 7541.

- (3) *Thorneloe & Clarkson, Ltd. v. Board of Trade*, [1950] 2 All E.R. 245; 2nd A Digest Supp.
- (4) *Saner v. Bilton*, (1878), 7 Ch.D. 815; 47 L.J.Ch. 267; 38 L.T. 281; 31 Digest (Repl.) 379, 5077.
- (5) *Hewitt v. Rowlands*, (1924), 93 L.J.K.B. 1080; 131 L.T. 757; 31 Digest (Repl.) 693, 7841.

Appeal.

The landlords of a cinema appealed against the decision of VAISEY, J., dated June 13, 1958, and reported [1958] 2 All E.R. 551, in an action by their tenants for £961 (being the cost of repairs to two roofs carried out by the tenants) damages for breach of the landlords' repairing covenant and a declaration that, on the true construction of the lease, repairs to the front elevation of the cinema were the liability of the landlords. The relevant parts of the lease and the questions in issue are set out in the judgment of JENKINS, L.J. (p. 179, post). The tenants, who had acquired the term on Dec. 13, 1954, asked the landlords, by a letter dated Jan. 31, 1955 (which contained a schedule of dilapidations), to execute repairs to the two roofs which leaked and to the front elevation. A protracted correspondence ensued between the parties and their respective solicitors, and each party obtained specifications and estimates for the work which they considered necessary. The tenants considered that extensive works, at a total estimated cost of £961, were necessary; the landlords maintained that less extensive works, for which the total estimated cost was £130 10s. would suffice, but denied that they were liable to do this work under the terms of the lease. Eventually, on July 7, 1955, the landlords' architect wrote to the tenants' architect that, subject to the landlords' approval, he recommended that "a reputable firm of builders should be employed to overhaul both the roofs, replacing broken and cracked slates and refixing where slipped". By letter dated July 11, 1955, the tenants' architect replied "I should like to know when you receive your clients' approval to the work you propose to carry out and to have a sight of your specification". This request to see the specification was never acceded to. On July 19, 1955, the landlords wrote to the tenants that they were prepared for the tenants to carry out the work recommended by the landlords' architect, on condition that the tenants also carried out certain other work at the same time. On July 29, 1955, the landlords' architect wrote that the landlords had instructed him "to obtain an estimate for approval by my clients to make the roof watertight... I am proceeding with the matter in all haste recognising the urgency of the situation". By letter dated Sept. 5, 1955, the tenants complained at having heard nothing more since the letter of July 29, and stated that

"unless your architect submits to [our architect] within seven days details of the work you propose doing, stating completion date, and [our architect] is satisfied with your proposals, we will give instructions to have the work carried out ourselves and charge you with the cost."

The landlords replied that their architect

"will be returning from his holiday on Sept. 8 and will immediately contact [your architect] thereafter... We will not agree to your carrying out any work at our expense."

The tenants, having heard no more, on Sept. 13, 1955, wrote to the landlords that they had instructed their own architect to order the repairs to be done. The same day the landlords' architect instructed a builder to do the work covered by the £130 10s. estimate, which they had obtained on Aug. 19, 1955, but of which they had not informed the tenants. On Sept. 14 the landlords' architect wrote to the tenants' architect that the landlords' builder would

A commence work " during the early part of next week ", and on the same day the landlords wrote to the tenants forbidding the tenants to have work carried out on the roof without the landlords' consent and stating that the landlords would hold the tenants responsible if they did so carry out work on the roof without consent. In answer, the tenants wrote:

B " your architect has not submitted for [our architect's] approval specification of work you propose doing, any specific date for completion, or indicated how the work would be done to allow the cinema to continue to remain open during its normal hours to the public. We see no reason for cancelling the order we have placed."

C After this the parties and their architects wrote to each other letters reiterating their previous contentions. On Sept. 19, 1955, the landlords' builder sent his men to the cinema to do the work on the roof specified in his estimate and that day the men did about a quarter of this work, but the tenants then ordered them off, and they went. Further fruitless correspondence ensued, and eventually the tenants did the work which their architect considered necessary, and brought this action to recover the cost, and for a declaration as to the meaning of the landlords' covenant to repair. VAISEY, J., construed the covenant in favour of the tenants, and made the declaration claimed, but found himself unable to decide what work had been necessary on the roof, and accordingly directed an inquiry as to the amount of damages due to the disrepair of the roof.

The landlords appealed.

E *H. Heathcote-Williams, Q.C.*, and *J. E. Vinclott* for the landlords.
R. E. Megarry, Q.C., and *Oliver Lodge* for the tenants.

Cur. adv. vult.

Mar. 23. The following judgments were read.

F JENKINS, L.J.: This is an appeal by the defendant landlords, Freehold Investment (Leytonstone) Ltd. from a judgment of VAISEY, J., dated June 13, 1958, in an action brought against them by the plaintiff tenants, Granada Theatres Ltd., concerning the liability of the landlords under a landlord's repairing covenant contained in a lease dated June 12, 1941, by the landlords' predecessors in title to the tenants' predecessors in title, of the premises known as the Century (formerly the Academy) Cinema, 350A, High Road, Leytonstone.

G The lease was for a term of twenty-one years from June 2, 1941, at a rent of £750 per annum increasable as therein mentioned. The term was assigned to the plaintiff tenants on Dec. 13, 1954. The landlords' repairing covenant is drawn by reference to a repairing covenant by the lessee, which is in these terms. It is No. 3 in the fasciculus of lessee's covenants contained in cl. 2 of the lease:

H " The lessee for itself and its assigns and to the intent that the obligations may continue throughout the term hereby created covenants with the lessors as follows . . . (3) To keep the demised premises and the sanitary and water apparatus and all additions and improvements thereto in good and substantial repair and condition and properly decorated and in a state in every respect fit for cinematograph entertainments but nothing in this clause contained shall render the lessee liable for structural repairs of a substantial nature to the main walls roof foundations or main drains of the demised building."

I The landlord's repairing covenant is in these terms—it is No. 2 in the fasciculus of landlord's covenants contained in cl. 3 of the lease:

" (2) To (except so far as the lessee is liable under the lessee's covenants hereinbefore contained) repair maintain and keep the main structure walls

roofs and drains of the demised premises in good structural repair and condition at all times during the said term."

The effect of this covenant read in conjunction with the lessees' repairing covenant appears to be that the landlords are liable under it for structural repairs of a substantial nature to the main walls, roof, foundations or main drains of the demised building; whereas the tenants are liable under the lessees' repairing covenant for all repairs not falling within that description. This follows, I think, from the exclusion from the landlords' repairing covenant of repairs for which "the lessee is liable under the lessees' covenants hereinbefore contained", coupled with the obligation cast on the lessee by the lessees' repairing covenant to do all repairs with the exception of structural repairs of a substantial nature to the main walls, roof, etc.

The questions in the case are in substance (a) whether certain works of repair done or needing to be done (i) to the main roof (formerly slated) and smaller back roof (at all material times covered with asbestos sheeting) of the auditorium of the cinema, and (ii) to the front elevation (consisting of a nine inch brick wall rendered with cement) of the demised premises, or any and if so which of these works, are repairs of the description for which the landlords are liable on the true construction of these ill-drawn covenants; and (b) if so, whether the tenants have lost or are precluded from asserting, their rights in respect thereof on one or other of the grounds relied on by the landlords, to which I will later refer.

To anticipate matters, it appears that after a protracted dispute, the tenants themselves carried out the work on the auditorium roofs which they considered to be necessary in order to put the roofs in the state of repair demanded of the landlords under the landlords' repairing covenant. Having carried out this work, the tenants began the present action in which they claimed (to put it shortly) (1) £961 as damages for the cost incurred by the tenants in executing the roof repairs, and (2) a declaration that on the true construction of the lease the repairs to the front elevation of the cinema were the liability of the landlords. By the order under appeal (again putting it shortly) the learned judge made declarations in favour of the tenants to the effect that on the true construction of the lease the repairs to the roof of the cinema and the repairs to the front elevation of the cinema required by items 84 and 85 of the schedule of dilapidations, referred to in para. 13 of the statement of claim, and set out in the schedule to the order, were the liability of the landlords, and ordered an inquiry what damages had been sustained by the tenants by reason of their having carried out the repairs to the roof referred to in para. 11 of the statement of claim*.

In reaching the conclusions to which the order gave effect, the learned judge held that all the repairs in question were structural repairs of a substantial nature and, as such, within the scope of the landlords' repairing covenant. He also rejected an argument advanced on the landlords' side to the effect that even if the repairs in question were in cumulo structural repairs of a substantial nature, they were no more than the accumulated product of individual wants of repair, each of which considered separately ought to have been remedied by the tenants under the lessees' repairing covenants, and that the landlords accordingly had a claim against the tenants in respect of these individual breaches sufficient to wipe out the tenants' claim against them under the landlords' repairing covenant. The learned judge refrained from deciding whether this contention could be supported in principle, rejecting it on the ground that in the present case the tenants only acquired the term on Dec. 13, 1954, and served their schedule of dilapidations on Jan. 31, 1955; the inference being that in his view there could not during that short period have been any material contribution by the tenants to the

* I.e., the repairs to the two roofs for which the estimate of £961 had been given and which the tenants had carried out.

A accumulated disrepair. A further point taken on the landlords' side which loomed large in the argument before us, and which no doubt was ventilated before the learned judge, and must inferentially be taken as having been rejected by him although he did not expressly deal with it, was to the effect that the tenants had forfeited any claim they might otherwise have had in respect of the roof repairs because the landlords had at all material times been ready and willing to do the necessary repairs, but the tenants had prevented the landlords from doing such repairs by refusing to allow the landlords access to the premises for that purpose, and ultimately doing the repairs themselves. There is one small question of fact which appears to have been misapprehended by the learned judge. In his judgment he attributes the £961 wholly to the cost of repairing the main roof of the auditorium, whereas in fact it was made up of £807 for the main roof and £154 for the rear roof, both roofs, and not the main one only, **C** having been repaired by the tenants themselves before action brought.

I must now refer to the history of the dispute, and in view of the point taken on the landlords' side to the effect that the tenants in any case disqualified themselves from relief in respect of the roof repairs by wrongfully preventing the landlords from doing those repairs and ultimately doing them themselves, **D** it must, I fear, be referred to in some detail. [HIS LORDSHIP then referred in detail to the correspondence, which is summarised at p. 178, ante, and continued:] So much for the correspondence. As appears from what I have already said, the learned judge construed the landlords' repairing covenant in the same way as I do, that is to say, as extending to "structural repairs of a substantial nature". As to the meaning of the expression "structural repairs" and the words "substantial" and "structure", the learned judge made these observations which I am content to adopt. He said ([1958] 2 All E.R. at p. 552):

"It appears, rather surprisingly, that the expression 'structural repairs' has never been judicially defined, a fact to which attention is drawn in **E** WOODFALL ON LANDLORD AND TENANT (25th Edn.) at p. 770, para. 1732, and counsel in the present case have accepted that statement as correct. The writer of the text-book submits on the same page that 'structural repairs' are those which involve interference with, or alteration to, the framework of the building, and I would myself say that 'structural repairs' means repairs of, or to, a structure. It is sometimes said that repairs must always be either structural or decorative, and if that is the simple criterion, we are in **G** this case certainly not dealing with decorative repairs.

"Next, what is meant by the words 'of a substantial nature'? In a South Australian case, *Terry's Motors v. Rinder* (1) ([1945] S.A.R. 167), the word 'substantial' is pilloried as a word devoid of any fixed meaning and as being an unsatisfactory medium for conveying the idea of some ascertainable proportion of a whole. In *Pulser v. Grinling, Property Holding Co., Ltd. v. Mischeff* (2) ([1948] 1 All E.R. 1) a question arose as to what was a 'substantial portion' of a rent, and the decision is summarised (not perhaps very helpfully) in the headnote ([1948] A.C. 291), saying that 'substantial' does not mean 'not unsubstantial', but is equivalent to 'considerable', and that the judge of fact must decide the matter according to circumstances in each case; see also *Thorneloe & Clarkson, Ltd. v. Board of Trade* (3) ([1950] 2 All E.R. 245). **H**

Again, what is a 'structure'? And what ought to be regarded as part of a structure? We are dealing here with (i) the roof, and (ii) one of the main walls of a cinema, and surely those are parts of the structure of the building." **I**

As to the specific items of disrepair on which the dispute turns, I may deal first with the front elevation of the premises. The competing views are, on the one hand, that you have here a wall, which no doubt is part of the structure, coated with a cement rendering which can be regarded for this purpose as equivalent to

paint. The cement rendering is merely, one might say, decorative, perhaps to some extent protective, but is no more part of the structure than a coat of paint would be. On the other hand, it is said that the front elevation of the cinema consists not of a wall with the incidental application of cement rendering, but it consists of a nine inch wall rendered in cement. The bricks and the cement should be taken together and they together constitute the front elevation. In my view the latter way of regarding this cement rendering and the wall behind it is correct. On the evidence as a whole the proper conclusion appears to me to be that the cement rendering (which appears to have been from three-eighths to seven-eighths inch in thickness) set up a chemical reaction in the bricks of the nine inch wall, and that this chemical reaction, coupled with the effect of water seeping down between the rendering and the wall and the effects of frost, caused the bricks to deteriorate and the rendering to come away from the wall, taking with it a considerable proportion of the outer ends and sides of the bricks. Moreover, the rendering, where it had come loose from the wall, was liable to fall and was thus a potential source of danger. The operations necessary to make good the frontage to the premises would, therefore, consist of removing the rendering, making good the defective brickwork, and replacing the rendering. These operations appear to me, as they did to the learned judge, to amount to structural repairs, and, moreover, in view of their extent, to amount to structural repairs of a substantial nature, and, therefore, these were repairs which fell to be included in the landlords' repairing covenant. I need not take time by going into the evidence, but my conclusions are amply supported, at all events, by the evidence of Mr. Green, which the learned judge must be taken as having accepted, and I see no reason to differ from the learned judge on that item.

Next, as to the roofs, it appears to me that even the work recommended by the builder employed by the landlords, which, according to his estimate, involved the use of some three hundred and fifty new slates but which in fact would have called for the provision or refixing of, I think, nearer five hundred slates in all, if one allows for slipped slates and lost ones, would amount to a structural repair of a substantial nature. I do not think that a matter of three hundred and fifty slates out of a total of twelve thousand slates on a roof could be regarded as a mere trifle. The question, when one is dealing with such things as slates, is necessarily to some extent one of degree. It was put in the course of the argument that if a gale blew off two slates, for example, the work of replacing them could hardly be said to be a structural repair of a substantial nature. But obviously different considerations must apply if there was a hurricane stripping the house of all its slates, and I would add that if somebody "bought blind" a house represented to be "structurally complete" and he went there and found the rafters with no slates on them, he could, I apprehend, complain with justification that his vendor had been guilty of misrepresentation. There are, of course, two ways of putting this. Counsel for the landlords, while admitting that a roof is a part of the structure and, accordingly, that repairs to the roof would be in the nature of repairs to the structure, says that in this case there is not enough substance in the structural aspect of the repairs. I think that that puts his position fairly, and his reason for so submitting is that although no doubt slates would have to be replaced and renewed, there would be no interference with the rafters or roof beams of the cinema: it would merely be a matter of replacing the protective skin or layer in the form of slates which formed part of the roof but which could be removed and replaced without interfering with the structure of the roof. Paying the best attention I can to the arguments and the evidence, I see no sufficient reason here for differing from the view taken by the learned judge that the roof repairs also fell within the landlords' repairing covenant.

Then there was a point of a different nature taken in the course of the argument that it would be inequitable to make the order sought. That contention was

A abandoned by junior counsel for the landlords, with the concurrence of their leading counsel, and I need not say anything further about it.

Then there was the interesting point, to which I have already referred, to the effect that these dilapidations did not occur overnight, but occurred, as it were, slate by slate, as slates got loose or fell off over the years, and inch by inch as the rain gradually seeped down the cement rendering or chemical reaction began to do its work. On this basis it is said that the alleged breaches of the landlords' repairing covenant are no more than an accumulation of individual breaches of the lessees' repairing covenant, and, consequently, that the tenants here cannot recover. It is said that in view of their liability under their covenant for the individual wants of repair making up the totality of disrepair, they must be liable for the totality of disrepair made up of those individual items, and that can be expressed as a set-off or cross-claim for an amount sufficing to wipe out the claim under the landlords' covenant. It appears to me that this contention fails for a number of reasons. First, it is clear, in view of the very short time which elapsed between the assignment to the tenants and the service of the schedule of dilapidations, that no appreciable part of the disrepair could have been attributable to breaches of the lessees' covenant to repair committed by the tenants themselves. It seems to me that this in itself is sufficient to dispose of the argument. An assignee of a term is not liable for particular breaches of tenant's repairing covenants committed by his predecessors. He is, of course, liable for the disrepair of the premises as they stand when he takes over, so far as their then state of disrepair falls within the scope of the tenants' repairing covenants, but particular breaches committed before the assignment to him, as distinct from the state of the premises when he takes over, are matters, generally speaking, with which he is not concerned. Over and above that, it is to be observed that this part of the landlords' case is pleaded so as to apply only to the acts of the tenants themselves and not of their predecessors in title, and it appears that when it was sought to amend the defence by bringing in this point, the inclusion of a reference to the predecessors in title of the tenants was expressly disallowed, the proposed amendment being objected to by the tenants. Finally, it seems to me that, if this point was otherwise sound, it could only operate by way of counterclaim; each side would have their claim to damages for breach of covenant, and if one of them wanted to pursue his claim after a claim had been made against him by the opposite party, I should have thought his proper course would have been to do so by an appropriate counterclaim in the action, and, as I understand it, there is no question of any such counterclaim here.

Those, I think, are all the points with which it is necessary to deal, except one. It does remain to consider with respect to the repairs to the main roof of the cinema, the landlords' contention to the effect that the landlords were, and had at all material times been, ready and willing to carry out the requisite repairs in accordance with the landlords' covenant in cl. 3 (2) of the lease, but were prevented from doing so by the tenants.

On this aspect of the case we were invited by both parties to assume that the repairs to the main roof, which the landlords engaged their builder to carry out, would, if carried out, have constituted a sufficient performance by the landlords of their obligations under cl. 3 (2) of the lease so far as this roof was concerned, and to decide whether on that assumption the tenants' conduct was such as to destroy their claim to damages under this head. This question turns almost entirely on the correspondence, to which I have already referred. [His LORDSHIP referred to the correspondence and to the evidence of the landlords' architect, and continued:] As to the law to be applied to the facts emerging from the correspondence and from the evidence of the landlords' architect:

(1) It is well settled that a landlord's covenant to repair is a covenant to A
repair on notice.

(2) It is further well settled that under such a covenant the landlord has an implied licence to enter on the premises for the purpose of performing it (see *Saner v. Bilton* (4) (1878), 7 Ch.D. 815).

(3) Where, as here, the covenant is to "keep" in repair, failure to perform it B
after notice constitutes a continuing breach in respect of which a fresh cause of action arises from day to day so long as the requisite repairs remain undone.

(4) In the event of the landlord failing to do the requisite repairs within a reasonable time after notice, the tenant is entitled to sue him in damages without first incurring expense by doing the repairs himself (*Hewitt v. Rowlands* (5) (1924), 131 L.T. 757).

(5) The covenant is clearly not specifically enforceable, but I apprehend that C
in the event of the landlord failing to do the repairs in a reasonable time, the tenant can, at his option, do the requisite repairs himself and claim the proper cost of so doing as damages flowing from the breach.

(6) If the landlord attempts within a reasonable time to do the work but is D
prevented from so doing by the tenant refusing him entry on the premises in accordance with the implied licence, the tenant cannot, I apprehend, maintain his action for damages so long as he persists in such refusal, because in such circumstances the landlord is not in breach of his covenant, or at all events has only been put in breach of it by the tenant's own conduct.

(7) The parties are under a duty to each other to act reasonably. It behoves E
the landlord, who is in breach of his covenant, to be diligent in the remedying of such breach. He is not entitled to keep the tenant waiting indefinitely and then complain if the tenant ultimately decides to do the work himself. On the other hand, he must be reasonable in the exercise of his licence to enter and (as I think) give the tenant sufficient notice of his intention to enter and information as to the nature and extent of the work he proposes to carry out. On his part, F
the tenant must not unreasonably obstruct the landlord in the exercise of his right of entry for the purpose of doing the work, or take the matter out of the landlord's hands by doing the work himself before the landlord has had a reasonable opportunity of doing so.

[His LORDSHIP then referred to the correspondence leading up to a letter by which the landlords' solicitors denied liability*, and continued:] At this point it would, I apprehend, have been open to the tenants forthwith to treat G
the landlords as having repudiated their obligation under the covenant, and, without allowing any further time, either to bring their action for damages immediately without first doing the work themselves, or at their option to proceed at once to do the requisite work and sue the landlords for its proper cost as damages flowing from the breach. Neither of these courses was actually pursued by the tenants, but the fact that they were open to the tenants shows H
that at this early stage of the correspondence the tenants already had a complete cause of action. [His LORDSHIP then referred to the subsequent correspondence and conduct of the parties, which is summarised at pp. 178, 179, ante, and continued:] In the end, the tenants resolved the deadlock by doing themselves the re-roofing in asbestos†. That, as I have said, must, in view of the assumption we have been invited to adopt as to the sufficiency of the landlords' builder's proposed work, be taken to have exceeded what was necessary I
to comply with the covenant. The landlords as reversioners have benefited by the tenants' work, and now claim to be entitled to that benefit for nothing, and, notwithstanding their breach of covenant, to be absolved from liability even for the sum it would have cost to carry out their own builder's proposed work. In all the circumstances of the case I am not prepared so to hold. It

* This letter was dated Mar. 2, 1955.

† I.e., the work of which the estimated cost was £961.

A appears to me that in view of the landlords' long delay, and their refusal or disregard of the tenants' and their architect's requests for information as to what they proposed to do, the matter had before Sept. 19, 1955 (when the landlords' builder's men were ordered off) reached a stage at which the tenants were entitled to do the necessary work themselves, in the absence of a firm assurance from the landlords that they really intended to do without further
B delay that which was necessary in order to comply with the covenant, with sufficient details of the work proposed to give the tenants' architect a reasonable opportunity of judging whether what was proposed would put the roof in the state of repair which the covenant demanded.

As I have said before, the landlords gave no particulars beyond saying that the roof would be made watertight. They remained in breach of their covenant
C for months after service of the notice of disrepair. It is not clear that they ever admitted that they were under any obligation to do any work on the roof. They certainly maintained in their defence to the action that they were under no such obligation. They had had ample opportunity of complying with the covenant before their builder's men ever came on the scene. I do not say that the tenants were wholly reasonable. They may have demanded more in the way
D of information as to the work proposed than they were strictly entitled to claim. On the other hand, the landlords were at least equally unreasonable. They were guilty of inordinate delay and undue reticence as to their intentions. The fact that they may have been asked for more information than they were obliged to give could not justify them in giving virtually no information at all. It would need a strong case to satisfy me that the tenants had by their conduct
E deprived themselves of their accrued and accruing claims for damages in respect of an undoubted and persistent breach of a continuing covenant such as this, and I do not consider that the landlords have made out such a case.

Accordingly, in my view, the tenants are entitled to damages in respect of the disrepair of the roof, even on the assumption which we are asked to make that the work which the landlords' builder was engaged to do would, if done, have
F satisfied the covenant. But clearly on this assumption the tenants' damages in respect of their expenditure on repairs to the roof must be limited to the reasonable cost of complying with the covenant by the landlords' builder's method. It would seem—though this point has not been argued and I therefore express no concluded opinion on it—that on the same assumption the landlords
G might be entitled to claim credit for any amount they had to pay their builder in respect of the quarter of the work which he had done before being ordered off.

However, my brothers, from whom I differ with diffidence, take a different view on this part of the case. The effect of their view appears to be that if the work proposed by the landlords' builder would have been a sufficient compliance with the landlords' repairing covenant had he been allowed to complete it, then
H the tenants' claim must fail so far as the main (or slated roof) is concerned. The learned judge expressed no finding one way or the other on the question whether the landlords' builder's proposals, if carried to completion, would or would not have constituted a sufficient compliance with the covenant. It seems that there must, accordingly, be a reference back to the learned judge for a finding on this
I question. This and any other points arising as to the form of order to be made will, however, best be discussed after my brethren have delivered their judgments.

ROMER, L.J.: With the exception of one point, I am in full agreement with the judgment which my Lord has delivered. The only question on which I have the misfortune to differ from him is that which was referred to in argument as the "ready and willing" point.

As to this, the tenants contend for various reasons that the landlords cannot succeed in their submission that they were willing to do the requisite repairs

to the slate roof but were prevented by the tenants from doing so, and, accordingly, were not, in this respect at least, in breach of their repairing covenant when the tenants issued their writ. A

On the hypothesis, however, which we were asked to accept for the purpose of considering this question, that the method which the landlords' builder proposed to adopt in order to do the work was adequate and satisfactory, it does appear to me that the landlords' submission is well founded. The tenants' first objection is that the landlords never gave them an unconditional assurance of their intention to do any work. It is true that in his letter of July 7, 1955, the landlords' architect told the tenants' architect that: B

"Subject to my clients' approval, I recommend that a reputable firm of builders should be employed to overhaul both the roofs, replacing broken and cracked slates and refixing where slipped." C

That in itself, of course, is no more than a conditional recommendation and would be quite insufficient to support the landlords' case. But on Sept. 14, 1955, the landlords' architect wrote to the tenants' architect a letter* which appears to me to amount to an unqualified intimation of intention to send the contractors on to the premises during the early part of the following week in order to do repair work; an intention which was in fact carried into effect. Therefore, I cannot accept the tenants' contention that the landlords never evinced, or communicated to them, a sufficiently definite intention to do any work to the roof. D

The tenants' next objection is that the landlords did not in any case give them details of the work which they proposed to do. At one stage of his argument counsel for the tenants went so far as to say that before a landlord can enter on the demised premises in order to perform his covenants to repair, he must supply the tenant with a detailed specification of the intended work. Counsel for the tenants cited no authority in support of such a proposition and I am unable to accept it. Alternatively, he submitted that if there is no specification the landlord must at least furnish the tenant with such information as he possesses relating to the work and that in the present case the landlords did not even show their builder's estimate to the tenants. I should imagine that it is very likely that if the tenants' architect had asked the landlords' architect to show him the landlords' builder's estimate, a short and simple document, the landlords' architect would have let him see it. What, however, the tenants' architect was wanting to see, as the correspondence shows, was a detailed specification of the work which the landlords were proposing to carry out, and this, as I have already intimated, was more than the tenants were entitled to demand—even if such a specification existed, which in fact it did not. In my judgment the landlords' architect's letters of July 7 and Sept. 14† gave the tenants sufficient notification of what they were proposing to do and when they intended to do it; and it is to be observed that the last paragraph of the letter of July 7, being almost an echo of the relevant part of the schedule of dilapidations which the tenants had served on the landlords on Jan. 31, 1955, cannot really have left the tenants' architect in any doubt as to the work which the landlords' architect had it in mind to do. [His LORDSHIP considered the later correspondence and continued:] The truth is, and it seems to emerge quite clearly from the correspondence as a whole, that the doubt which existed in the tenants' mind was not as to the work which the landlords intended to do in relation to the slate roof but as to the adequacy of that work, the tenants taking the view that it was quite insufficient. E F G H I

In my judgment, accordingly, the landlords gave the tenants sufficiently clear notice of their intention to do the work and sufficient information as to the

* The material part of the letter is summarised in the last line of p. 178 and the first line of p. 179, ante.

† The relevant part of the letter of July 7 is printed at p. 178, letter E, ante.

A nature of that work. What then in those circumstances is the result of their being prevented from doing it and of the tenants repairing the slate roof themselves? On the assumption already referred to (viz., that the work which the landlords intended to do would have been a sufficient compliance with their covenant), the result in my judgment is that on this part of the case the tenants could not succeed. In asking for an order on the landlords to repay them for the work which they themselves did, they are asking in substance for damages for breach by the landlords of their repairing covenant. If, however, the tenants prevented the landlords from performing that covenant and then put it out of the landlords' power to perform it by doing the work themselves, I cannot see how it can be said that the landlords were then or thereafter in breach at all. In the event, therefore, of it being subsequently decided or admitted that the work referred to in the letter of July 7* would have been a sufficient performance of the landlords' covenant if it had been carried out, I would hold that the tenants have established no cause of action so far as the slate roof is concerned.

On every other question I entirely agree with what my Lord has said and there is nothing that I wish to add for myself.

D **ORMEROD, L.J.:** I am in full agreement with the matters which have been dealt with by JENKINS, L.J., and do not propose to deal with those matters, except on the last point which has been called the "ready and willing" point.

E Assuming that the landlords are right when they say that the work set out in their builder's estimate was all that was necessary to put the roof in a proper state of repair, the question arises whether the landlords made known to the tenants that they were ready and willing to do this work. The contention of the tenants is that at no time did they have enough information of the proposed work to enable them to form any opinion as to its adequacy. From time to time in the correspondence they asked the landlords for a written specification of the proposed work which the landlords refused or neglected to give. The case is complicated by the fact that the lease does not give to the landlords any power to enter on the land to perform their covenant. Counsel for the tenants, however, referred us to *Saner v. Bilton* (4) ((1878), 7 Ch.D. 815) from which it appears that such a right may be implied. However, he argued that this was a right to be exercised reasonably, and that in these circumstances it was reasonable that the landlords should inform the tenants of the work proposed to be done. For the landlords it was argued that they had discharged their obligation if they could show that they had engaged a competent surveyor and builder, and were acting on their advice. The tenants, on the other hand, contended that they were entitled to know exactly what it was the landlords proposed to do. In my judgment each of these submissions goes too far. The tenants are, I think, entitled to know the general nature and purpose of the work to be performed. They have to put up with the inconvenience of having workmen on the premises, and it is reasonable that they should have such information as would enable them to judge whether the proposed repairs would be likely to fulfil their purpose. There is no doubt that the landlords made it known to the tenants that they proposed to do some work. They not only said so in their letters, but they sent a builder to the premises who actually started to do the work, but was sent away by the tenants' manager. It is clear too from the correspondence and from the evidence what work the landlords proposed to do. Whether that work would have been a sufficient compliance with the covenant is a question which will have to be determined by the learned judge. The question now is whether the tenants were sufficiently informed. [His LORDSHIP then referred to the correspondence in July, 1955, which is summarised at p. 178 and continued:] It is contended by the tenants that the use of the phrase "make

* The relevant part of this letter is printed at p. 178, letter E, ante.

the roof watertight " in this and subsequent letters indicated that the landlords intended to do no more than patch up the obvious leaks in the roof, which would not amount to putting the roof in repair. Reading the correspondence between the parties as a whole, I do not think that this contention is justified. The question of the roof being watertight was a matter of urgency and was no doubt uppermost in the minds of the landlords' architect, but the reasonable inference appears to be that the landlords intended to carry out the work set out in the letter of July 7, 1955*. That such was in fact their intention is made clear from their correspondence with the builder engaged by the landlords, and from the evidence given at the trial both by that builder and by the landlords' architect.

It is unfortunate that by September, 1955, the parties and the respective architects representing them appear to have been at loggerheads. The tenants and their architect were demanding a specification of the proposed work, and the landlords were failing for some reason to make any attempt to comply with the demand. The landlords' architect had in his possession an estimate from his builder, a copy of which he could have sent to the tenants' architect. He did not do so, and it appears from the evidence that in this he was acting on the instructions of his clients. [His LORDSHIP considered the later correspondence and continued:] In my judgment it appears sufficiently from the correspondence between the parties that the landlords were prepared to do such work in the repair of the roof as would have complied with the tenants' original notice of want of repair. If the tenants were in any doubt about this, such doubt could in my view have been resolved if the tenants' architect had complied with the landlords' architect's suggestion for a meeting, a suggestion which in my view was a very sensible and reasonable one. The tenants and their architect, however, continued to insist on a written specification which, as I have already said, they were not entitled to demand. I think that the real trouble between the parties was that the tenants, on the one hand, were not prepared to be satisfied by anything less than stripping and recovering the roof, and, on the other hand, the landlords took the view that this was unnecessary, and that the replacement of broken, cracked and slipped slates was all that needed to be done. In my view the tenants had sufficient notice of work which the landlords proposed to do. If the learned judge is of opinion that the proposed work would have been a sufficient compliance with the landlords' covenant, it would seem that there is no liability now on the landlords in respect of this item of the tenants' claim. The tenants have themselves stripped the roof and covered it with asbestos, so putting it out of the power of the landlords to comply with the covenant. If, of course, the learned judge is of a contrary opinion, the landlords will be liable in damages for such sum as it is eventually found would have been necessary to put the roof in proper repair.

Judgment of VAISEY, J., set aside in so far as it was adjudged that the landlords were liable to the tenants for damages in respect of their failure to carry out the repairs to the auditorium roof of the cinema referred to in the particulars of claim; declaration that the landlords were liable for such repairs only if the repairs proposed to be carried out by them, if completed, would not have constituted compliance with the covenant in cl. 3 (2) of the lease. Case referred to VAISEY, J., for him to determine whether the repairs proposed to be carried out, if completed, would have complied with the covenant. Order of VAISEY, J., as to costs set aside. All costs, including costs of appeal, to be in the discretion of VAISEY, J. Same as aforesaid, appeal dismissed.

Solicitors: Harewood & Co. (for the landlords); E. F. Turner & Sons (for the tenants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* The relevant part of this letter is printed at p. 178, letter E, ante. The work therein referred to was the work for which the landlords' builder had given the estimate of £130 10s.

HERBERT v. HAROLD SHAW, LTD.

[COURT OF APPEAL (Hodson, Romer and Pearce, L.J.J.), April 9, 10, 1959.]

Building — Building regulations — Application — Independent contractor — “Workman” — “Person employed” — Whether person working as an independent contractor is a “workman” or “person employed” — Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 4, reg. 31.

An independent contractor, who is himself working but is not by contract obliged to work on an operation to which the Building (Safety, Health and Welfare) Regulations, 1948, apply, is not a “workman” or person employed, so as to be entitled to the benefit of duties imposed by reg. 4 and reg. 31; and the definition of “workman” in s. 10 of the Employers and Workmen Act, 1875, has no application in ascertaining the meaning of the word “workman” in the regulations.

Per HODSON, L.J.: the question does not depend on whether the independent contractor had to do the work himself (see p. 192, letter B, post).

Appeal dismissed.

[**Editorial Note.** The building regulations referred to above were made under s. 60* of the Factories Act, 1937, among other sections, and it may seem, therefore, that an individual sub-contractor is not a “person employed”, or in “any class of those persons” within s. 60 as amended by the Factories Act, 1948, since the decision shows that there was not “employment” of the sub-contractor in the context of the regulations. If the accident had happened to an employee of a sub-contractor, liability under the building regulations might have arisen; see *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper* ([1956] 2 All E.R. at p. 726, letter D), cf., *Canadian Pacific Steamships, Ltd. v. Bryers* ([1957] 3 All E.R. 572).

As to special regulations for safety and health made under the Factories Acts, see 17 HALSBURY'S LAWS (3rd Edn.) 122, para. 204; as to the building regulations, see *ibid.*, 125, para. 206; and for cases on the subject, see 24 DIGEST (Repl.) 1075, 327; 1078, 1079, 341-345; 1081, 354-356.

For the Factories Act, 1937, s. 60, as amended, see 9 HALSBURY'S STATUTES (2nd Edn.) 1046; and for the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 5, reg. 24, reg. 31, see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 213, 220, 224.]

Appeal.

The plaintiff appealed against the decision of STREATFIELD, J., in a reserved judgment given at Nottingham Assizes on June 24, 1958, dismissing his action against the defendants for damages for personal injuries. These injuries were suffered by the plaintiff when he fell while doing roofing work, which was a “building operation” within the meaning of the Building (Safety, Health and Welfare) Regulations, 1948, for the defendants.

By his statement of claim the plaintiff alleged that at the time of the accident he “was employed by the defendants” to do roofing work on a shed which the defendants were erecting as contractors for the National Coal Board at Clifton Colliery, near Nottingham. He alleged that the defendants were guilty of negligence at common law, and were also in breach of their statutory duty to him

* The Factories Act, 1937, s. 60, as amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, provides: “(1) Where the [Minister] is satisfied that any manufacture, machinery, plant, equipment, appliance, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed, or any class of those persons, he may . . . make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.”

under reg. 4, reg. 5, reg. 24, and reg. 31 (1), (3), of the regulations*. STREETFELD, J., found that the defendants were not guilty of negligence at common law, found on the facts (which are stated in the judgment of HODSON, L.J.) that the plaintiff was working as an independent contractor, held that an independent contractor was not a "workman" to whom duty was owed under the Building Regulations, and dismissed the action.

J. R. Bickford Smith for the plaintiff.

Marven Everett, Q.C., and *A. E. James* for the defendants.

HODSON, L.J.: This is an appeal from a judgment of STREETFELD, J., given at Nottingham Assizes on June 24, 1958. The learned judge gave judgment in favour of the defendants, a firm called Harold Shaw, Ltd., in an action brought against them by the plaintiff, a Mr. Alfred James Herbert. The plaintiff was doing roofing work on a shed which was being erected by the defendants as contractors for the National Coal Board at Clifton Colliery near Nottingham. The work that he had to do was fixing asbestos roofing sheets to the steel framework of the shed. He was occupied on that work on July 19, 1956, when unfortunately he had an accident and fell off the roof to the ground and was injured. He brought this action against the defendants, and in his statement of claim alleged that he was employed by the defendants and based his case on that. The defendants by their defence set out in the forefront that the plaintiff was not employed by them in the ordinary sense of the word at all (although, of course, the word "employed" can be used in a loose sense), but that he was an independent contractor who had entered into a contract with them to do this roofing work.

The case turns primarily on whether he was employed in the normal sense of the word by a master to do work or whether he was an independent contractor who contracted with the defendants to do the work which they required to be done. The evidence on this part of the case is very plain indeed. The plaintiff was a skilled roofer and he had worked at his trade for a great many years. He had worked on his own and he had worked as a servant or employee; indeed, he had worked for this particular firm as their servant at one time. After the war he decided that he would rather be independent and be on his own. His evidence is very clear on this subject. He was his own "boss" and that was what he wanted to be. It was put to him that there was a period when the relationship between him and the defendant firm changed and that he became their employee during the war, and he said that that was quite right. He was asked this:

"Q.—After the war you reverted to being a roofing and tiling contractor?"

A.—Yes. During the war I went as foreman for Harold Shaw and then after the war I preferred to go back on the old basis. Q.—And that was the basis of being your own boss, was it not? A.—Quite right."

That was his position. He was treated for income tax purposes as a man running a business; and an accountant prepared his returns for the purpose of profits

* By reg. 4: "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him . . . ; (ii) to comply with such of the requirements of reg. 31 . . . as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen . . ."

Regulation 5 requires the provision of scaffolds for certain work "and sufficient safe means of access . . . to every place at which any person has . . . to work."

Regulation 24 requires the provision of guard-rails and toe-boards for certain places "from which a person is liable to fall . . ."

Regulation 31 (1) requires that where "... a person employed is likely to slip down or off the roof . . . suitable precautions shall be taken to prevent his so falling"; and reg. 31 (3) deals with "... work . . . on . . . roofs . . . through which a person is liable to fall . . . (a) where workmen have to . . . work . . ."

A under Sch. D. He could work for anybody he liked, although as a matter of convenience he had worked for the defendants continuously for some years past. Sometimes he was paid for the work he did and sometimes he was paid by the hour. For insurance purposes he was treated as a self-employed man, he covered his own risks and in every respect he was an independent man and not a servant.

B On that state of facts the learned judge stated his conclusion as follows:

C "I do not think that it can be said on those facts that the plaintiff was a person who, being a craftsman, has entered into, or works under, a contract with an employer, that being a contract personally to execute any work or labour. That that was the hope and the expectation I have no doubt, but that it was the contract I do not think is proved. For that reason, therefore, I do not think that any contract of employment, either for service or for services, ever came into existence, quite apart from their hope and expectation, and indeed their practice. I think that at all material times the plaintiff was carrying on as he preferred to carry on, namely, as an independent contractor."

D Having come to that conclusion of fact, the learned judge came to the further conclusion that the plaintiff, who was in the habit of working on a roof and of making his own arrangements for borrowing ladders and any necessary boards which he might require and of finding his own tools, was not in a position to say that, because he fell off a roof, the defendants were liable either at common law or under the building regulations for breach of any regulations designed for the safety of workmen.

E That conclusion is, I think, quite unassailable, but it has been attacked in this court on the basis that sufficient regard was not had to the definition of "workman" contained in an Act of 1875, an Act which had to do with employers and workmen. The Employers and Workmen Act, 1875, was an Act "to enlarge the powers of county courts in respect of disputes between employers and workmen . . .", and contained a definition in s. 10 which I will read so far as is material:

F "The expression 'workman' does not include [and then certain persons are named] but . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

H It is submitted that that definition has application to this case, and the learned judge, without ruling on that, dealt with the case on the footing that that definition might apply. In the passage which I have read he found the facts, which are justified by the evidence, which would cause this action to fail even if this definition applied. Having regard to the way the case has been dealt with, it is our duty to point out that that Act has no direct bearing on this case at all. I The definition is expressed to be a definition of "workman" in this Act, and it was applied expressly in other Acts of Parliament, in the Truck Amendment Act, 1887*, and in the Employers' Liability Act, 1880†, but it was not applied in the Factories Act, 1937, under which the building regulations‡ in question

* See s. 2 of the Truck Amendment Act, 1887; 9 HALSBURY'S STATUTES (2nd Edn.) 40.

† See the Employers' Liability Act, 1880, s. 8, since repealed by the Law Reform (Personal Injuries) Act, 1948, s. 1 (2); 9 HALSBURY'S STATUTES (2nd Edn.) 37.

‡ *Le., the Building (Safety, Health and Welfare) Regulations 1948.*

here were made. The expression "workman" as such, so far as our researches have gone, does not appear at all in the Factories Act, 1937, although it does appear in the building regulations. It does not, therefore, have a direct bearing on this case that, for the purposes of particular legislation, the word "workman" has been defined. A

The question is a very simple one and does not necessarily depend, for example, on whether this man had to do the work himself. Some contracts with independent contractors have to be performed by the man himself with whom the contract is made. It is immaterial whether this man was expected to work on the site himself or whether he could have left his assistant in his place if it was not convenient for him to be there. The contract was essentially not a contract for work, but a contract for the results of the work, which is an expression used in one of the authorities. The fact that he was paid by the hour seems to me not to throw any doubt on the view which I have expressed. He was paid by the hour at the standard rate at the material time, and the defendants allowed him to add in his bill against them the wages which he paid to his assistant, Mr. Coope. The contract between the plaintiff and the defendants was, however, a perfectly straightforward contract between independent contractors and no question of employer and employee or master and servant arises. In that state of affairs this man had no possible claim against these defendants for his unfortunate accident, and, to be fair to him, he has never in his evidence blamed the defendants for the casualty which befell him on this day. B C D

I think that this appeal fails and should be dismissed.

ROMER, L.J.: I entirely agree and I only wish to say that it is my view also, as my Lord has said himself, that no assistance is to be derived in the present case from the definition of "workman" in s. 10 of the Employers and Workmen Act, 1875. The question has to be decided as a question of construction of the Factories Act, 1937, and the regulations made under that Act, and the definition in the Act of 1875 is of no assistance in the elucidation of the problem. E F

PEARCE, L.J.: I agree. The learned judge considered carefully the arguments and evidence put forward on behalf of the plaintiff and came to the conclusion that the alleged duty was not owed. In my view there can be no criticism of the result at which he arrived. He investigated the matter on the hypothesis that the plaintiff was right in arguing that the definition of "workman" in s. 10 of the Employers and Workmen Act, 1875, was applicable, but I do not understand him to have accepted that hypothesis as correct; nor do I think that that hypothesis is correct. G

For the reasons which my Lord has given more fully, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Helder, Roberts & Co.*, agents for *Fuller & Pepper*, Sutton-in-Ashfield (for the plaintiff); *Hewitt, Woollocott & Chown*, agents for *Browne, Jacobson & Roose*, Nottingham (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

R. v. SMITH.

[COURTS-MARTIAL APPEAL COURT (Lord Parker, C.J., Streetfield and Hinchcliffe, JJ.), March 24, 25, 1959.]

Criminal Law—Confession—Admissibility—Second statement after prior inadmissible confession—Admissibility.

Court-Martial—Murder—Causation—Bayonet wound resulting in haemorrhage of lung—No time for proper medical examination—Incorrect medical treatment—Death two hours after stabbing—Good chance of recovery if proper medical treatment had been given—Whether death was caused by the wound.

On Apr. 13, 1958, just before 10 p.m., a fight took place at a barracks which was then being shared by a company of the K. regiment and a company of the G. regiment, and three men of the G. regiment were stabbed with a bayonet. On hearing of the fight, a regimental sergeant-major of the K. regiment put his men on parade and indicated that he would keep them on parade until the man responsible for the stabbing came forward. The appellant then confessed to the stabbing. C., one of the wounded men, had been stabbed in the back and, although this was not known at the time, his lung was pierced. While he was being carried by another soldier to the medical reception station, he was dropped twice. When he was eventually brought into the reception station, about an hour after he was stabbed, the seriousness of his condition was not at first realised. There was no time for a careful medical examination, as the medical officer and his orderly were dealing with a number of other cases, and the treatment which C. received was, in the light of subsequent knowledge, inappropriate and harmful. He died about two hours after being stabbed. There was evidence that, if he had received immediate and different treatment, he might not have died, and, if a blood transfusion had been administered, his chances of recovery would have been about seventy-five per cent., but facilities for blood transfusion were not available at the medical reception station. At about 7.30 a.m. on Apr. 14, an investigating officer spoke to the appellant and, after administering the usual caution, referred to the appellant's admission to the sergeant-major on the previous night. The appellant thereupon repeated his confession and, after signing a written caution, made a statement in writing admitting that he had stabbed the three men. He was convicted by a general court-martial of the murder of C. At the trial both his confession to the sergeant-major and his oral and written statements to the investigating officer were admitted in evidence; and the judge-advocate, in his summing-up, left to the court the question whether they were satisfied that the wound had caused C.'s death in the sense that the death flowed from the wound although the treatment which C. received was, in the light of subsequent knowledge, wrong.

Held: (i) the appellant's confession to the sergeant-major was not admissible as evidence at the trial, because the confession was made as a result of a threat or an inducement, and, therefore, was not a voluntary confession.

(ii) the oral and written statements made by the appellant to the investigating officer were admissible as voluntary statements, despite the investigating officers' opening reference to the appellant's alleged confession to the sergeant-major, because the effect of any inducement or threat under which the original confession was made had been dissipated before the second statements were made.

(iii) on the facts of the case, the judge-advocate's summing-up on causation was perfectly adequate, for no jury or court, properly directed, could come to any other conclusion than that C.'s death resulted from the wound inflicted by the appellant.

R. v. Jordan ((1956), 40 Cr. App. Rep. 152) distinguished.

PER CURIAM: if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound (see p. 198, letters D and E, post).

Appeal dismissed.

[As to confessions and statements by a defendant, see 10 HALSBURY'S LAWS (3rd Edn.) 469, 470, paras. 860-863; and for cases on the subject, see 14 DIGEST (Repl.) 480-486, 4578-4648.]

As to liability when a dangerous wound has been inflicted and the wounded person dies, see 10 HALSBURY'S LAWS (3rd Edn.) 706, para. 1353.]

Cases referred to:

- (1) *R. v. Megnell*, (1834), 2 Lew. C.C. 122; 168 E.R. 1100; 14 Digest (Repl.) 482, 4610.
- (2) *R. v. Sherrington*, (1838), 2 Lew. C.C. 123; 168 E.R. 1101; 14 Digest (Repl.) 489, 4713.
- (3) *R. v. Doherty*, (1874), 13 Cox, C.C. 23.
- (4) *R. v. Rue*, (1876), 34 L.T. 400; 13 Cox, C.C. 209; 14 Digest (Repl.) 481, 4592.
- (5) *Lord v. Pacific Steam Navigation Co., Ltd., The Oropesa*, [1943] 1 All E.R. 211; sub nom. *The Oropesa*, [1943] P. 32; 112 L.J.P. 91; 168 L.T. 364; 36 Digest (Repl.) 231, 1231.
- (6) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 2nd Digest Supp.
- (7) *R. v. Jordan*, (1956), 40 Cr. App. Rep. 152; 3rd Digest Supp.

Appeal against conviction by general court-martial.

The appellant, Thomas Joseph Smith, a private soldier in the first battalion of the King's Regiment, was convicted by a general court-martial sitting at Verden, Germany, on July 2, 1958, of the murder of Private David Creed, of the Gloucestershire Regiment, at Semmelage on Apr. 13, 1958, and was sentenced to imprisonment for life. He appealed against his conviction, the main grounds of appeal being (a) that confessions alleged to have been made by him were wrongly admitted as evidence at the trial, and (b) that the summing-up by the judge-advocate on the question of causation was defective.

Roderic Bowen, Q.C., and *H. K. Woolf* for the appellant.

E. Garth Moore for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was a private soldier in the King's Regiment. At the material time a company of the King's Regiment were sharing barracks with a company of the Gloucestershire Regiment, and on the night of Apr. 13, 1958, a fight developed. As a result of that fight three members of the Gloucesters were stabbed with a bayonet and one of them, Private Creed, subsequently died. It was for his murder that the appellant was convicted by a general court-martial in Germany. He was sentenced to imprisonment for life.

In this court several points have been quite properly taken by counsel for the appellant, but there are, in the view of the court, only two which merit consideration. The first one is the question whether two alleged confessions given by the appellant were wrongly admitted in evidence. It is a vital point because if it would be conceded, I think, that in the absence of the evidence of these confessions there would have been at the end of the case for the prosecution no evidence at all against the appellant.

The confessions arose in this way. The fight took place just before 10 p.m., and immediately after the fight the regimental sergeant-major of D company of

A the King's Regiment, having heard that there had been a fight and, as far as he knew, that two men had been stabbed—he did not know of the third and, indeed, Private Creed had not then died—put the company on parade in one of the barrack rooms, and he used words to the effect: "I am going to get to the bottom of this fighting and whoever did it must step forward." He indicated quite plainly that his intention was to keep them there until he could get to the bottom of the matter. Nobody did step forward, and he then addressed each man personally asking them where they were and, so far as this appellant is concerned, he got the answer: "I was in bed." The regimental sergeant-major still was not satisfied and he then said words to the effect: "I am not leaving. I am staying here until you give me an answer about this fight." It was at that point that the appellant stepped forward and said: "I did the stabbing." He was then asked what weapon he had used, and he replied: "A bayonet which was by the bed in the barrack room."

The court is quite clear that, while there was nothing improper in the action taken by the regimental sergeant-major, the evidence of what took place was clearly inadmissible at the appellant's trial. What the sergeant-major did might well have been a very useful course of action in order to enable further inquiries to be made, but the court is quite satisfied that, if the only evidence against the appellant was a confession obtained in those circumstances, it would be quite inadmissible at his trial. It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice*, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint a confession. To say to a man in the presence of the rest of his company, or rather to say to all those on parade, "You are staying here and are not going to bed until one of you owns up" is, in the view of this court, clearly a threat. It might also, I suppose, be looked on as an inducement in that the converse is true, "If one of you will come forward and own up, the rest of you can go to bed." Whichever way one looks at it, the court is clearly of opinion that, while the action was perfectly proper and a useful start, no doubt, to inquiries, evidence in regard thereto was clearly inadmissible.

The matter, however, does not rest there, because at about 7.30 the next morning Sergeant Ellis from the Special Investigation Branch came down to make inquiries, and he, when he first saw the appellant, gave him the usual caution. He, however, went on to refer then to what had happened the night before. Apparently, after administering the caution, he said:

"There was a disturbance last night in a barrack room in Polish Barracks. I understand that after the disturbance you admitted to your R.S.M. that you had been involved and that you stabbed three men of the Gloucestershire Regiment."

H Apparently Sergeant Ellis by then had been told that three men were involved. The appellant replied: "Yes, I am not denying it. I stabbed three of them all right." He was then asked if he wished to make a statement. He said: "Yes." A written caution was then made which the appellant signed, and there followed a statement which I need not read, but which admitted that he had stabbed about three of them altogether with a bayonet which he found on the floor of the room.

I It was urged by counsel for the appellant that the original taint in the confession given to the sergeant-major really persisted in these later confessions, both oral and in writing, and, in particular, counsel pointed to the fact that Sergeant Ellis at the outset referred to what had taken place, or what was said to have taken place, the evening before. Counsel for the appellant also referred us to a

* See 10 HALSBURY'S LAWS (3rd Edn.) 470, para. 865.

number of cases. It is unnecessary to refer to them in detail. He started with *R. v. Meynell* (1) ((1834), 2 Lew. C.C. 122), where, in regard to a second confession, TAUNTON, J., said (*ibid.*, at p. 123):

"I am clearly of opinion, that it is not receivable; it being impossible to say that it was not induced by the promise which the constable made to her in the morning."

In other words, he was saying that the second statement was inadmissible in that a promise made when the first statement was given was still in operation when the second statement was given. To the same effect was the opinion of PATTESON, J., in *R. v. Sherrington* (2) ((1838), 2 Lew. C.C. 123), where he said (*ibid.*, at p. 124):

"There ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination."

I should observe that in neither of those cases was a caution administered before the second statement was obtained

Counsel also referred to an Irish case, *R. v. Doherty* (3) ((1874), 13 Cox, C.C. 23), where WHITESIDE, C.J., in ruling on the admissibility of the second statement, said (*ibid.*, at p. 24):

"The judges have held that it must be shown that the prisoner thoroughly understood that he could expect no gain from a confession. The subsequent caution must be shown to have had the effect of removing all such expectation from the prisoner's mind."

Again, in *R. v. Rue* (4) ((1876), 13 Cox, C.C. 209), DENMAN, J., said (*ibid.*, at p. 210):

"There are cases which hold that a confession once rejected on the ground that it was made under an inducement does not become admissible merely from the fact that it was again made to some other person who has not held out an inducement, the inducement being deemed to be a continuing one. But I am not at this moment aware of any case in which it has been held that, where the person who held out the inducement is absent, then a confession made to a third party is not admissible, no fresh inducement having been held out. The general principle is clear, that if it is made out to the satisfaction of the judge that the statement was not made voluntarily, it is not admissible. It is not merely a question as to whom the confession is made or when it is made; but it is a matter in which you have to get at the mind of the prisoner, and see whether or not it is probable that the confession was made voluntarily, in the proper sense of the word."

Having consulted KELLY, C.B., DENMAN, J., held on the facts of that case that the second statement was so connected with the original inducement as to be inadmissible.

The court thinks that the principle to be deduced from the cases is really this: if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement. In the present case, the judge-advocate never had to

A rule on the confessions on the second occasion. As he had admitted the first* confession, there was no question but that the confessions on the second occasion must be also admissible. Accordingly, he never had to rule on the question of admissibility. He never had to exercise any discretion in the matter, and there was no occasion for his leaving it to the court to determine the value or weight to be attached to the second confessions. This court, however, is of the clear opinion that the second confessions were admissible. No doubt, the opening reference to what the appellant was said to have said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is quite clear that the effect of any original inducement or threat under which the first confession was made had been dissipated. Quite apart from the fact that the caution was given, and given twice, some nine hours had elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible.

D The second ground concerns a question of causation. The deceased man in fact received two bayonet wounds, one in the arm and one in the back. The one in the back, unknown to anybody, had pierced the lung and caused hæmorrhage. There followed a series of unfortunate occurrences. A fellow member of his company tried to carry him to the medical reception station. On the way he tripped over a wire and dropped the deceased man. He picked him up again, went a little further, and fell apparently a second time causing the deceased man to be dropped on to the ground. Thereafter he did not try a third time but went for help, and ultimately the deceased man was brought into the reception station. There, the medical officer, Captain Millward, and his orderly were trying to cope with a number of other cases, two serious stabbings and some minor injuries, and it is clear that they did not appreciate the seriousness of the deceased man's condition or exactly what had happened. A transfusion of saline solution was attempted and failed. When his breathing seemed impaired, he was given oxygen and artificial respiration was applied. He died after he had been in the station about an hour, which was about two hours after the original stabbing. It is now known that, having regard to the injuries

G * The passage in the judge-advocate's summing-up relating to the first confession, viz., the confession made on parade, was as follows:—

H "Now, as to the accused's admission, you will remember it is on those admissions that he is identified as the person who did in fact stab three men who were injured, including the deceased. At the parade over which Sgt.-Major Perkins presided the accused stepped forward—to his credit, as has been pointed out both by counsel and Col. Marshall—when the parade was addressed by the sergeant-major, who was asking that the person who had committed the stabbing should admit it. The accused stepped forward and said 'It was me, sir; I did the stabbing'. The sergeant-major asked the accused what he did the stabbing with, and the accused replied 'with a bayonet'. The sergeant-major then asked him where he got the bayonet and the accused replied

I "It was on the floor by the bed". The accused was then ordered into close arrest. Now, you will remember that at that time the sergeant-major had only referred to the stabbing of two men, not of three men, and at no time before him did the accused say that he had stabbed three men, but merely admitted in general that he was responsible for the stabbing. Then he made the second admission. I should, however, correct myself by one small point. When he first admitted the stabbing and stepped forward, he did not say "It was me, sir; I did the stabbing". It was when he was leaving the room in arrest and turning round that he said "It was me, sir; they had nothing to do with it". That was reference to the fact that Hornby and Clark had also stepped forward and said that they were implicated in the fighting, and the accused then turned to protest them. The prosecution, whilst paying tribute to his sense of fairness in doing this, asked the court to say that in doing it he was taking the blame for all the stabbing, and indicating that he alone of all the men in his regiment in that room was responsible for the stabbing."

which the deceased man had in fact suffered, his lung being pierced, the treatment which he was given was thoroughly bad and might well have affected his chances of recovery. There was evidence that there is a tendency for a wound of this sort to heal and for the haemorrhage to stop. No doubt his being dropped on the ground and having artificial respiration applied would halt, or at any rate impede, the chances of healing. Further, there were no facilities whatsoever for blood transfusion, which would have been the best possible treatment. There was evidence that, if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as seventy-five per cent.

In these circumstances counsel for the appellant urges that, not only was a careful summing-up required, but a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says counsel for the appellant, any other cause whether resulting from negligence or not, if, as he contends here, something happened here which impeded the chance of the deceased recovering, then the death did not result from the wound. The court is quite unable to accept that contention. It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult, when directing a jury or, as here, a court, to find a form of words which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of LORD WRIGHT in *Lord v. Pacific Steam Navigation Co., Ltd., The Oropesa* (5) ([1943] 1 All E.R. 211 at p. 215), where he said that, to break the chain of causation:

"It must always be shown that there is something which I will call ultraneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic."

To much the same effect was a judgment on the question of causation given by DENNING, J., in *Minister of Pensions v. Chennell* (6) ([1946] 2 All E.R. 719).

Counsel for the appellant placed great reliance on *R. v. Jordan* (7) (1956), 40 Cr. App. Rep. 152, a decision of the Court of Criminal Appeal, and, in particular, on a passage in the headnote which says:

"... that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but that the same principle does not apply where the treatment employed is abnormal."

Reading those words into the present case, counsel for the appellant says that the treatment which Private Creed received from the moment when he was struck until the time of his death was abnormal. The court is satisfied that *R. v. Jordan* (7) was a very particular case depending on its exact facts. It incidentally arose in the Court of Criminal Appeal on the grant of an application

A to call further evidence, and, leave having been obtained, two well-known medical experts gave evidence that in their opinion death had been caused, not by the stabbing, but by the introduction of Terramycin after the deceased had shown that he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid. It also appears that, at the time when that was done, the stab wound, which had penetrated the intestine in two places, had mainly healed. In those circumstances the court felt bound to quash the conviction because they could not say that a reasonable jury, properly directed, would not have been able, on that evidence, to say that there had been a break in the chain of causation; the court could uphold the conviction in that case only if they were satisfied that no reasonable jury could have come to that conclusion.

C In the present case it is true that the judge-advocate did not, in his summing-up, go into the refinements of causation. Indeed, in the opinion of this court, he was probably wise to refrain from doing so. He left to the court the broad question whether they were satisfied that the wound had caused the death in the sense that the death flowed from the wound, albeit that the treatment which the deceased man received was, in the light of after-knowledge, a bad thing. In the opinion of this court, that was, on the facts of the case, a perfectly adequate summing-up on causation; I say "on the facts of the case" because, in the opinion of the court, they can only lead to one conclusion: A man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination and the treatment given turns out in the light of subsequent knowledge to have been inappropriate and, indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly, the court dismisses this appeal.

Appeal dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re VERNAZZA.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.),
April 9, 1959.]

Vexatious Proceedings—Actions each disclosing a cause of action—Regard to be had to history of the matter—Whether proceedings were vexatious—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 51 (1).

In 1935 V. sued a company for £158,982 for breach of contract and/or wrongful dismissal. The action was dismissed in 1937. In 1938 V. brought an action in the Chancery Division claiming that the judgment in the earlier action should be set aside; in this action the statement of claim was struck out as vexatious. In 1938, 1939, 1940, 1952, 1953, 1957, 1958 and 1959 he took further proceedings or steps in proceedings before the courts arising out of the same claim as had been the subject of the action; all these were dismissed or refused. On a motion for an order under s. 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by V. without the leave of the High Court or a judge thereof, it was contended on V.'s behalf that as the process issued disclosed a cause of action, except in the second action where the statement of claim was struck out, the proceedings were not vexatious.

Held: in determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had throughout disclosed a cause of action, and in the present case, so regarded, the order should be granted.

[As to vexatious actions, see 1 HALSBURY'S LAWS (3rd Edn.) 19, para. 29.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 488.]

Motion.

This was an originating motion by the Attorney-General, brought on notice dated Feb. 19, 1959, for an order pursuant to s. 51 of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by the respondent, Mr. Anthony Vernazza, without the leave of the High Court or a judge thereof, by reason of the respondent's having habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. On July 11, 1935, a writ was issued by the respondent against Baburizza & Co., Ltd. claiming damages for breach of contract and/or wrongful dismissal. On June 16, 1937, the action was heard by SWIFT, J., and judgment was given for the defendants with no order as to costs, on the undertaking that £400 that was in court should be paid out to the plaintiff. The respondent appealed and on Mar. 10, 1938, the appeal was dismissed and leave to appeal to the House of Lords was refused. On June 2, 1938, the respondent issued a writ in the Chancery Division asking that the judgment of SWIFT, J., be set aside and claiming damages for conspiracy or fraud, and on Nov. 1, 1938, FARWELL, J., ordered the statement of claim to be struck out as vexatious. The respondent delivered a new statement of claim and, after divers applications, an application of the respondent for leave to deliver interrogatories was dismissed by FARWELL, J., on Dec. 19, 1939; appeal from this order was dismissed by the Court of Appeal, leave to appeal to the House of Lords was refused and subsequently the respondent's petition to the Appeals Committee of the House of Lords for leave to appeal was refused. On Oct. 8, 1957, a summons to dismiss the action of June, 1938, for want of prosecution came before HARMAN, J., and the action was dismissed in the absence of the respondent. Subsequently he appealed to the Court of Appeal from this order and his appeal was dismissed, leave to appeal to the House of Lords was refused, and a petition to the Appeals Committee of the House of Lords for leave to appeal was refused on July 24, 1958. On the same

A day, July 24, 1958, the respondent began an action against the company in the Chancery Division claiming that the judgment of SWIFT, J., should be set aside and on Dec. 12, 1958, this action was dismissed by WYNN-PARRY, J., as frivolous and vexatious and an abuse of the process of the court. The company had gone into voluntary liquidation in 1937 and the respondent had filed a proof for a debt of £158,982 0s. 6d.; the proof was rejected. In 1938 the respondent took out a summons for an order that his proof be allowed and subsequently in that year he took out a misfeasance summons against the liquidators, which latter summons was stood over pending the result of his first action in the Chancery Division. In 1958 the respondent issued a third summons asking for the removal of the liquidator of Baburizza & Co., Ltd. The three summonses were brought on before VAISEY, J., and were dismissed. In January, 1959, three notices or amended notices of appeal to the Court of Appeal were served by the respondent. In 1952 and 1953 two caveats were entered by the respondent in non-contentious proceedings for administration with the will annexed of one Francisco Petrinovic deceased; and in 1957 the respondent issued an originating summons and a writ in the Chancery Division against the Chase Manhattan Executor and Trustee Corporation, Ltd., the attorney administrators of the deceased Petrinovic. All these proceedings on the part of the respondent related to his claim for £158,982 0s. 6d., the deceased being alleged to have been chairman of the company and liable under guarantee or as tortfeasor in respect thereof.

It was now contended on behalf of the respondent that with the exception of the first Chancery action where the statement of claim was struck out as frivolous and vexatious, none of the proceedings could be said to be vexatious because the statements of claim or other process disclosed in each instance a cause of action.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and J. R. Cumming-Bruce for the applicant.

Arthur Bagnall for the respondent.

LORD PARKER, C.J.: This is really rather a tragic case in some ways.

F Apparently as long ago as 1935 the respondent was obsessed with the idea that he was owed by a company that he had served some £158,982 0s. 6d. for services rendered. He brought proceedings in the King's Bench Division claiming that sum. At the time when they came on before SWIFT, J., the respondent's leading counsel had advised him that he had no case, but thanks to some generosity on the part of the defendant company, judgment was entered by SWIFT, J., for the defendant but without costs on the understanding that the defendant would allow the plaintiff to take out and retain the £400 that was in court. Notwithstanding that, he persisted in this delusion. He has since brought actions in the Chancery Division and the Queen's Bench Division claiming in one form or another that that consent judgment ought to be set aside and that he is still owed this £158,000. During the course of the history of the matter the company concerned went into voluntary liquidation, and there followed in the Companies Court some five summonses, true to a large extent to retain the status quo and prevent the company distributing the assets, but all taken out under this delusion that he is owed some £158,000.

I For myself, I am quite satisfied that this is just the sort of case to which the section applies, and that an order should be made. Counsel for the respondent, to whom the court is very indebted, has appeared, instructed by the Official Solicitor on the respondent's behalf. He has put forward, quite properly, his submission that this case does not come within the section on the ground that, as he maintains, no action or no proceedings can be said to be vexatious if the statement of claim, or the process that starts the proceedings, in fact discloses a cause of action. Accordingly he says that if one looks at each of the proceedings in this case, except in regard to one Chancery action where the statement of claim was struck out as being frivolous and vexatious, there are no proceedings which can be said to be vexatious. I am quite satisfied that that contention is

wrong. In considering whether any proceedings are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed. This is in my judgment a clear case and there must be the order prayed.

DONOVAN, J.: I agree.

SALMON, J.: I agree.

Order accordingly.

Solicitors: *Treasury Solicitor* (for the applicant); *Official Solicitor* (for the respondent).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

KAHN v. NEWBERRY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, JJ.), April 10, 14, 1959.]

Shop—Hours of closing—Costermonger's barrow—Sale of goods in street from barrow after closing hour—Whether retail trade or business carried on in barrow or on piece of ground where barrow stood—Shops Act, 1950 (14 Geo. 6 c. 28), s. 12.

Judgment—Judicial decision as authority—Scottish and English decisions conflicting—English decisions followed.

On May 6, 1958, the appellant sold some apples from a costermonger's barrow at a late hour when it would be unlawful for a shop to be open in the locality for such sales. The barrow was then stationary in a street in London but it had no fixed location at that place. Under s. 12 (1)* of the Shops Act, 1950, it was unlawful to carry on "in any place not being a shop" a retail trade or business at a time when it would be unlawful to keep a shop open in the same locality for like trade. The appellant was convicted of an offence against s. 12. On appeal,

Held: the appellant was not guilty of an offence against s. 12 of the Shops Act, 1950, because neither his costermonger's barrow nor the piece of ground where the barrow was at the time when the sale was made was a place where he was carrying on a retail trade or business within the meaning of s. 12.

Elldorado Ice Cream Co., Ltd. v. Clark ([1938] 1 All E.R. 330) and *Stone v. Boreham* ([1958] 2 All E.R. 715) applied.

Nixon v. Capaldi (1949 S.C. (J.) 155) not adopted.

Per DONOVAN, J. (SALMON, J., concurring): the case of the itinerant hawker is not the case which Parliament had in mind when passing the Shops Acts (see p. 208, letter B, post).

Appeal allowed.

[Editorial Note. The position where a stall is regularly erected on the same piece of ground, so as to produce some permanency of the situation of the trade, is reserved for decision when the question arises (see p. 208, letters A and F, post).]

* The relevant terms of s. 12 are printed at p. 204, letter A, post.

A As to trading elsewhere than in shops, see 17 HALSBURY'S LAWS (3rd Edn.) 196, para. 321.

For the Shops Act, 1950, s. 2, s. 12, see 29 HALSBURY'S STATUTES (2nd Edn.) 191, 198.]

Cases referred to:

- B** (1) *Stone v. Boreham*, [1958] 2 All E.R. 715; [1959] 1 Q.B. 1.
 (2) *Eldorado Ice Cream Co., Ltd. v. Clark, Eldorado Ice Cream Co., Ltd. v. Keating*, [1938] 1 All E.R. 330; [1938] 1 K.B. 715; 107 L.J.K.B. 290; 158 L.T. 249; 102 J.P. 147; 24 Digest (Repl.) 1114, 560.
 (3) *Nixon v. Capaldi*, 1949 S.C. (J.) 155; 24 Digest (Repl.) 1109, 170.
 (4) *Coulairs Co-operative Society, Ltd. v. Glasgow Corpn.*, [1957] S.L.T. 288.

C **Case Stated.**

This was a Case Stated by the chairman of the appeal committee of the County of London Sessions at the instance of the appellant, Bidrich Kahn.

D On July 10, 1958, on a summons laid by the respondent (a duly authorised officer acting on behalf of the London County Council), the appellant was convicted by the justices of the Westminster Petty Sessional Division, sitting at Westminster City Hall, of an offence against s. 12 of the Shops Act, 1950, in that on May 6, 1958, in a place not being a shop, to wit a pitch on the east side of Great Windmill Street, London, he unlawfully carried on a retail trade or business (namely, the sale of apples) after 8 p.m., being a time when it would be unlawful in that locality under s. 2 of the Act of 1950 to keep a shop open for the purposes of retail trade or business, the sale of apples not being a transaction mentioned in Sch. 2 to the Act. A fine was imposed on the appellant under s. 14 of the Act. The appellant appealed to the appeal committee of the County of London Sessions.

E At the hearing of the appeal on Aug. 15, 1958, the following facts were found. On May 6, 1958, between 10.20 p.m. and 10.25 p.m., the appellant was standing beside a stationary costermonger's barrow on a pitch in Great Windmill Street, on the east side, about five yards north of the junction of Coventry Street. **F** During that period he sold several apples to two different customers. The appellant was carrying on a trade or business not being a transaction mentioned in Sch. 2 to the Shops Act, 1950. The costermonger's barrow was not a moving vehicle*.

G The appellant contended that the costermonger's barrow was a moving vehicle and, as such, was not liable to the provisions of the Act of 1950. The respondent contended (a) that a stationary costermonger's barrow was not a moving vehicle and was a place within the meaning of s. 2 and s. 12 of the Act of 1950; and (b) that the pitch on which retail trade or business was carried on from a stationary costermonger's barrow was a place within the meaning of s. 2 and s. 12 of the Act of 1950. The appeal committee were of the opinion that **H** the appellant was engaged in carrying on a retail trade or business after 8 p.m. in a place not being a shop in a locality where it was unlawful to keep open a shop for the purposes of retail trade or business, and dismissed the appeal. The question for the opinion of the High Court was whether they came to a correct decision in point of law.

The appellant appeared in person.

I *Paul Wrightson* for the respondent.

LORD PARKER, C.J.: I will ask DONOVAN, J., to give the first judgment.

DONOVAN, J.: This is an appeal by way of Case Stated from a decision of the appeal committee of the County of London Sessions dismissing an appeal by the appellant against his conviction by the Westminster justices for trading in contravention of the terms of s. 12 of the Shops Act, 1950. The Case finds that

* As to this finding, see p. 207, letters H and I, post.

the appellant on May 6, 1958, sold apples from a barrow which was stationary at the time in Great Windmill Street. Section 12 provides: A

"It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class..." B

Section 2 (1) of the same Act makes it unlawful for a shop to keep open for the serving of customers after certain hours; in the winter months, after seven o'clock in the evening on what is called "the late day" and six o'clock on any other evening; and outside the winter months after nine o'clock in the evening on the late day and eight o'clock on any other evening. The appellant, however, was serving apples from his barrow in Great Windmill Street between 10.20 p.m. and 10.25 p.m. C

The appeal committee found that this business was not one of those exempted from the closure provisions of the Act of 1950 by Sch. 2 to the Act*, and they further found that the appellant's costermonger's barrow was not a moving vehicle. Without giving reasons the appeal committee then decided that the appellant was in breach of s. 12 and dismissed his appeal. He now contends that they should have allowed it, and he relies on the recent decision of this court in *Stone v. Boreham* (1) ([1958] 2 All E.R. 715). Prior to that decision there were other cases on the same or a similar point, two in Scotland and one in England. In 1938 this court decided *Eldorado Ice Cream Co., Ltd. v. Clark*, *Eldorado Ice Cream Co., Ltd. v. Keating* (2) ([1938] 1 All E.R. 330) and held that a movable box-tricycle from which ice cream was being sold was outside the relevant provisions of the Shops (Sunday Trading Restriction) Act, 1936†. Those provisions were s. 11 (1) and s. 13‡. Section 11 (1) laid down that D

"... no person shall be employed on Sunday about the business of a shop which is open for the serving of customers ... unless the following requirements are complied with ..." E

Then followed certain requirements, which I need not detail, and which provided for extra time off for the employees. Section 13 of the Act of 1936 provided: F

"... the provisions of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop..."

In *Eldorado Ice Cream Co., Ltd. v. Clark* (2) this court was dealing with a decision by the justices that each of two box-tricycles from which sales were made was a "place" where retail trade or business was carried on, within s. 13 of the Act of 1936, and, therefore, was to be treated as a shop. The court held that that was wrong and that a box-tricycle was not such a place. LORD HEWART, C.J., said, among other things ([1938] 1 All E.R. at p. 334): G

"Here the contention was boldly made, not indeed that any warehouse was a shop, nor that the place where, at a given moment, the box-tricycle was to be found was a shop, but that each of the two box-tricycles themselves, from which sales were made, was a place where retail trade or business was carried on within the meaning of s. 13 of the Act ... when one looks at s. 11, and, indeed, at the whole scheme for the purposes of this Act — which begins with the provision about the closing of shops and the serving of customers in shops, which s. 11 contains the words [which he had quoted] ... it is essential that the place where the employment is carried on must be the place which is either a shop or premises akin to a shop, so as to be a place within the meaning of s. 13. What does s. 13 say? It does not say H

* By s. 2 (3) (b) the transactions mentioned in Sch. 2 are not affected by the provisions of s. 2 (1). I

† This Act was repealed and replaced by the Shops Act, 1950.

‡ See now s. 22 (1), s. 23, and s. 58 of the Act of 1950.

A that any retail sale at all, wherever made, shall be within the meaning of the Act; it does not prohibit the transaction of selling . . . To re-write, therefore, s. 11, as [the argument of counsel for the respondent] seeks to extend it, one gets some such result as this: 'No person shall be employed on Sunday about the business of a box-tricycle which is open for the serving of customers on that day unless the following requirements are complied with'.

B When one looks at s. 13, the place which is referred to is 'any place where any retail trade or business is carried on', not any apparatus by means of which, or any place from which, retail trade or business is carried on. So one finds in the proviso to s. 13, any person employed 'in connexion with the retail trade or business carried on thereat'. All through these sections one finds words which denote locality and position, a definite fixed locality or position, and so one finds in the regulations which are made under the

C Act [the Shops Regulations, 1937] that it is required, among other things, that the address of the place shall be stated. What would be the address of the tricycle, if the tricycle be a place? "

LORD HEWART, C.J., went on to say that the box-tricycle was not such a place, and the appeal was allowed.

D Eleven years later, in 1949, *Nixon v. Capaldi* (3) (1949 S.C. (J.) 155) came before the High Court of Justiciary in Scotland. That case arose under s. 9 of the Shops Act, 1912*, which provided:

E "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class . . ."

It is to be noted at the outset that the Act of 1912 was not dealing merely with Sunday trading, as was the Act of 1936 under which the *Eldorado* case (2) arose; but it is difficult to see any material difference in the wording of the respective

F sections. Section 13 of the Act of 1936 was also dealing with a "place not being a shop", because the section provided that the Act should apply "as if that place were a shop". Furthermore, the kind of "place" which each Act has in view is described in similar language. In each case it must be a place where retail trade or business is carried on. The High Court of Justiciary held that, in selling ice cream from a mobile van outside permitted hours, Mr. Capaldi was in

G breach of s. 9 of the Act of 1912, because, in their view, he was carrying on a retail trade or business in a place not being a shop. The High Court of Justiciary were obviously not impressed with the English decision in the *Eldorado* case (2) and certain distinctions were tentatively suggested. Thus, LORD MACKAY said (1949 S.C. (J.) at p. 160):

H "I agree with what your Lordship has said about that decision. It dealt with a wholly different and English Act. The statute in England was not dealing with the closing of shops in order that employees should not be over-employed or with any similar topic. It dealt with releasing Sunday trading restrictions under old English Acts, and that a releasing only to a limited extent. It may be that the same words 'place other than a shop' have to receive one construction in a Scottish statute and a different construction in an English statute, inasmuch as each of these statutes deals with quite a different evil. If, however, it should fall to me to choose between the reasoning of the two learned sheriffs in Scotland and that of the Lord Chief Justice in England, I should certainly agree with the Scottish decisions, in respect, inter alia, that they correctly bring into play the main purpose of the statute and the mischief it is supposed to remedy."

I

* This Act was repealed by the Act of 1950.

The reference there to the two sheriffs is to two previous decisions* which were similar to that of the High Court of Justiciary in *Nixon v. Capaldi* (3). I have set out above the language of s. 9 of the Act of 1912 and of s. 13 of the Act of 1936, and, as I have said, I find it difficult to detect any difference which is crucial.

Then came another case in Scotland, namely, *Cowlairs Co-operative Society, Ltd. v. Glasgow Corpn.* (4) ([1957] S.L.T. 288). That case arose under the Shops Act, 1950, which consolidated the various statutes on this subject-matter. The co-operative society was prosecuted under s. 12, as is the appellant in the present case, and it was held that, in carrying on a retail grocery trade from a mobile shop van on a vacant piece of land held on a ninety-nine year lease, and during the afternoon of a day which had been fixed as the weekly half-holiday for grocers' shops in the locality, the society was in contravention of s. 12. The van was towed to the vacant land each morning and towed back to its garage at night. The society contended that there was sufficient permanence about the arrangement to constitute the van "a shop", and that it was, therefore, not within the scope of s. 12 which refers to "any place not being a shop". This contention the High Court of Justiciary rejected, holding that the fundamental idea in the definition of a "shop" for the purposes of the Act was that the trading must be carried on from premises and that the van could not be regarded as "premises". There was a subsidiary argument for the society based on the right to elect for early closing on Saturday, which is not relevant here. There was naturally no argument to the effect that the van was not a "place" from which retail trade or business was carried on because the contrary had already been decided in Scotland in *Nixon v. Capaldi* (3).

Finally, in 1958 this court decided *Stone v. Borcham* (1), which arose under s. 58 and s. 74 (1) of the Shops Act, 1950. Section 58 reproduced the effect of s. 13 of the Shops (Sunday Trading Restriction) Act, 1936. Section 58 is in Part 4† of the Act dealing with Sunday trading, and it provides that, with certain specified exceptions which are not here material:

"The foregoing provisions of this Part of this Act . . . shall extend to any place where any retail trade or business is carried on as if that place were a shop . . ."

Then s. 74 (1) defines "shop" as including "any premises where any retail trade or business is carried on". Accordingly, a "place" where such trade is carried on, even if it is not a shop within the definition, for example, because there are no "premises", is to be treated as if it were a shop for the purposes of s. 58. In *Stone v. Borcham* (1) a mobile van, equipped as a mobile shop and stocked with a variety of goods, stopped in a street on a Sunday and the owner, the respondent in the case, sold a packet of tea to a customer standing in the roadway. If the mobile van or the site it occupied were "a place where . . . retail trade or business [was] carried on" within the meaning of s. 58, an offence was committed: see s. 47‡ of the Act. The argument for the appellant in that case was, not that the van was such a place because that contention was precluded by the decision in the *Eldorado* case (2), but that the ground on which the van rested at the time was such a place. That argument likewise failed, and Lord GODDARD, C.J., said ([1958] 2 All E.R. at p. 717):

" . . . I cannot hold that a retail trade or business is carried on in a mobile shop. At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on there. A man carries on business from an address. I do not think that the words in these

* *Glasgow Corpn. v. Murphy*, (1915), 31 Sh. Ct. Rep. 82, and *Dundee P. v. Fiscal v. Casgrove*, (1938), 54 Sh. Ct. Rep. 152.

† Part 4 of the Act consists of s. 47 to s. 66, inclusive.

‡ Section 47 provides for the closing of shops on Sundays.

A sections apply to a mobile van of this sort. I do not for my part think it necessary to go into a long account of the Shops Acts or the Scottish cases, because *Eldorado Ice Cream Co., Ltd. v. Clark* (2), to which the justices refer, which is a decision of this court, is binding on us. Whether, if the case was res integra, we might come to a different decision I need not inquire."

B LORD GODDARD, C.J., went on to say that it would be really fanciful to distinguish the *Eldorado* case (2) on the ground that there the court was concerned with the box-tricycle itself, whereas, in *Stone v. Borcham* (1), it was concerned with the ground on which the mobile van stood, and with that view SLADE and DEVLIN, JJ., agreed. It should be said, however, that SLADE, J., remarked that, if the matter had been res integra, he would have decided otherwise, being

C impressed by the Scottish decision in *Nixon v. Capaldi* (3). DEVLIN, J., on the other hand, preferred the English decision in the *Eldorado* case (2) to that in *Nixon v. Capaldi* (3). He said ([1958] 2 All E.R. at p. 719):

"The Shops Act, 1950, is extended by s. 58 to any place where the retail trade or business is carried on, but not to any place where the sale happens to be effected. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. Clearly it may well have been a dozen . . . similar places which could equally well be described as the place where a sale happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? So to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are so many sections of the Act which make it clear that s. 58 has in mind a place where business is carried on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought. That is s. 47, which says: 'Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday'. That, to my mind, makes it quite plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. The ordinary man could not make sense of a requirement of the law that, in the words of this information, he should close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. It is very undesirable that this court should strain to give meanings to a section of the Act which would be to produce a result incomprehensible to the traders who have to comply with it. The result is, as my Lord has said, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose."

In the case now before us, although the appeal committee found, among other things, that the appellant's barrow was not a moving vehicle, it is common knowledge that a costermonger's barrow is something on wheels and is pushed about. The committee can, I think, mean no more than that the barrow was not moving at the time of the sale, which is in no sense a decisive consideration, and, although this is not in the Case, the appellant told us, and we can well believe it, that he had to move about, particularly on the appearance of a policeman. If the barrow is treated as a mobile counter, I can see no relevant distinction between this case and *Stone v. Borcham* (1). Counsel for the respondent said that that decision and the decision in the *Eldorado* case (2) were decisions dealing with Sunday trading, whereas the two Scottish decisions and the present case dealt with weekday trading, and different statutes, at any rate originally, were involved. That is quite true. For that reason I have referred

to the actual wording of the respective provisions, and I find no such difference as would, in my opinion, justify this court in not following the decision in *Stone v. Boreham* (1).

Two things perhaps might finally be said. This case is not the case where a stall is regularly erected on the same piece of land so that an aspect of some permanency is given to the site as one where goods are regularly sold by retail. It may be that such a place would be within the language of s. 12 and s. 58 of the Shops Act, 1950. That case can be left to be decided if and when it arises. Secondly, the case of the itinerant hawker is not, in my view, the case which Parliament had in mind when passing the various Shops Acts. My first reason for saying that is because the language of those Acts, which, as has been pointed out before in this court, seems to contemplate shops, in the ordinary sense of the word, and other places, not being shops, but with sufficient aspect of permanency about them to warrant them being treated as shops. My second reason is that, although this court held over twenty years ago that a mobile selling vehicle was not within the Shops Act, Parliament has taken no steps to bring such a contrivance within this legislation. In Scotland it would seem that the view has been taken that no undue straining of the words of the Acts is required to achieve this result. In England the opposite view has prevailed. I think that the court must follow the English view and that this appeal must be allowed.

SALMON, J.: I agree with everything that has fallen from my Lord and there is nothing that I can usefully add.

LORD PARKER, C.J.: I have come to the same conclusion. In particular, after reading the two material sections of the Shops Act, 1950, namely, s. 12 and s. 58, dealing respectively with what I may call weekday trading and Sunday trading, I can find no material distinction. It seems to me that the test or criterion to be applied, in deciding whether a piece of ground is a shop where retail trade or business is carried on, is the same under both sections. That being so, it follows that this court is bound by the English decisions to which *DONOVAN, J.*, has referred and, in particular, by the decision of this court in *Stone v. Boreham* (1). Looking at the matter in the way which I have just mentioned, I can see no distinction between the barrow in the present case and the mobile van in *Stone v. Boreham* (1) except to a slight degree. I would, like my Lords, specifically reserve for a future occasion the question whether, if a barrow has a fixed location either by practice or by licence, it would come within the sections. It seems to me, as at present advised, that the only real difference between the decisions in England and those in Scotland turns on the degree of permanency necessary. If one looks at the judgments of *LORD GODDARD, C.J.*, and *DEVLIN, J.*, in *Stone v. Boreham* (1), I think that that becomes quite clear. The English decisions emphasise that it requires more than a casual retail sale to constitute a piece of ground the place where a retail trade or business is carried on, whereas the High Court of Justiciary in Scotland has gone the length of saying that any place from which a casual sale is carried out is a place within the section. I agree that this appeal must be allowed.

Appeal allowed.

Solicitor: *Solicitor, London County Council* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ROBERTS v. ROBERTS AND PETERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Stevenson, J.), March 3, 1959.]

Divorce—Practice—Rescission of decree—Co-respondent an infant at date of decree—No guardian appointed—Petition served on co-respondent personally—Undefended suit—Summons by petitioner for rescission of decree—Jurisdiction of judge to order rescission—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 66 (3).

On June 24, 1958, the husband obtained a decree nisi for the dissolution of his marriage on the ground of the wife's adultery with the co-respondent, the suit being undefended. Shortly afterwards, it was discovered that the co-respondent was an infant. The petition had been served on the co-respondent personally, and not on his father or guardian as required by r. 66 (3)* of the Matrimonial Causes Rules, 1957. The husband applied by summons for the decree nisi to be rescinded and for the co-respondent's father to be appointed as the co-respondent's guardian for the purpose of the proceedings.

Held: the court had no jurisdiction to rescind the decree nisi on an application by summons, because non-compliance with r. 66 (3) of the Matrimonial Causes Rules, 1957, vitiated the subsequent proceedings (*Stanga v. Stanga*, [1954] 2 All E.R. 16, applied); the correct procedure was for the husband to move the Divisional Court to set aside the decree and order a re-hearing of the petition.

Griffiths v. Griffiths ((1912), 106 L.T. 646) and *Rutter v. Rutter* (No. 2) ([1921] P. 421) considered.

[As to service in a matrimonial cause on an infant, see 12 HALSBURY'S LAWS (3rd Edn.) 325, 326, paras. 662, 663, and Supplement; and for cases on the subject, see 27 DIGEST (Repl.) 582, 5410, 686, 6561, 688, 6578, and 3rd DIGEST Supp.]

For the Matrimonial Causes Rules, 1957, r. 36, r. 66 (3), (4), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 237, 251, 252.]

Cases referred to:

- (1) *Stanga v. Stanga*, [1954] 2 All E.R. 16; [1954] P. 10; 3rd Digest Supp.
- (2) *Gore-Booth v. Gore-Booth*, [1953] 2 All E.R. 1000; [1954] P. 1; 3rd Digest Supp.
- (3) *Ousey v. Ousey & Atkinson*, (1875), 1 P.D. 56; 45 L.J.P. 33; 33 L.T. 789; 27 Digest (Repl.) 686, 6561.
- (4) *Griffiths v. Griffiths*, (1912), 106 L.T. 646; 27 Digest (Repl.) 688, 6578.
- (5) *Rutter v. Rutter* (No. 2), [1921] P. 421; 90 L.J.P. 366; 126 L.T. 120; 27 Digest (Repl.) 582, 5410.

Summons adjourned into court.

The husband and wife were married in 1950 and there were four children of the marriage. On Dec. 16, 1957, the co-respondent made a statement admitting adultery with the wife, and the wife made a statement in similar terms. On Jan. 20, 1958, the husband filed a petition on the ground of the wife's adultery with the co-respondent, and on Jan. 25, 1958, the petition was served on the co-respondent. On his father's advice the co-respondent returned the acknowledgment of service and did nothing further in the matter. On June 24, 1958, in an undefended suit, His Honour JUDGE LEON granted the husband a decree nisi and awarded costs against the co-respondent. A few days later it was ascertained that the co-respondent was an infant. By a summons dated Sept. 29, 1958, and served on the father of the co-respondent, the husband applied to have the father appointed as guardian ad litem of the co-respondent, so that the father could defend on behalf of the co-respondent an application to have the

* The terms of r. 66 (3) are printed at p. 210, letter H, post.

decree nisi rescinded, since r. 66 (3)* of the Matrimonial Causes Rules, 1957, had not been complied with. The father did not oppose the application. The registrar who heard the application did not think that he had power under r. 66 (4)† of the Rules of 1957 to make the order which was sought and referred the matter to STEVENSON, J., in chambers. On Oct. 14, 1958, the summons came before STEVENSON, J., in chambers and was adjourned generally. On Dec. 18, 1958, STEVENSON, J., re-heard the summons in chambers and made an order appointing the co-respondent's father guardian ad litem for the purpose of having the decree nisi rescinded. As it was desired, if it were possible, to have the decree rescinded by a shorter method than moving the Divisional Court under r. 36 of the Rules of 1957, HIS LORDSHIP directed that a further summons be issued by the husband asking for the decree nisi to be rescinded, that the summons should be served on the wife, the co-respondent, the father of the co-respondent, and the Queen's Proctor, and that the matter should be adjourned into court for argument by counsel for the Queen's Proctor on the question whether the decree nisi might be rescinded by a judge. Accordingly, on Feb. 24, 1959, the husband took out the present summons for rescission of the decree nisi pronounced on June 24, 1958, and asking that the father of the co-respondent be assigned his guardian by whom he might appear and defend this cause or otherwise for the purpose of these proceedings. At all material times both the wife and the father of the co-respondent clearly indicated that they did not intend to defend the application, or a re-hearing of the suit, as it was the intention of the wife and the co-respondent to get married after the husband had obtained a decree absolute. The summons came before STEVENSON, J., in court.

N. H. Curtis-Raleigh (A. T. R. Fletcher with him) for the husband.

Brian T. Neill for the Queen's Proctor.

STEVENSON, J.: This is a summons taken out on behalf of a husband petitioner asking, in effect, for rescission of a decree nisi which was pronounced on his petition on June 24, 1958, and that one Arthur Leonard Peters, the father of the co-respondent, Michael John Peters, should be appointed as the co-respondent's guardian by whom the co-respondent may appear and defend this case and otherwise for the purpose of these proceedings.

The petition in this case was filed on Jan. 20, 1958, alleging adultery between the respondent wife and the co-respondent. It is common ground that the co-respondent was at all material times an infant and no guardian ad litem was appointed to represent him, as r. 66 (3) of the Matrimonial Causes Rules, 1957, requires. The language of r. 66 (3) is as follows:

"Where service of any document in a cause to which these rules apply is required to be effected on an infant, the document shall, unless otherwise directed, be served on the father or guardian of the infant or, if he has no father or guardian, on the person with whom he resides or under whose care he is, and service so effected shall be deemed good service on the infant, so however that a registrar may order that service effected or to be effected on the infant shall be deemed good service."

It is a most unfortunate fact that no one representing the husband realised that the co-respondent was a minor until after His Honour Judge LEECH had granted a decree nisi, on June 24, 1958, dissolving the marriage on the ground of adultery between the wife and the co-respondent; he also made an order

* Rule 66 (3) is printed at letter H, above.

† Rule 66 (4) reads: "Where a petition . . . has been served in accordance with [r. 66 (3)] and no appearance has been entered on behalf of the infant, the party at whose instance the petition . . . was served shall, before proceeding further with the cause, apply for an order that some proper person be assigned guardian of the infant by whom he may appear and defend or intervene in the proceedings."

A for costs against the co-respondent. A few days after that was done the mistake was discovered and on Sept. 29, 1958, the husband took out a summons to appoint the father of the co-respondent as guardian ad litem. That summons came before me in December, 1958, having been referred to a judge by the registrar before whom it first came. There was some discussion, but not a full examination, in chambers as to the appropriate procedure, and the matter was adjourned in order that those advising the husband might have a fuller opportunity of considering the position than they then had had. I expressed the view that in the circumstances it was unlikely that the parties would be able to avoid the necessity of moving the Divisional Court for the rescission of the decree nisi and a re-hearing*, but it was earnestly desired to consider other and shorter methods of achieving that purpose, with the result that the present summons now comes before me asking that the decree nisi should be rescinded by me. On this hearing I have had the advantage of an argument by counsel for the Queen's Proctor.

Stanga v. Stanga (1) ([1954] 2 All E.R. 16) makes it abundantly clear that non-compliance with the rule which prescribes the way in which service on, or on behalf of, an infant is to be effected of necessity vitiates all the subsequent proceedings which follow on that defective service. *Gore-Booth v. Gore-Booth* (2) ([1953] 2 All E.R. 1000) demonstrates the same proposition. That was a case where service purported to be effected on a person then under care and treatment in a mental home and, on a motion to the Divisional Court, the decree was set aside and a re-hearing ordered so that the Official Solicitor might be appointed as guardian ad litem of the respondent in that case to carry on the proceedings on his behalf.

Counsel for the husband put before me *Ousey v. Ousey & Atkinson* (3) ((1875), 1 P.D. 56), *Griffiths v. Griffiths* (4) ((1912), 106 L.T. 646) and *Rutter v. Rutter* (No. 2) (5) ([1921] P. 421). He relied, in particular, on *Griffiths v. Griffiths* (4), which may be described as the high water mark which his argument reached, as justifying me in rescinding the decree in this case. That was a case where a wife petitioned for dissolution of marriage, or, in the alternative, for a judicial separation. The husband did not enter an appearance and filed no answer, and on June 11, 1909, a decree nisi of dissolution was pronounced. In 1912 the husband applied by summons that the decree nisi should be rescinded and the petition dismissed for want of prosecution, on the ground that the decree had never been made absolute. The wife opposed that application and asked for a rescission of the decree nisi and for a decree of judicial separation in lieu thereof. SIR SAMUEL EVANS, P., gave the following judgment (106 L.T. at p. 646):

"In the present case the guilty husband, the respondent, entered no appearance to the suit instituted by his wife. A decree nisi was pronounced in due course. Now the wife, for some reason or other, which I do not require to know, wants her decree nisi changed to a decree of judicial separation. I do not think that the respondent has any right whatever to come here and make any suggestion as to what course should be pursued under the circumstances, and consequently I see no cause why the petitioner should not have the change she requires effected. The decree nisi will be rescinded, a decree of judicial separation will be pronounced, and the petitioner will have the custody of the children of the marriage, with costs."

I The result of that case appears to be that the wife, in her application for a final decree, sought what was, in effect, a change of the relief from dissolution to judicial separation, for which she had originally asked in the alternative in her petition. It does not appear from the report that the question of jurisdiction was very closely argued, and I am unable to regard that case as an authority

* By r. 36 (1) of the Matrimonial Causes Rules, 1957: "An application for re-hearing of a case heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate, Divorce and Admiralty Division".

which would justify me in doing what I am asked to do on the present summons, particularly having regard to the effect of the judgments in *Stanga v. Stanga* (1) and *Gore-Booth v. Gore-Booth* (2), as I understand them. A

Reliance was also placed by counsel for the husband on *Rutter v. Rutter* (No. 2) (5), a case in which a husband's petition for dissolution had been dismissed and a decree nisi had been granted to the wife on the cross-charges in her answer. The wife, who was a minor without a guardian, filed a petition for maintenance, and the husband took out a summons to dismiss the petition for maintenance and asked that the costs already paid to the wife might be paid into court until the decree was made absolute. The wife moved to rescind the decree nisi. It was held that the husband, being the guilty party, could have no relief, and the wife's motion was dismissed, with an intimation that, if renewed, it must be by a guardian. What is significant about this case is that Sir HENRY DUKE, P., refused to make any order rescinding the decree and dismissed the wife's motion, saying ([1921] P. at p. 424): B C

"I am satisfied however that I have power to make such an order if the circumstances of the case warranted it. But if the wife applies again she must apply by her guardian, who will at any rate be responsible for costs." D

I am equally unable to regard that as an authority which will justify me in saying that I can rescind the decree in the present case. Much as I regret it, and I feel sympathy for the parties, I can see no escape from the conclusion that the husband petitioner must move the Divisional Court in this case to rescind the decree and ask for a re-hearing because the original trial was completely vitiated by the defect in service. E

Summons dismissed.

Solicitors: *Pothecary & Barratt*, agents for *Ottaways*, St. Albans (for the husband); *Queen's Proctor*.

[Reported by N. P. METCALFE, ESQ., *Barrister-at-Law*.]

CATER v. ESSEX COUNTY COUNCIL.

QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.),
April 14, 1959.]

Town and Country Planning—Enforcement notice—Validity—Wrong factual basis—Development alleged to have been carried out without planning permission—Permission for twenty-eight days under general order—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (1)—Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3 (1), Sch. 1, Class IV, para. 2.

In 1954 the appellant began to use his land as a caravan site. He applied to the local planning authority under the Town and Country Planning Act, 1947, for permission so to use the land, and his application was refused. On Dec. 12, 1956, the planning authority served an enforcement notice on the appellant under s. 23 (1) of the Act of 1947* requiring him within three months to discontinue "the use of the said land comprising the said development" and reciting that "it appears to the [planning authority] that development consisting of a material change of use has been carried out on the land . . . without the grant of permission required in that behalf under Part 3 of the Act, the said land being used for the purpose of a caravan site". The appellant relied on the Town and Country Planning General Development Order, 1950, art. 3 (1) and Sch. 1, Class IV, para. 2, whereby permission was given for the "use of any land for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use".

Held: the enforcement notice was a nullity, because the permission afforded by art. 3 (1) of the Order of 1950 and para. 2 of Class IV of Sch. 1 to that order was a permission granted under Part 3 of the Act of 1947 in relation to the appellant's land when the caravans were first brought on to it, and the recital in the enforcement notice was untrue.

Francis v. Yiewsley & West Drayton U.D.C. ([1957] 3 All E.R. 529) applied.
Appeal allowed.

[For the Town and Country Planning Act, 1947, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 524.

For the Town and Country Planning General Development Order, 1950, Sch. 1, Class IV, see 21 HALSBURY'S STATUTORY INSTRUMENTS 158.]

Cases referred to:

- (1) *Francis v. Yiewsley & West Drayton U.D.C.*, [1957] 3 All E.R. 529; [1958] 1 Q.B. 478; 3rd Digest Supp.
- (2) *East Riding County Council v. Park Estate (Brillington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223; 120 J.P. 380; 3rd Digest Supp.
- (3) *Mayor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices in respect of their adjudication as a magistrates' court sitting at Romford on July 25, 1958. The Essex County Council, as local planning authority, preferred an information against the appellant that he on Apr. 14, 1958, at Romford without the grant of permission in that behalf under Part 3 of the Town and Country Planning Act, 1947, used land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated Dec. 12, 1956, which required such use to be discontinued, contrary to s. 24 of the said Act. The justices found the offence proved and fined the appellant in the sum of £20. The facts

* The relevant terms of this sub-section are printed at p. 217, letter B, post.

found by the justices appear from the judgment of LORD PARKER, C.J. It was contended by the appellant (a) that the facts alleged and proved did not amount to a breach of the enforcement notice; (b) that the prosecution was out of time; (c) that the enforcement notice was bad in that it did not comply with s. 23 of the Act of 1947, because the notice failed to specify the development as required by that section, it made no allegation of the manner in which the use of the land was said to have been changed, and it made no allegation of the date on which any such change occurred; (d) that the enforcement notice was bad in that it alleged that development consisting of a material change of use had been carried out without the grant of the requisite permission whereas in fact permission for the alleged change of use was granted by the Town and Country Planning General Development Order, 1950, art. 3 and Sch. 1, Class IV, para. 2. The justices did not require the planning authority to argue on any of those submissions. They were of the opinion that the enforcement notice was valid, that the facts proved amounted to a breach of the notice and that the prosecution was in time.

R. E. Megarry, Q.C., and R. Higgins for the appellant.

F. H. Lawton, Q.C., and J. G. Marriage for the respondents, the local planning authority.

LORD PARKER, C.J.: This is another of the many difficult cases which have arisen in regard to an enforcement notice under the Town and Country Planning Act, 1947, s. 23 (1). The matter comes before the court by way of Case Stated by Justices for the Petty Sessional Division of Romford, before whom the appellant was charged that on Apr. 14, 1958, at Romford,

"without the grant of permission in that behalf under Part 3 of the Town and Country Planning Act, 1947, used certain land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated Dec. 12, 1956, which required such use to be discontinued, contrary to s. 24 of the Town and Country Planning Act, 1947."

The justices were faced with several technical points which were taken by the appellant, who was the party charged, and one has very great sympathy with them when, all the merits being with the respondents, the County Council of Essex, they thought nothing of the points raised, and indeed did not require the county council to argue on them. They accordingly found the offence proved and fined the appellant £20.

The short facts giving rise to the matter were these: The appellant was at all material times the owner of a little over six acres of land which apparently prior to 1954 were used as a smallholding. In that year, 1954, he allowed caravans to be parked on the land, and by Jan. 21, 1955, the number had increased to about ninety caravans. Application was made to the local planning authority for permission and it was refused. There was an appeal to the Minister, a local inquiry was held, and in due course on July 19, 1956, the Minister gave his decision, which was to the effect that he had decided that the appeal must be dismissed, but that, as the notice went on:

"While he deprecates the bringing of this camp into use without planning permission, he has much sympathy with the caravan occupiers and he relies on the county council to give full weight to the need to avoid hardship in pursuing any enforcement action they may see fit to take."

Thereupon, on Dec. 12, 1956, the respondents served an enforcement notice on the appellant requiring him within three calendar months of the date when the notice was to take effect

"to discontinue the use of the said land comprising the said development and to restore the said land to its condition before the said development

A took place such restoration to be carried out to the satisfaction of the county planning adviser."

B I must refer in due course in more detail to the enforcement notice. That enforcement notice was enclosed in a letter of the same date in which the county council, in giving effect to the hopes expressed by the Minister, informed the appellant that they would not prosecute provided, to put it generally, he took steps to reduce gradually the number of caravans and ultimately in three years to discontinue the use. However, by Mar. 11, 1958, the county council were not satisfied that the appellant was complying with that offer; indeed it appeared that there were then over one hundred caravans still on the site, and so they wrote to the appellant again and in effect said that if the number of caravans was not substantially reduced, in fact to some fifty-six in number by Apr. 14, 1958, they would prosecute. In due course, the appellant having taken no steps in the matter, this information was laid. Pausing there, I should have thought the merits were wholly with the county council. The appellant has flagrantly avoided compliance with the intentions of the planning authority and the Minister, but a number of technical points have been raised, and whether technical or not, if they are good points, the appellant is entitled to succeed.

D The prosecution was under s. 24 of the Act of 1947. Section 24 (3) provides:

E "Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine . . ."

F Be it observed that it is a condition precedent that there should be an enforcement notice and, of course, a valid enforcement notice. Counsel for the appellant takes first and foremost the point that this was not a valid enforcement notice in that what I may call the factual basis of it was incorrect, and he refers to the decision of the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (1) ([1957] 3 All E.R. 529). It is unnecessary, I think, to refer to the details of that case, but the enforcement notice had recited that the land was developed by the placing thereon of caravans without the grant of planning permission required. In that case, though when the development by the placing of caravans on the site first took place there was no permission, there had in fact been later, pursuant to s. 18 of the Act of 1947, what I may call a retrospective permission by the Minister which was to be for a period of six months. The Court of Appeal held that in those circumstances the recital in the enforcement notice was wrong in that permission had been obtained, albeit retrospectively; and they held further that, the recital being wrong, the whole enforcement notice was a nullity, and that is the important point of the decision from the point of view of the present case.

H In the present case counsel for the appellant points to the fact that under the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), permission is given by art. 3 (1) and Sch. 1, Class IV, para. 2, for

I "The use of land . . . for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use."

Accordingly, says counsel, this is an a fortiori case in the light of *Francis v. Yiewsley & West Drayton U.D.C.* (1) in that on the first day when caravans were brought on to the site there was certainly then a change of use, and, therefore, a development and there existed permission pursuant to the Development Order of 1950. The enforcement notice recites:

"Whereas it appears to the county council that development consisting of a material change of use has been carried out on the land described in the schedule hereto without the grant of permission required in that behalf under Part 3 of the Act, the said land being used for the purpose of a caravan site."

Accordingly, says counsel for the appellant, when that development first took place, when caravans were first brought on to this site, there was in fact permission under Part 3 of this Act in that the Development Order of 1950, which was made under s. 13 of the Act of 1947, had permitted that development.

In order to test the validity of that argument, it is necessary to look at a few of the sections of the Town and Country Planning Act, 1947, itself. Part 3, which is the relevant Part, commences with s. 12 which, so far as is material, provides:

"(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

"(2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . ."

The sub-section then goes on, by a series of paragraphs in a proviso to provide that certain changes of use of land shall not be deemed to be development at all. By s. 12 (5) certain other development is referred to which, though deemed to be development, shall not be development for which permission is required. By s. 13 (1) it is provided:

"The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; (b) in any other case, by the local planning authority (or, in the cases hereinafter provided, by the Minister) on an application in that behalf made to the local planning authority in accordance with the provisions of the order."

Accordingly it will be seen that the scheme of the Act was first of all to exclude certain types of development by providing that they should not be development; secondly, to set up a second category of development which, though it remained development under the Act, would not require permission; and thirdly, to provide that in all other cases permission was required and might be granted either by a development order specifying any classes of development or, in other cases, by the ordinary applications to the local planning authority and, through the planning authority to the Minister, for permission to develop. Observe that in the passage in s. 13 (1) which I have read it is said that permission "may be granted", and if one looks further on in that same section there is a constant reference to that. Thus, in sub-s. (2) it is provided:

"An order under sub-s. (1) of this section . . . may be made either as a general order applicable . . . to all land, or as a special order applicable only to such land as may be so specified, and the permission granted by any such order may be granted either unconditionally or subject to such conditions . . ."

Accordingly, again that provision in referring, as it does, to the general order as well as the special order is speaking of permission being thereby granted; indeed, in sub-s. (3) and sub-s. (4) there are phrases to the same effect. Therefore, it seems to me clear that a permission which appears by reason of inclusion in Sch. 1 to the Development Order of 1950 is not an exception from the planning

A of permission, but is itself the grant of permission. Accordingly, for my part, I think, and indeed I think counsel for the county council would concede, that on a literal interpretation of those sections the use of the land for twenty-eight days as a caravan site was a permission granted under Part 3 of the Act.

Section 23 (1), which is providing for the enforcement notice, provides:

B "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

C the authority may within four years of such development being carried out serve on the owner and occupier an enforcement notice. Accordingly, it seems to me to be clear that in a case where the Development Order of 1950 applies, there has been the grant of permission required in that behalf under Part 3 of the Town and Country Planning Act, 1947, and, if that be right, the recital in the enforcement notice in this case is not true in fact. Its basis is inaccurate, and on the authority of the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (1) the enforcement notice is a nullity.

D It is a point of no merit. Certainly nobody was deceived, least of all the appellant, as to what he was being required to do, but these provisions are provisions which have to be strictly complied with. As VISCOUNT SIMONDS said in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (2) ([1956] 2 All E.R. 669 at p. 672):

E "It was in the first place contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, commands assent and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences."

F It is said on the other side that the court should not give the literal interpretation to the words in the various sections to which I have referred in that to do so would really drive a coach-and-four through the powers of local authorities in regard to enforcement notices. It is said that unless the permission for the temporary user for twenty-eight days is treated as a conditional permission it would be quite impossible to frame an enforcement notice which was valid, and arguments have been addressed to the court to suggest that the permission for the twenty-eight day user is not a conditional permission at all. For my part I do not propose in this case to decide what the effect of that provision is, whether it can be said that it is merely a description of a limited development or whether it is a development with an implied condition that it shall cease at the end of twenty-eight days. I find it unnecessary to decide that case, because, even if it is not a condition (and I myself suggested* that this or similar permission might be conditional in *Francis v. Yiewsley & West Drayton U.D.C.* (1)), I cannot think that this is a case where the court in effect is entitled to re-write an Act of Parliament. It is not merely a case where the insertion of a word by necessary implication will cure the mischief. It is not a case, as sometimes happens, where the court is constrained to use the word "or" and make it conjunctive or anything like that. It is a matter of re-writing a considerable number of sections in an Act of Parliament. LORD SIMONDS in *Mayor & St. Mellons Rural District Council v. Newport Corpn.* (3) ([1951] 2 All E.R. 839), gave a sharp reminder of the dangers of a court usurping the powers of the legislature. I need not refer to the passages because they are well known. I, for my part, feel that the words in the Act are so clear that, whatever their effect may be, this court must give effect to them.

I should add that two other points were taken which, if valid, would not

* See [1957] 3 All E.R. at p. 539.

necessitate what I may call the re-writing of the Act at all. It is said, first, A
that in s. 12 (2) there is a definition of "development" which is the meaning
in the Act except where the context otherwise requires. It has been said that
in s. 23 (1) it might be possible to read "development" as meaning something
different, in particular as applying to a continuation of a permitted use after the
permission had expired. For my part, I find it impossible to say that there is B
any context in s. 23 which requires such an interpretation. Certainly the context
of the Development Order of 1950 itself cannot be imported. The most that
could be said would be that s. 13 has intervened between s. 12 and s. 23 but there
is nothing in s. 13 which would suggest that a temporary user for twenty-eight
days, such as we are considering here, was to be a matter for a development
order.

Secondly, it has been suggested that it might be possible to read "permission C
required" in s. 23 as referring only to the permission required in the ordinary
sense, viz., by applications made to the local authority and through the local
authority to the Minister and that in this context "permission required" does
not refer to a general permission, if one may use that phrase, as under the
General Development Order. Again, I find it quite impossible under the scheme
in this Act to which I have referred to say that "permission required" in s. 23 D
is limited in that way. In particular, it is relevant to observe that s. 13 deals
in one and the same section and in one and the same sub-section with permissions
which may be granted whether it be on an application to the local authority
in individual cases or whether by means of a general or special order. In my
judgment, sorry as I am to come to that conclusion, I fear that the technical
point succeeds and that this appeal must be allowed. E

I would only add that counsel for the appellant took several other points as
to the validity of the enforcement notice, and he further contended that the
prosecution was too late in point of time. In view of the opinion at which I
have arrived on his main point, I find it unnecessary to deal with his other
points, and I do not propose to do so.

DONOVAN, J.: I feel bound, and with the like reluctance, to agree. The F
construction which this court is now putting on the words "permission required
in that behalf under this Part of this Act", viz., that such permission is given
inter alia by the Town and Country Planning General Development Order, 1950,
granting twenty-eight days' permission, will make the enforcement of planning
control even more difficult than it is already, and perhaps in a large number
of cases impossible. For that reason I have sought a construction of the G
words which would avoid the result which I do not think Parliament could ever
have intended. In this search I have failed. I think the words themselves
are clear, and it is not necessarily the case that the purpose of the Act will be
completely defeated if the words are given their ordinary meaning.

In these circumstances to agree with the modifications in the language of H
s. 12, s. 23 and s. 24 of the Town and Country Planning Act, 1947, which would
be required to defeat the appellant's argument are not as a matter of construction
justified. Furthermore, I think that the difficulty can probably be cured by a
simple amendment, e.g., of s. 23 and s. 24 of the Act to the effect that in the
application of those sections any permission granted under para. 2 of Class IV
of Sch. 1 of the Development Order of 1950 should be disregarded. I

SALMON, J.: I agree.

Appeal allowed.

Solicitors: *James & Charles Dodd* (for the appellant); *Sharpe, Pritchard & Co.*,
agents for *Clerk of Essex County Council* (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

NOTE

FILMER v. FILMER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), April 7, 1959.]

Divorce—Evidence—Discretion statement as evidence of adultery—Statement not on oath—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 28 (5).

[As to the evidential effect of a discretion statement, see 12 HALSBURY'S LAWS (3rd Edn.) 320, para. 644; and for cases on the subject, see 27 DIGEST (Repl.) 324, 2696, 2697.]

For the Matrimonial Causes Rules, 1957, r. 28 (5), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 232.]

Petition.

In this case the husband petitioned for divorce on the ground of desertion and cruelty and prayed for the exercise of the court's discretion in his favour. His discretion statement was duly lodged. The wife by her answer cross-prayed for divorce on the ground of the husband's adultery. At the hearing of the suit the husband was represented by counsel, but did not attend himself. Counsel for the husband sought to tender the husband's discretion statement so that the wife could verify the husband's signature thereto and use the contents of the statement as evidence, by way of confession, in support of her charge of adultery.

D. R. Ellison for the husband.

G. C. Ryan for the wife.

LORD MERRIMAN, P., referred to the Matrimonial Causes Rules, 1957, r. 28 (5)*, and said: There is no way in which the discretion statement can be legitimately used as evidence except by being proved by the person who made it and put in evidence in open court. From the moment when it is verified by the person who made it and is put in evidence it is a public document, but before that it is a secret document.

[HIS LORDSHIP, therefore, refused to admit the husband's discretion statement as evidence.]

Solicitors: *Gilbert S. N. Richards*, Coventry (for the husband); *Hall, Brydon* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* The Matrimonial Causes Rules, 1957, r. 28 (5), reads: "Neither the fact that a discretion statement has been lodged or that . . . notice [of an allegation of adultery or other matrimonial offence . . . which is not referable to any specific allegation in the pleadings] has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that party has put the discretion statement or notice or the contents thereof in evidence in open court."

OLVER v. HILLIER.

[CHANCERY DIVISION (Roxburgh, J.), April 10, 1959.]

Partnership—Dissolution—Arbitration—Stay of proceedings—Partnership deed providing for reference of disputes to arbitration—Action for dissolution started by partner—Application for receiver and manager—Claim that dissolution “just and equitable”—Whether action would be stayed pending arbitration—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 35 (d), (f).

By an agreement dated Mar. 30, 1954, the plaintiff and the defendant agreed to become partners in a dairy business for a period of seven years. The agreement provided that “All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners . . . touching this agreement or the construction or application thereof or any clause or thing herein contained or any account valuation or division of assets debts or liabilities to be made hereunder or as to any act deed or omission of either partner or as to any other matter in any way relating to the partnership business or the affairs thereof shall be referred to a single arbitrator . . .” In February, 1959, the plaintiff started an action claiming dissolution of the partnership, accounts and inquiries, and a receiver and manager, on the ground that by reason of the conduct of the defendant it was just and equitable that the partnership should be dissolved. The claim appeared to fall within the Partnership Act, 1890, s. 35 (d) and (f). The defendant moved to stay the action in view of the arbitration clause.

Held: in the exercise of its discretion the court would permit the action to continue, having regard especially to the facts that

(i) the action claimed dissolution of the partnership on the ground that it was just and equitable to dissolve it, the power of deciding which was expressly conferred on the court by s. 35 (f) of the Act of 1890; and

(ii) the appointment of a receiver and manager was sought.

Joplin v. Postlethwaite ((1889), 61 L.T. 629) applied.

Vaudrey v. Simpson ([1896] 1 Ch. 166) distinguished.

[As to application of arbitration clause where dissolution of partnership is claimed, see 24 HALSBURY'S LAWS (2nd Edn.) 498, para. 948; and for cases on the subject, see 36 DIGEST (Repl.) 613, 614, 1730-1744.

For the Partnership Act, 1890, s. 35, see 17 HALSBURY'S STATUTES (2nd Edn.) 598.]

Cases referred to:

(1) *Joplin v. Postlethwaite*, (1889), 61 L.T. 629; 36 Digest (Repl.) 614, 1738.

(2) *Vaudrey v. Simpson*, [1896] 1 Ch. 166; sub nom. *Vaudrey v. Simpson*, 65 L.J.Ch. 369; 36 Digest (Repl.) 614, 1741.

Motion.

This was a motion by the defendant in a partnership action. The defendant moved the court for an order that the action be stayed on the ground that the partnership agreement, to which the plaintiff and the defendant were parties, provided for disputes between them to be resolved by arbitration. The facts appear in the judgment.

A. H. Ormerod for the plaintiff.

J. M. Hoare for the defendant.

ROXBURGH, J.: This is a motion to stay a partnership action on the ground of an arbitration clause in the partnership articles. The statement of claim in the action, which was started by a writ dated Feb. 2, 1959, is as follows: By an agreement dated Mar. 30, 1954, and made between the plaintiff and the defendant, it was agreed that they should become partners as from May 1,

A 1954, in a dairy farming business carried on at Highfields Farm and Hollybush Farm in the county of Hertford for a period of seven years "subject to determination as hereinafter provided", and they carried on business accordingly. It is alleged that the defendant has so conducted himself in matters relating to the partnership business that it is not reasonably practicable for the plaintiff to carry on the business in partnership with him. Particulars are then given, which are quite irrelevant for the present purpose, and the plaintiff claims: "In the circumstances it is just and equitable that the said partnership be dissolved". Pausing there, that appears to be a claim under both para. (d) and para. (f) of s. 35 of the Partnership Act, 1890. The plaintiff claims: "Dissolution of the said partnership. Accounts and inquiries, and a receiver and manager".

C The arbitration clause is very wide, though not, I think, wider than in the leading case of *Joplin v. Postlethwaite* (1) ((1889), 61 L.T. 629). It is as follows:

D "All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective representatives or between either partner and the representatives of the other partner touching this agreement or the construction or application thereof or any clause or thing herein contained or any account valuation or division of assets debts or liabilities to be made hereunder or as to any act deed or omission of either partner or as to any other matter in any way relating to the partnership business or the affairs thereof shall be referred to a single arbitrator . . ."

E It is quite plain that those words are, on their true construction, ample to cover everything that arises in this action. Therefore, under the Arbitration Act, 1950, s. 4, the burden is on the plaintiff to justify the continuance of his action. His obligation is not to persuade the court that he has a right to continue, but that he ought to be allowed to continue. In other words, in the last resort, the question is one of discretion, which must, of course, be exercised, like all discretions conferred on judges, judicially. I desire to stress that because the matter is not really one of authority at all, but of judicial discretion exercised in relation to the facts of the particular case. But there are two cases which, when read subject to that important proviso, are material to the present case. The first is a decision of the Court of Appeal in *Joplin v. Postlethwaite* (1). The arbitration clause in that case was very wide. None the less, BOWEN, L.J., in delivering the second judgment, said (61 L.T. at p. 632):

G "Now, one of the matters to be determined here is, whether or not the partnership should be dissolved. It does seem to me that that is a matter which should not be determined by arbitration."

H FRY, L.J., agreed. In fact, though KAY, J., had gone further and said that there was no power to stay in such an action, and the Court of Appeal did not accept that view, they did none the less affirm the order made by KAY, J., that the action should not be stayed.

I Against that, counsel for the defendant very properly cited *Fawcett v. Simpson* (2) ([1896] 1 Ch. 166). In that case CHITTY, J., granted a stay. It does not seem to me (though the position is not clear) that the relief there was sought under para. (f) of s. 35, but only under para. (d). At any rate, CHITTY, J., did not advert to a difficulty which troubles me, viz., the difficulty of transferring to the arbitrator the power expressly conferred on the court of deciding, not what the facts are, but whether, on the facts as found, it is just and equitable to decree a dissolution. I do not say that, as a matter of construction, the contract may not have that effect, or it may be that the contract has ousted that section altogether as a matter of pure construction. I am not concerned to decide those questions, and I do not. But it seems to me that where s. 35 (f) is involved, the view which BOWEN, L.J., and FRY, L.J., took is particularly persuasive. Moreover, there is here a request for a receiver and manager; and it may well be that

the parties have by their contract excluded the possibility of a receiver or manager ever being appointed in connexion with this partnership; I do not know, and I am not concerned to decide that question. It appears to me that the dissolution of a partnership which involves the exercise of a judicial discretion under s. 35 (f), and which may involve the appointment of a receiver and manager, is again a matter which perhaps is more conveniently left in the hands of the court.

On these grounds, exercising a discretion—because I think that the matter is entirely open to me—and exercising it, I hope, judicially, I decide not to grant a stay in this present case. The motion is accordingly dismissed, and the defendant must pay the plaintiff's costs of the motion in any event.

Order accordingly.

Solicitors: *W. J. Fraser & Son* (for the plaintiff); *Maples, Teesdale & Co.*, agents for *Benning, Hoare & Drew*, Dunstable (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

ROSS v. EVANS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.), April 17, 1959.]

Animal—Dog—Suffering unmuzzled ferocious dog to be at large in a thoroughfare—Passer-by bitten by greyhound on lead—Whether greyhound “at large”—Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54 (2).

On Feb. 16, 1958, the appellant was walking in a thoroughfare with six or seven greyhounds on a master lead with small leads from it to which the dogs were attached, when one of the dogs sprang at a passer-by and bit him. On Mar. 14, 1958, the appellant was again in a thoroughfare with five or six greyhounds, all of which were on leads, when one of the dogs leapt and bit a passer-by. The appellant was convicted of two offences under s. 54 (2)* of the Metropolitan Police Act, 1839, namely, of suffering to be at large an unmuzzled ferocious dog on each of the two occasions. On appeal,

Held: the appellant was not guilty, on either of the two occasions, of an offence against s. 54 (2) of the Metropolitan Police Act, 1839, because, in each case, the dog was not “at large” within the meaning of the subsection, which was aimed at the case where a person had no physical control of a dog at all and did not apply where a person could exercise control over a dog by means of a lead but did not do so.

Appeal allowed.

[As to suffering a ferocious dog to be at large, see 1 HALSBURY'S LAWS (3rd Edn.) 694, para. 1322.

For the Metropolitan Police Act, 1839, s. 54 (2), see 24 HALSBURY'S STATUTES (2nd Edn.) 818.]

Case Stated.

This was a Case Stated by justices for the County of Middlesex in respect of their adjudication as a magistrates' court sitting at Harrow on Nov. 4, 1958. On June 20, 1958, two informations were preferred by the respondent against the appellant charging him, in each case, with an offence against s. 54 (2) of the Metropolitan Police Act, 1839, in that (on Feb. 16, 1958, in one case, and on Mar. 14, 1958, in the other case) he had suffered to be at large an unmuzzled, ferocious dog, contrary to the subsection. The following facts were found,

* The terms of the subsection are printed at p. 223, letter G, post.

A On Feb. 16, 1958, the appellant was walking in Chapel Hill, Harrow Weald, with six or seven greyhounds on a master lead with small leads from it. One of the greyhounds sprang upon a Mr. R. Mortimer who was also walking in Chapel Hill, made a small bite on his left arm and tore his coat. On Mar. 14, 1958, the appellant was walking in Brookshill, Harrow Weald, with five or six greyhounds. They were all on leads. One of the greyhounds leapt and bit a Mrs. M. Mahoney on her left arm, tearing her coat and causing a wound necessitating hospital treatment including a skin-grafting operation and leaving a scar. The appellant did not try to control the dog. The appellant contended that there was no case to answer. The respondent contended that the offences had been proved. The justices were of opinion that a dog being on a lead and in the circumstances therein proved was a dog "at large", within the meaning of s. 54 (2) of the Act of 1839, and, accordingly, they found the appellant guilty on both summonses. They imposed a fine of 40s. on each summons and ordered the appellant to pay £33 14s. costs. The question for the opinion of the court was whether the justices came to a proper decision in point of law.

D *S. M. Stewart* for the appellant.

D *H. C. Pownall* for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the Petty Sessional Division of Gore, sitting at Harrow Magistrates' Court, before whom the appellant was charged with two offences contrary to s. 54 (2) of the Metropolitan Police Act, 1839, in that he suffered to be at large an unmuzzled, ferocious dog. The justices found the offences proved and imposed a fine of 40s. on each summons and ordered the appellant to pay costs.

[His LORDSHIP summarised the facts and continued:] The sole question, a short one and a novel one, is whether in each of those cases the dog concerned was "at large" within the meaning of s. 54 (2) of the Act of 1839. The Act concerned is "An Act for further improving the police in and near the Metropolis", and s. 54 reads:

"... Every person shall be liable to a penalty ... who ... shall in any thoroughfare or public place, commit any of the following offences; (that is to say,) ... 2. Every person who shall turn loose any horse or cattle, or suffer to be at large any unmuzzled ferocious dog, or set on or urge any dog or other animal to attack, worry, or put in fear any person, horse, or other animal."

The justices in this case clearly, I think, came to the conclusion that, although a person might have control of a dog by some physical means such as a lead, yet if he did not control the dog, the dog was at large. They say—with regard, it is true, to only one of the offences charged, but I understand that the facts were the same in each case—that the dogs were all on leads, and that "The appellant did not try to control the dog", that is, the dog that jumped up and bit the passer-by. For my part I am quite satisfied that an offence is not committed under s. 54 (2) where a person has the physical means of controlling the dog but does not do so. I think that the sub-section is aimed at the case where a person has no physical control of the dog at all. The case was put in argument of a person who had a dog on a lead so long that he could not exercise any physical control. It may well be that in such a case it could be said that the control was so minimal that the dog was to all intents and purposes a dog at large. However, that is not the present case. This is a case where a man could exercise control over the dog by means of the lead, but did not do so. In my judgment, the justices were wrong in convicting the appellant on these two charges, and the appeal must be allowed.

DONOVAN, J.: I should be glad, if I could, to take the same view as the justices took of the meaning of the expression "suffer to be at large any unmuzzled ferocious dog" where it occurs in s. 54 (2) of the Metropolitan Police Act, 1839. One has little sympathy with anyone exercising on the public highway six or seven greyhounds controlled only by a lead of such a design that the dog cannot, it seems, be effectively prevented from biting passers-by. The question here, however, is purely one of construction of the section. The respondent relies on the expression "turn loose any horse or cattle" in the same sub-section, as contrasted with the words "suffer to be at large" used in relation to a dog, and he says that this shows that the legislature contemplated that a dog could be at large although not turned loose. The expression "to turn loose", however, is one commonly used to describe horses or cattle which are set free; but, where dogs are concerned, the same idea is commonly expressed by the term "suffer to be at large". Of more weight, I think, is the inference to be drawn from s. 54 (4), which reads:

"Every person having the care of any cart or carriage who shall ride on any part thereof, on the shafts, or on any horse or other animal drawing the same, without having and holding the reins, or who shall be at such a distance from such cart or carriage as not to have the complete control over every horse or other animal drawing the same."

If the legislature intended s. 54 (2) to apply to a dog on a lead giving less than complete control over it, I think that similar language could have been used. My Lord has said that it may be that, if a dog were on a lead which was so extravagantly long that the dog was for practical purposes just as free to be a nuisance on the highway as if it were loose, the dog could be said to be "at large" within the meaning of the sub-section. There is no evidence of that here. All the court knows is that, in the first episode, there was a master lead with small leads from it, and that, in the second, all the dogs were on leads and the appellant did not try to control the offending dog. That implies that he could have controlled it and that the lead was of such a kind that would have enabled him to do so. Accordingly, when the respondent urges that this is a question of fact, I think that the answer must be that there was no evidence to justify the conclusion that the leads were so extravagantly long or so hopelessly inadequate as to leave the dog, for the purposes of being a nuisance, practically at large. That being the case, I do not feel it possible to say that a dog on a lead or leads such as are described in the Case is "at large" within the meaning of s. 54 (2), and I agree, therefore, that the appeal must be allowed. I hope that there is some bye-law which can be invoked in this district to stop a repetition of these incidents.

SALMON, J.: I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Darracotts* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

**A SOUTH OF SCOTLAND ELECTRICITY BOARD AND OTHERS
v. BRITISH OXYGEN CO., LTD. (NO. 2).
SOUTH OF SCOTLAND ELECTRICITY BOARD v. BRITISH
OXYGEN GASES, LTD.**

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Merriman, Lord Reid, Lord
B Tucker and Lord Keith of Avonholm), January 28, 29, February 2, 3, 4, 5, 9,
March 2, 3, 4, 5, April 16, 1959.]

Electricity—Charges for supply—Undue preference or discrimination—Differential in prices charged to high voltage consumers and low voltage consumers—Whether “undue discrimination” against high voltage consumers—Remedies available to consumers—Electricity Act, 1947 (10 & 11 Geo. 6 c. 54), s. 37 (8)—Hydro-Electric Development (Scotland) Act, 1943 (6 & 7 Geo. 6 c. 32), s. 10A (5), added by Electricity Reorganisation (Scotland) Act, 1954 (2 & 3 Eliz. 2 c. 60), s. 15 (1), Sch. 1, Part 1.

The respondents were supplied with electricity at high voltage by the appellants and their predecessors. Electricity at high voltage was less costly to supply than electricity at low voltage, because, in order to produce low voltage electricity, the high voltage power had to be subjected to a further process in which some power would be lost, e.g., 105 units generated at high voltage might produce a hundred units at low voltage. Thus the amount of fuel required to produce high voltage electricity was less than that required to produce low voltage electricity. The respondents paid for the electricity according to tariffs under which the price charged to high voltage consumers was less than that charged to low voltage consumers. There were four consecutive tariffs, in the second, third and fourth of which the difference between the basic price per unit charged to low voltage consumers and that charged to high voltage consumers was less than in the first tariff. In addition each tariff provided for a flat rate increase in price for each penny by which the cost of fuel to generate electricity rose above a stated price. The flat rate in the first tariff was the same for both high voltage and low voltage consumers, but in subsequent tariffs it contained a slight differential in favour of high voltage consumers. The cost of fuel was at all material times above the stated price. Moreover, the respondents' demand for electricity was fairly constant throughout the year and, since electricity generating stations were constructed to meet maximum seasonal demand, with the consequence that some part of the plant would be idle during those parts of a year when the demand of other consumers than the respondents was small, consumers such as the respondents were, they contended, more economical to supply than consumers whose demand fluctuated seasonally. The respondents brought proceedings against the appellants alleging undue discrimination (contrary, as regards the first three tariffs, to s. 37 (8)* of the Electricity Act, 1947, and, as regards the fourth tariff, to s. 10A (5)† of the Hydro-Electric Development (Scotland)

* Section 37 (8) of the Electricity Act, 1947, provided “An area board, in fixing tariffs and making agreements under this section, shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons . . .”

This sub-section was amended by the Electricity Act, 1957, s. 42 (3), Sch. 5, Part 2, as from a date subsequent to the time relevant to the proceedings reported.

† Section 10A of the Hydro-Electric Development (Scotland) Act, 1943, as amended, provides: “(1) Subject to the provisions of the Electricity Act, 1957, with respect to railways, the prices to be charged by the Scottish Electricity Boards for the supply of electricity shall be in accordance with such tariffs as may be fixed by each board from time to time.

(5) A board, in fixing tariffs and making agreements under this section, shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons.”

The enactments of s. 10A were added by the Electricity Reorganisation (Scotland) Act, 1954, s. 15 (1), Sch. 1, Part 1.

Act, 1943, as amended) against the respondents on the grounds of (i) inadequacy of the differential between basic unit charges to low and high voltage consumers in the second and subsequent tariffs and by absence or inadequacy of differential in flat rate increases in costs, and (ii), as regards the fourth tariff, by not including in the tariff an annual maximum demand charge of, e.g., ten times the amount of the maximum monthly demand. The respondents also claimed repayment of the amount of overcharges on the footing of the discrimination that they alleged. The appellants contended that the claims were irrelevant or incompetent and should be dismissed on the grounds, principally, that there could not be undue discrimination against the respondents when in fact they were charged prices that were less than those charged to low voltage consumers, and that (as regards the claim for repayment of alleged overcharges) in any event the amount of any such overcharges was not recoverable in law.

Held: (i) there should be proof before answer on the question of undue discrimination within s. 37 (8) of the Electricity Act, 1947, in relation to the first three tariffs for the following reasons—

(a) (VISCOUNT KILMUIR, L.C., LORD MERRIMAN and LORD TUCKER; LORD REID dissenting) in determining whether there had been discrimination as between high voltage consumers and low voltage consumers the lesser cost of supplying high voltage power should be taken into consideration, and, therefore, there might be discrimination against high voltage consumers notwithstanding that the price charged to them was a little lower than that charged to low voltage consumers (see p. 229, letter I, to p. 230, letter A, p. 232, letter H, p. 239, letters G and H, and p. 246, letter H, post).

(b) (per LORD REID) although discrimination could not be judged by reference to cost of supplying electricity, or (per LORD KEITH OF AVONHOLM) even if cost were excluded in determining whether there had been discrimination, yet it was possible for there to be discrimination in some matter other than the prices charged per unit, and in the present case it was a relevant consideration in comparing prices per unit that more than one unit at high voltage might have to be generated to produce one unit at low voltage (see p. 244, letter F, p. 245, letters E and F, and p. 250, letters E and F, post).

(ii) (LORD REID and LORD KEITH OF AVONHOLM dissenting) proof before answer should be allowed on the question whether there had been undue discrimination against the respondents arising from the facts that their demand was comparatively constant throughout the year but that the tariff of prices contained no option to pay a maximum demand charge of, e.g., the cost of ten times the maximum monthly demand (see p. 235, letter G, p. 237, letter I, to p. 238, letter A, and p. 246, letter H, post).

(iii) (VISCOUNT KILMUIR, L.C., LORD MERRIMAN, LORD REID and LORD TUCKER) overcharges attributable to undue discrimination were recoverable, and (LORD KEITH OF AVONHOLM concurring) proof before answer should be allowed in relation to repayment (see p. 233, letter A, p. 234, letter D, p. 240, letters B and C, p. 241, letter I, and p. 250, letters G to I, post).

Appeals dismissed.

[**Editorial Note.** The essence of the decision, apart from the question of recovery of over-payments, is, perhaps, that price is not the sole criterion of discrimination, but that an unfair distribution of cost also may be discrimination.

In relation to holding (iii) above comparison may be made with, e.g., *Twyford v. Manchester Corpn.* ([1946] 1 All E.R. 621 at pp. 627, 628).

As to undue preference and discrimination by area boards in fixing tariffs for electricity, see 14 HALSBURY'S LAWS (3rd Edn.) 412, para. 793.

For the Electricity Act, 1947, s. 37, see 8 HALSBURY'S STATUTES (2nd Edn.) 978.]

A Cases referred to:

(1) *A.-G. v. Wimbledon Corpn.*, [1940] 1 All E.R. 76; [1940] Ch. 180; 109 L.J.Ch. 56; 162 L.T. 365; 104 J.P. 111; 2nd Digest Supp.

(2) *A.-G. v. Long Eaton Urban Council*, [1914] 2 Ch. 251; 83 L.J.Ch. 774; *affd.* C.A., [1915] 1 Ch. 124; 111 L.T. 514; 79 J.P. 129; sub nom. *Long Eaton Urban Council v. A.-G.*, 84 L.J.Ch. 131; 20 Digest 207, 48.

B

(3) *A.-G. v. Hackney Corpn.*, [1918] 1 Ch. 372; 87 L.J.Ch. 122; 118 L.T. 393; 82 J.P. 116; 20 Digest 207, 50.

(4) *Re Harris & Cockermouth & Workington Ry. Co.*, (1858), 3 C.B.N.S. 693; 1 Ry. & Can. Tr. Cas. 97; 27 L.J.C.P. 162; 30 L.T.O.S. 273; 140 E.R. 914; 8 Digest (Repl.) 219, 1379.

C

(5) *Murray v. Glasgow & South Western Ry. Co.*, (1883), 11 R. (Ct. of Sess.) 205; 21 Sc.L.R. 147; 8 Digest (Repl.) 223, 850.

(6) *Great Western Ry. Co. v. Sutton*, (1869), L.R. 4 H.L. 226; 38 L.J.Ex. 177; 22 L.T. 43; 33 J.P. 820; 8 Digest (Repl.) 199, 1263.

(7) *Lancashire & Yorkshire Ry. Co. v. Gidlow*, (1875), L.R. 7 H.L. 517; 45 L.J.Q.B. 625; 32 L.T. 573; 8 Digest (Repl.) 175, 1145.

D

(8) *London & North Western Ry. Co. v. Evershed*, (1878), 3 App. Cas. 1029; 48 L.J.Q.B. 22; 39 L.T. 306; *affg.* sub nom. *Evershed v. London & North Western Ry. Co.*, (1877), 3 Q.B.D. 134; *affg.*, 2 Q.B.D. 254; 8 Digest (Repl.) 218, 1375.

(9) *Budd v. London & North Western Ry. Co.*, (1877), 4 Ry. & Can. Tr. Cas. 393; 36 L.T. 802; 8 Digest (Repl.) 217, 1371.

E

(10) *Phipps v. London & North Western Ry. Co.*, [1892] 2 Q.B. 229; 61 L.J.Q.B. 379; 66 L.T. 721; 8 Digest (Repl.) 218, 1376.

(11) *Denaby Main Colliery Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, (1885), 11 App. Cas. 97; 55 L.J.Q.B. 181; 54 L.T. 1; 50 J.P. 340; 8 Digest (Repl.) 195, 1250.

F

(12) *Parker v. Great Western Ry. Co.*, (1844), 7 Man. & G. 253; 3 Ry. & Can. Cas. 563; 13 L.J.C.P. 105; 2 L.T.O.S. 420; 135 E.R. 107; 8 Digest (Repl.) 196, 1255.

(13) *Maskell v. Horner*, [1915] 3 K.B. 106; 84 L.J.K.B. 1752; 113 L.T. 126; 79 J.P. 406; 32 Digest 336, 201.

Appeals.**G**

South of Scotland Electricity Board and Others v. British Oxygen Co., Ltd. (No. 2).

Appeal by the South of Scotland Electricity Board and the Electricity Council against an interlocutor of the Second Division of the Court of Session (Lord Justice-Clerk (LORD THOMSON), LORD PATRICK, LORD MACKINTOSH and LORD BLADES), dated Nov. 7, 1957, recalling an interlocutor of the Lord Ordinary (LORD HILL WATSON), dated May 31, 1957, allowing a proof before answer of the respondents' averments (with certain exceptions), and quoad ultra dismissing an action by the respondents for declarator and payment. This was a further appeal by the appellants in the action, which had been previously before the House of Lords (see [1956] 3 All E.R. 199), and was concerned with the Electricity Act, 1947, s. 37 (8). The facts appear in the opinion of VISCOUNT KILMUIR, L.C.

I

South of Scotland Electricity Board v. British Oxygen Gases, Ltd.

Appeal by the South of Scotland Electricity Board against an interlocutor of the Second Division of the Court of Session (Lord Justice-Clerk (LORD THOMSON), LORD PATRICK, LORD MACKINTOSH and LORD BLADES), dated Mar. 26, 1958, recalling an interlocutor of the Lord Ordinary (LORD GUEST), dated Feb. 7, 1958, sustaining the appellants' plea to relevancy so far as directed against one of the matters in issue, and quoad ultra allowing a proof before answer in an action by

the respondents, British Oxygen Gases, Ltd., for declarator, interdict and payment. This appeal was concerned with the Hydro-Electric Development (Scotland) Act, 1943, s. 10A (5), which is substantially the same as s. 37 (8) of the Electricity Act, 1947. The facts appear in the opinion of VISCOUNT KILMUIR, L.C., p. 229, letters F to I, and pp. 234, 235, post.

J. O. M. Hunter, Q.C. (of the Scottish Bar), *E. S. Fay, Q.C.*, and *R. Reid* (of the Scottish Bar) for the appellants.

Sir Andrew Clark, Q.C., *Ian H. Shearer, Q.C.*, and *A. J. Mackenzie Stuart* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

Apr. 16. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, the first of these appeals is a further appeal by the statutory successors of the defenders (appellants) in the action which was previously before this House in June, 1956, and in which the opinions of your Lordships were given in July, 1956 ([1956] 3 All E.R. 199). The first named appellants are the South of Scotland Electricity Board, a public authority established under the Electricity Reorganisation (Scotland) Act, 1954. On Apr. 1, 1955, they took over the functions of the South West Scotland Electricity Board, an Area Board established under the Electricity Act, 1947. The second appellants are the Electricity Council established under the Electricity Act, 1957. They are a public authority and are successors to the British Electricity Authority established under the Act of 1947 and renamed the Central Electricity Authority by the Act of 1954. The respondents were at all material times industrial consumers of electricity within the area supplied by the first appellants. The action was originally raised on Aug. 3, 1953, against the South West Scotland Electricity Board and the British Electricity Authority. It was, and is, an attack on three consecutive tariffs embodying charges for electricity, the first of which came into operation on Jan. 1, 1952, and the third of which ceased to operate on Dec. 31, 1955. The attack made on each tariff is now limited in effect to a simple declarator that the appellants exercised undue discrimination against high voltage users like the respondents, coupled with a conclusion for payment of £10,000. In the result, the conclusions now insisted on are 1 (a), 3 (a), 5 (a) and 8.

The earlier history of this case is that both defenders (appellants) tabled pleas to the relevancy of the pursuers' (respondents') averments; on Jan. 7, 1955, the Lord Ordinary (LORD HILL WATSON) sustained those pleas and dismissed the action; on motion for review, the Second Division, on June 10, 1955, recalled the interlocutor of the Lord Ordinary and allowed a proof before answer (excluding certain averments); on July 19, 1956, this House dismissed an appeal by the appellants against the last-named interlocutor; after amendment, by interlocutor dated May 31, 1957, the Lord Ordinary allowed a proof before answer of the averments in support of certain of the declaratory conclusions and quoad ultra dismissed the action; on motion for review, the Second Division (LORD MACKINTOSH dissenting on the first point) on Nov. 7, 1957, recalled the Lord Ordinary's interlocutor and allowed a proof before answer of the averments in support of the declaratory conclusions which I have mentioned and the conclusions for payment. When this action was previously considered by this House, the question was whether, on a true interpretation of s. 37 (8) of the Electricity Act, 1947, the respondents had relevantly averred a case of undue preference or undue discrimination. The House then decided that the word "undue" was not restricted to signifying that the preference or discrimination was illegitimate, and was capable of signifying an excessive preference or discrimination. This House refused to consider an argument that, since high voltage consumers (including the respondents) were charged less than low voltage consumers, there were no relevant averments of any preference or discrimination, on the ground that this

A argument had not been advanced in the lower courts. The appellants then amended their Record to raise the question whether the respondents had relevantly averred that any preference or discrimination existed, and also the question of the relevancy of the averments relating to the alleged overcharge and, in a certain event, the competency of the present action.

Section 37 (8) of the Electricity Act, 1947, is in the following terms:

B "An area board, in fixing tariffs and making agreements under this section, shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons, and the Central Authority shall, in exercising their powers under this section in relation to the fixing of tariffs and making of agreements by area boards, secure compliance by area boards with this sub-section."

C It is also provided, by sub-s. (3) of the same section, that the prices to be charged by area boards for the supply of electricity by them shall, subject to any directions of the Central Authority, be in accordance with such tariffs as may be fixed from time to time by them, and that those tariffs shall be so framed as to show the methods by which and the principles on which the charges are to be made, as well as the prices which are to be charged.

D The first tariff here in question, after setting out the lower prices for a supply metered at or above a voltage of 6,000 and higher prices in respect of a voltage less than 6,000, contains the following proviso:

E "(b) The unit charge shall be increased or reduced at the rate of 0·0008d. per unit for each penny by which the fuel cost per ton used for the purpose of, and shown on, the invoice for the supply of electricity in bulk by the British Electricity Authority to the board in the previous month is more or less than 38s."

F Now it is common ground that it is less costly for the appellants to supply electricity at high voltage than at low voltage. The amount of fuel required to produce and supply to the user a given amount of electricity on a high voltage supply is substantially less than that required to produce and supply the same amount of electricity for a low voltage supply by reason of the losses in transformation and distribution. This accounts for the difference in price charged to high voltage and low voltage consumers in the first tariff, 45d. and 475d. respectively. G There is, therefore, a differentiation of 025d. per unit, which represents a differential of 5·55 per cent. That was with the cost of coal at 38s. a ton. A change in the cost of coal is dealt with by the proviso which I have already quoted. The respondents aver that no differentiation is made in this fuel variation charge between high voltage and low voltage supplies and, in consequence, it operates unfairly against high voltage consumers. In the twelve months ended Mar. 31, H 1953, the average cost of fuel per ton was 67s. 3d. and approximately thirty-eight per cent. of the unit component (basic rate plus fuel addition) is attributable to the fuel variation charge. In the case of the second tariff, the differential in the new basic unit charge is only 3·78 per cent. In the case of the third tariff, it is 3·74 per cent. The respondents aver that the least differential in unit charge that can be given without unduly discriminating against high voltage users is a differential of 5·55 per cent. (when the cost of fuel is 38s. a ton), increasing (as I the cost of fuel increases) in accordance with the increasing ratio of fuel component to oncost component in the unit charge. To the appellants, the vital point is that the high voltage consumers, including the respondents, pay less than the low voltage consumers.

On these facts, the appellants submitted first that the respondents have not relevantly averred that any discrimination (whether due or undue) was exercised against them. They supported this by the arguments that no person can establish a case of undue preference or discrimination without relevant averments that

another person or class of persons is preferred to him, that whether there is preference must be judged, when the alleged preference is monetary, by the criterion of price and that, judged by price, the respondents are not, on their averments, discriminated against but preferred to the low voltage consumers. They go on to say that the respondents' criterion of cost is wrong in law and has not hitherto been applied in electricity cases, and further that the respondents' case involves giving a positive meaning to a negative provision in the statute which will make the courts a tariff-fixing body.

It is convenient to begin by considering what is the ordinary meaning of sub-s. (8). The fact that it contains the two phrases "undue preference" and "undue discrimination" seems to me to make clear that it places two prohibitions on the area board. The first prohibits making an undue difference between one customer and another in favour of one; the second prohibits making an undue difference between them against the other. It may well be that the many and important functions assigned to the board will necessitate them approaching a problem with the desire to charge a consumer or group of consumers less than other customers. They may do so, but it must not be too much less. On the other hand they may feel, for example, that the cost of electricity is so minor a constituent of the end-products of some other consumers that they should be charged more. Again it must not be too much more. I cannot find that this construction is undermined by the negative form of the section. The sternest injunctions from the Ten Commandments onwards have tended to be in this form. Equally, the duty of the courts is clear and comprehensible; it is to step in when the making of a difference between customers goes beyond measure and reason. I, therefore, do not find difficulty either in the negative form of the sub-section or in the argument that the courts may be placed in the position of fixing tariffs. I am reluctant to construe any enactment as barring recourse to the courts in the absence of clear words. Here we are invited so to do on what appears to me flimsy implications.

I now come to the argument that the complainant must show that someone else is preferred in price and that it is illegal to look at the cost of giving the supply. Counsel for the appellants accepted the position that, however unfairly a consumer has been treated, he must not come into court unless he can find someone who pays less. They adopt LORD MACKINTOSH's interpretation of discrimination by amending the statute to read:

"shall not exercise any undue discrimination against any person or class of persons by giving to his or their competitors an undue preference in the matter of the charge to be made to him or them whether under a tariff or an agreement."

In fact, the argument amounts, in the words of LORD PATRICK (1958 S.C. at p. 77), to asking us to read into s. 37 (8) some such words as:

"provided that, if amount of charge is in question, a person shall be deemed not to be preferred unless he is charged less than the person with whom he is compared, and no person shall be deemed to be discriminated against unless he has been charged more than the person with whom he is compared."

Looking at the words of the sub-section, I can find no justification for such an addition, and I should be loath to read into the statute so manifest an intention to do unfairness. In many cases there will be a practical difficulty for a would-be complainer to base an attack on anything except price. In this case, however, the appellants, who are under a statutory obligation to set out the methods and principles of the tariffs, commence by creating a differential of 5.55 per cent. between high voltage and low voltage consumers with the cost of coal at 38s. a ton. Thereafter, by their own fuel variation clause, they themselves say that they are causing the differential to diminish, although they do not dispute that it will

A be more expensive and will require more coal to supply low voltage electricity. The respondents aver that 5.55 per cent., suitably adjusted as the price of coal rises, is the lowest proper differential. I am unable to see why, in these circumstances, they should not be allowed the opportunity of proving it unless there is some authority to the contrary. The appellants have introduced the question of cost to themselves and must abide the result.

B The appellants, however, maintain that Parliament must be taken to have used the phrase "undue preference" as it was interpreted by the courts under earlier electricity and railway statutes, and submit that there is no case where a person paying less has complained of undue preference. On this point it must at once be noted that the decisions are under statutes whose wording is different. C None of these cases turned on the meaning or effect of the words "discrimination against". Moreover, in no case did the question in issue in this case directly arise, although counsel for the respondents submitted that, in *A.-G. v. Wimbledon Corpn.* (1) ([1940] 1 All E.R. 76) to which I shall refer later, the view was expressed that there could be a discrimination although the consumers compared were paying the same. He further submitted that this is not a case where the compared consumers are receiving the same service as one is D receiving high voltage and the other low voltage electricity. This is a submission on which I do not feel it necessary to pronounce finally as it could be elaborated when the facts are investigated.

With these general points in mind, I examine the electricity cases on which reliance was placed. The first is *A.-G. v. Long Eaton Urban Council* (2) ([1914] 2 Ch. 251 and [1915] 1 Ch. 124). That decision purports to apply the distinction E made by the railway cases between the legitimate and illegitimate reasons for making a "lower or preferential charge". It is illegitimate to charge less in order to get customers, but it is legitimate to charge less if it costs less. It was held, applying these principles to the facts of the case, that there was a breach of both s. 19 (the "equality" section) and s. 20 (the "undue preference" section) of the Electric Lighting Act, 1882. The importance of the case is that, in F his dissenting opinion in the instant case, LORD MACKINTOSH quotes the words of SARGANT, J., "lower or preferential charge". With all respect, I am unable to build on a quotation which was natural on the facts of that case but not addressed to the problem before us. On the other hand, the principle applied might well be thought to point to its converse that, where it is less costly to supply A than B, there ought to be a differentiation and if it is not granted there will be a dis- G crimination.

The second case was *A.-G. v. Hackney Corpn.* (3) ([1918] 1 Ch. 372), from which I have been unable to obtain any assistance on this part of the case. The third was *A.-G. v. Wimbledon Corpn.* (1). In that case, the material facts are stated as follows: In 1936 S. discovered that other houses in the same area with the same floor space were subjected to an annual charge of about £7 only, and he applied for a reduction. The defendants replied that, being a large con- H sumer, they could only reduce his fixed charge to £7 on condition that he submitted to a maximum limit of 2½ kilowatts at times of peak load. S. accepted this limit for a time, but made repeated efforts to find out from the defendants, on what basis his original fixed charge of £15 was estimated. The defendants refused to supply him with any information on this matter, and after much I correspondence, reimposed the fixed charge of £15. It was held that the tariff was not per se ultra vires and illegal, and the action by the Attorney-General was dismissed. On the action brought by the relator in his own name, SIMONDS, J., said ([1940] 1 All E.R. at p. 86):

"The plaintiff had, in my judgment, no other course open to him than to bring his action, and he is entitled to relief. I have already indicated that I am not disposed to grant an injunction which would debar the defendants from operating by agreement this or any other kind of two-part tariff. It will

meet the case, I think, if I grant an injunction following the language of s. 19 and s. 20 of the Act. It will be sufficiently clear from what I have already said that the attempt to impose upon the relator alone among consumers a limit of maximum demand cannot be justified."

The last sentence is important because it refers to a position which obtained for some time, although it had been altered before the action was commenced, when the relator paid the same charge as the compared consumers but had imposed on him a maximum demand. This the learned judge thought unjustifiable. Bearing in mind that opinion and the problems raised in these electricity cases, I cannot find anything which forces on me an interpretation of s. 37 (8) which could admittedly procure unfairness.

I now turn to the railway cases. In considering them it is necessary to state in broad terms the statutory background. Section 90 of the Railways Clauses Consolidation Act, 1845, was, in effect, an equality section, but only permitted comparison when goods of the same description were hauled by the same type of engine over the same piece of line. By reason of its very limited effect, Parliament soon passed the Railway and Canal Traffic Act, 1854. Section 2 of that Act prohibited undue preference and undue or unreasonable prejudice or disadvantage. Section 3 provided a special remedy. The effect of these sections, together with s. 6, was to make that remedy exclusive save that it preserved the position under the Act of 1845, where that was applicable. The next relevant legislation was the Railway and Canal Traffic Act, 1888. I note, without elaborating, the provisions in s. 12 and s. 13 with regard to damages, and pass to s. 27, which placed the onus on the railway company to disprove "undueness" where the complainant established that another was paying less than he. This did not alter the substantive law as to what was undue preference or undue prejudice or disadvantage, but enacted that, if you want to shift the onus, you must show that you are charged more.

It is important to have that outline of the statutory provisions in mind because only two of the cases submitted to assist us were before the Act of 1888. These were *Re Harris & Cockermouth & Workington Ry. Co.* (4) ((1858), 1 Ry. & Can. Tr. Cas. 97) and *Murray v. Glasgow & South Western Ry. Co.* (5) ((1883), 11 R. (Ct. of Sess.) 205). The first was a case of giving lower rates to keep customers, although COCKBURN, C.J. (1 Ry. & Can. Tr. Cas. 102), and CROWDER, J. (*ibid.*, at pp. 106, 107), deal with the materiality of cost to the railway company and, indeed, the appellants in this case concede that cost is material and can be relied on by a board in rebutting "undueness". The second, so far as the first point in this case is concerned, does not seem to me to be of assistance to either side. The cases after the Act of 1888 are all cases where the complainant was seeking to take advantage of the alteration of onus, and any dicta which may be abstracted were made on the hypothesis that the complainant was charged more and must be viewed in that light.

In my opinion, therefore, the appellants do not establish that the interpretation of s. 37 (8) is limited by attaching to "undue preference" or "undue discrimination" a special meaning drawn from previous authority. In my view, the appellants' first contention fails.

The second point of the appellants is that, on the assumption that the first appellants have exercised undue discrimination against the respondents, the latter have no remedy by way of recovery of any sums paid under a tariff which has been brought into force. The appellants seek to draw a distinction between the effect of an equality section and an undue preference section. I do not think that they succeed. In my opinion, the first governing principle is that a tariff which imposes a charge on the respondents involving their being unduly discriminated against is contrary to s. 37 (8) of the Electricity Act, 1947. The respondents were charged more than is warranted by the statute. Then it is clear that, until a court so declares, the respondents have no alternative but to continue

A to pay the charges demanded of them. In principle, the appellants should not be permitted to obtain payment for which they have no warrant to charge. The respondents may, therefore, recover whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them. I did not understand it to be disputed that the charges to the low voltage customers were excessive. It is fully within the competence of a court on the evidence B to find and estimate the amount by which the respondents have been overcharged, and the respondents have, in my view, averred with sufficient specification the standard by which that amount should be estimated.

I cannot find anything in the cases decided under the railway and electricity statutes which would necessitate or lead to a contrary view. I respectfully agree with LORD PATRICK that *Great Western Ry. Co. v. Sutton* (6) ((1869), L.R. 4 H.L. 226) and *Lancashire & Yorkshire Ry. Co. v. Gidlow* (7) ((1875), L.R. 7 H.L. 517) support this view. The appellants admit that, if a breach of an equality clause were established, any unwarranted excess charge could be recovered, but submitted that certain cases under the railway statutes justified the distinction that excess charges proved to have been imposed in breach of a prohibition against undue discrimination were irrecoverable. I find no ground for the distinction alleged. In *London & North Western Ry. Co. v. Evershed* (8) ((1877), 2 Q.B.D. 254; 3 Q.B.D. 134; (1878), 3 App. Cas. 1029), two members of your Lordships' House affirmed the decision of both the Divisional Court and the Court of Appeal that overcharges could be recovered as a breach both of an equality section and an undue preference section while two relied only on the equality section. In *Budd v. London & North Western Ry. Co.* (9) ((1877), 4 Ry. & Can. Tr. Cas. 393), the court E held that overcharges under an undue preference clause could be recovered. It is quite true that they omitted to consider the effect of s. 2, s. 3 and s. 6 of the Railway and Canal Traffic Act, 1854, and, therefore, their decision cannot stand, but on the present point the bent of the minds of the judges is clear. In *Murray v. Glasgow & South Western Ry. Co.* (5) (11 R. (Ct. of Sess.) 205), LORD PRESIDENT INGLIS was of opinion that the pursuer had stated a relevant breach of s. 2 of the Act of 1854 but decided that the remedies provided by that Act were exclusive F and, therefore, that the claim for repayment could not succeed. That does not touch the principle here in question. Moreover, with the greatest possible respect to LORD HERSCHELL, I cannot accept without qualification his statement in the Court of Appeal in *Phipps v. London & North Western Ry. Co.* (10) ([1892] 2 Q.B. 229 at p. 248):

G " [*Budd's case* (9)] is as a decision unquestionably no longer law. It is an action brought to recover differences which were said to constitute an overcharge by reason of difference of treatment under s. 2 of the Act of 1854. The House of Lords has decided in the *Denaby Main Colliery Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry. Co.* (11) ((1885), 11 App. Cas. 97) that no such action will lie . . . "

H In the *Denaby Main* case (11) this House decided, in the first part of the case which included consideration of undue preference, that the plaintiff had failed to prove that there had been a breach of s. 2 of the Act of 1854. They discussed the question whether an action would lie for breach of the section or whether the remedy under s. 3 was exclusive. The House had *Murray's case* (5) before them. I LORD HALSBURY, L.C., reserved his opinion, the EARL OF SELBORNE and LORD FITZGERALD did not mention the matter, while LORD BLACKBURN took the same view as the Lord President in *Murray's case* (5) that the remedy under the Act of 1854 was exclusive. I have already mentioned the position in which the matter was left in *Budd's case* (9). There is no decision that, in principle and apart from the special provisions of the Act of 1854, an action cannot lie to recover overcharges made in breach of a section prohibiting undue preference or undue discrimination. I have read with the care which they deserve the doubts

expressed by LORD PRESIDENT INGLIS in *Murray's* case (5) when he says that the tolls were within the statutory limit and then asks (11 R. (Ct. of Sess.) at p. 212):

"What, then, made them unlawful? They were not so because Wilkie was overcharged, but because the Eglinton Iron Company was charged less, and thereby unduly favoured."

Again, I think that the answer could not be put better than in the words of LORD PATRICK (1958 S.C. at p. 82):

"It is beside the point that the complainer has been charged a less rate than the statute would have permitted. The same might be said in the case of an action for breach of an equality clause but is no answer if in fact A has been charged more than B for the same service. It is equally no answer if in fact B has been unduly preferred to A in the matter of charges, in breach of an undue preference clause."

Again, I find nothing in the authorities under the railway and electricity statutes which prevents one applying the principle which I have previously stated, and the appellants fail on the second point. That is sufficient to dispose of the first appeal which, in my view, should be dismissed.

In the second appeal, the South of Scotland Electricity Board are the appellants and the British Oxygen Gases, Ltd., a company to which the British Oxygen Co. has sold its undertaking in industrial and medical gases, are respondents. The appellants issued their fourth tariff with effect from Jan. 1, 1956, and the respondents have taken large supplies of electricity at high voltage from the appellants under that tariff. On July 12, 1957, the respondents raised the present action against the appellants. They complain that, by the fourth tariff, the appellants exercised undue discrimination against them as consumers of high voltage electricity. This is the same type of complaint as the respondents in the first appeal make against the three tariffs in the first appeal. The respondents in the second appeal also complain that, by the fourth tariff, the appellants exercised undue discrimination against them as consumers having a high load factor of over seventy per cent. This appeal comes before us as an appeal against an interlocutor of the Second Division of the Court of Session in an action brought by the respondents for declarator, interdict and payment. The appellants tabled pleas to the competency of the action and the relevancy of the respondents' averments; on Feb. 7, 1958, the Lord Ordinary (LORD GUEST) sustained the appellants' plea to relevancy so far as directed against one of the matters on issue and quoad ultra allowed a proof before answer; on motions for review (after amendment of the pleadings), the Second Division recalled the interlocutor of the Lord Ordinary, repelled the appellants' plea to competency and allowed a proof before answer.

The appellants argued before us—(i) that the respondents have not relevantly averred that the appellants have exercised any discrimination against them—(A) as high voltage consumers, or (B) as consumers with a load factor of over seventy per cent.; (ii) that on the assumption that the appellants have exercised undue discrimination against the respondents, the respondents have no remedy—(A) by way of recovery of any sums paid under a tariff which has been brought into force, (B) by way of interdict against the appellants charging prices fixed under such a tariff.

As far as the relevancy of the averments of discrimination against the respondents as high voltage consumers is concerned, this raises first the question which I have already considered and answered in the sense that there can be undue discrimination even where the party alleged to be discriminated against is not paying more. It was also suggested by the appellants in this case that the respondents, by their failure to aver any fact or explanation of their averment that

A 5.55 per cent. is a minimum fair differential when the cost of fuel is 38s. per ton, have not given sufficient notice of the case that they intend to prove. This plea was fully considered by the Lord Ordinary and by all four judges in the Second Division. I accept their reasons for rejecting it, and I do not think it necessary to add anything to them. Similarly, I need not repeat the reasons why, in my opinion, the respondents can, if they establish discrimination, recover whatever sum is in excess of such a charge as would have avoided discrimination. Furthermore, the appellants have failed to convince me that the Second Division are in error on the question of interdict.

This leaves the relevance of the averments of discrimination against the respondents as consumers with a load factor of over seventy per cent. The respondents maintain that the tariff here in question further discriminates against them in that it fails to incorporate an annual maximum demand charge which is defined as one in which the consumer is given the option of paying as an annual charge ten times the maximum monthly demand charge. They say that the cost of production and distribution of electricity is, and must be, related to the highest demand of the year. In other words, for part of the year there must be maintained surplus generating capacity which has to be paid for. On this they base their allegation that, from the point of view of the supplier, the consumer with a constant or relatively constant demand is more satisfactory than one whose demand is subject to major fluctuations. Load factor is the ratio which the quantity of electricity used in a year bears to the quantity that would have been used had the maximum rate of use of electricity been maintained throughout the year. The respondents are consumers whose load factor is exceptionally high, being of the order of eighty per cent., and it follows that their demand is responsible for little, if any, of the appellants' unproductive generating capacity. The respondents say that the charges under the said tariff are directly related to meeting the highest demand in a year, whereas the adoption of an annual demand charge would recognise that consumers having a high load factor should not be charged on the same basis as those having a low load factor whose seasonal demands inflate the fixed costs of electricity supply. The respondents further say that the provision of an annual demand charge is in accordance with proper, recognised and usual practice in such tariffs, and that ten of the twelve area boards in England and Wales make such an annual demand charge available to industrial consumers at the consumers' option. I respectfully agree with their Lordships of the Second Division that the respondents have in the foregoing deployed a case which requires that the facts should be ascertained before a final answer is given as to its relevancy.

I would also dismiss the second appeal.

LORD MERRIMAN: My Lords, the background of both these appeals is so fully set out in the opinion of my noble and learned friend the Lord Chancellor, which I have had the advantage of seeing, that no recapitulation on my part is called for. Moreover, the Lord Ordinary, LORD GUEST, in the second appeal, gives the history in detail of all the four tariffs for the supply of electricity involved in this dispute. The nature of the dispute is the same throughout: namely, whether the appellants (the defenders), have exercised undue discrimination against industrial users of supplies of electricity metered at or above a voltage of 6,000, including the respondents (the pursuers). As between the first three tariffs with which the first appeal is concerned and the fourth tariff with which the second appeal is concerned, the parties, both suppliers and users, have changed; but nothing really turns on this and I shall refer to the pursuers and defenders throughout this opinion. It is also to be observed that, as between the first and second appeal, the method of supply changed. In the case of the first three tariffs, the defenders bought electricity in bulk from the British Electricity Authority and merely distributed it to the users, whereas in the case of the fourth tariff the defenders themselves generated the electricity they supplied.

I need only say by way of preface that a duty was placed on the area board in framing a tariff to show the method by which and the principles on which the charges for electricity are to be made. Some criticism (see per LORD PATRICK in the second appeal) has been made that the defenders have failed in this respect. This much, at least, is clear about the construction of the first tariff: a distinction is made between supply metered at or above a voltage of 6,000 and that metered at a voltage of less than 6,000, "generally of the order of 415 volts" (see answer 3 in the Record of the first appeal). These two supplies have been called throughout "High" and "Low" voltage respectively, although the terms are not actually used in the first tariff, and in subsequent tariffs different measures of "high" and "low" are specified and a "medium" range is introduced. It is unnecessary to refer further to these modifications, since it is on the method and principles on which the first tariff has been constructed and on the perpetuation thereof in subsequent tariffs that the pursuers found their case of undue discrimination. It is admitted that, in general, it is less costly to the defenders to supply electricity at high voltage than at low voltage, and that, in respect of the low voltage supply, there falls on the defenders the loss entailed in transformation to the lower voltages and in the case of certain customers the loss entailed in distribution; that the low voltage supply tariff is based, *inter alia*, on average transformation and distribution losses; and that, for that reason, there is a differential tariff between low and high voltage. The basic unit prices are fixed in the first tariff as '45d. for high voltage, and '475d. for low voltage, giving a differential of 0.025d., which, expressed as a percentage of '45d., is 5.5 per cent. Of this differential, the pursuers make no complaint; on the contrary, they aver that this is the minimum percentage which avoids discrimination against them. This averment is repeated in relation to all other tariffs; and it is the averred failure throughout to maintain at least this percentage of differential which the pursuers plead as discrimination against them.

From the fact that the defenders were buying electricity in bulk for distribution under the first three tariffs it follows that the purchase of the extra units required, as is averred, for the supply to users of low voltage electricity necessarily increased the defenders' costs in this respect. Accordingly a clause described as "the fuel clause" was inserted in the first tariff in the following terms:

"(b) The unit charge shall be increased or reduced at the rate of 0.0008d. per unit for each penny by which the fuel cost per ton used for the purpose of, and shown on, the invoice for the supply of electricity in bulk by the British Electricity Authority to the board in the previous month is more or less than 38s."

As the fuel cost per ton was invariably more than 38s., the question of reduction can be ignored. This fuel clause is the crux of the first tariff, and its operation is reflected in the other tariffs.

The area of dispute clearly appears by contrasting two passages in the pleadings. In answer 6 in the first appeal, the defenders explain and aver that, although the basic cost of coal in the fuel clause of the old (that is, the first) tariff was 38s. per ton, the actual price of coal when the old tariff was introduced was not less than 60s. per ton, and the basic unit prices for high voltage and low voltage supplies were fixed at levels which, when adjusted by the operation of the fuel clause, resulted in charges for the high voltage and low voltage supplies appropriate to these defenders' costs at that time. Thus, as has been said (LORD HILL WATSON, 1958 S.C. at p. 59):

"the defenders have chosen to gear the price per unit to the cost of fuel by the fuel variation clause".

I appreciate that this particular pleading is merely intended to repel the argument based on cost, if, as the defenders do not admit, the question of cost is relevant at all.

A On the other hand, in condescendence 12, in the second appeal, the pursuers accept and aver that the low voltage unit price and the fuel variations applicable thereto in all four tariffs are fair and reasonable in the circumstances, and it is on that basis that they found their averment of overcharge.

B Translating these averments into actual terms, it is asserted, on the one hand, that the basic unit prices of 45d. for high voltage and 475d. for low voltage supplies were fixed at levels which, *when adjusted by the addition to each basic price of 0008d. per unit for each penny by which the fuel cost per ton was increased above the arbitrary figure of 38s. per ton* (the italics are mine) resulted in charges for high voltage and low voltage supplies appropriate to these defenders' costs at that time. To this, the pursuers reply that they expressly admit that the basic price of 475d. for low voltage is fair and reasonable, and so is the adjustment of C that basic price by the operation of the fuel clause; and, as I have already said, it has never been disputed that the basic price of 45d. and the differential of 025d. is also fair and reasonable. But the pursuers say that it is self-evident that the fuel clause cannot operate to produce a charge for the high voltage supply which is appropriate to the defenders' costs, since, for every penny by D which the cost of fuel rises above 38s., the identical figure of 0008d. is added to the basic price for high voltage, in spite of the admitted fact that the cost of high voltage supply is less than that of low voltage supply. This, they assert, is undue discrimination against them. In other words, the pursuers' case is that the indiscriminate addition to two different basic prices of an identical figure on the 264 occasions on which the cost of fuel rises by one penny from 38s. to 60s. itself operates as a discrimination against them, inasmuch as, to use the words E of the Lord Justice-Clerk (LORD THOMSON) in the first appeal (*ibid.*, at p. 68), the pursuers are "being called upon to bear a disproportionate amount of the costs of distribution".

F It is true that, in the second tariff, a differential is introduced into the additional charge per unit; namely, 0008d. for the low voltage and the lower figure of 00075d. for the high voltage. Of this differential as such no complaint is made. But the pursuers aver that the discrimination against them in the first tariff is carried forward into the second tariff in the following manner, as appears from the analysis in LORD KEITH's opinion in the former appeal to your Lordships' House ([1956] 3 All E.R. at p. 204):—In the second tariff the basic price is raised to 60s. a ton; the resultant of the increase of 22s. in the basic price at 0008d. for each 1d. is 211d. This figure is added to each of the original price G units of 45d. and 475d., producing new price units of 661d. for high voltage and 686d. for low voltage. This preserves a differential of 025d., but perpetuates the vice of having applied the same increased unit charge indiscriminately between the fuel costs of 38s. and 60s. per ton.

H I do not think that it is necessary to go into detail about the third tariff. Suffice it to say that, on the introduction of the second tariff, the percentage of differential is said to be reduced from 5.55 per cent. to 3.78 per cent., and under the third tariff it is reduced further to 3.74 per cent.

I As to tariff IV: First, I think that, in condescendence 10 and in condescendence 12 in the second appeal, it is sufficiently averred that this tariff is tainted by the vice of the first tariff. Secondly, however that may be, there is a definite averment that the minimum percentage of differential is 5.55 per cent., which plainly relates to the original differential of 025d. in tariff I before adjustment by the fuel clause in that tariff. It is averred that the differential in tariff IV is only 4.28 per cent. in favour of high voltage users. Condescendence 12 also contains the important admission, already mentioned, that the pursuers accept and aver that the low voltage unit price and the fuel variations applicable thereto in all four tariffs is fair and reasonable in the circumstances.

Secondly, as to the annual maximum demand charge, I am of opinion that there is a sufficient averment of a general recognition of the practice of offering

such a tariff to industrial users with the high load factor, as now defined in the amended pleading, and I agree with LORD PATRICK in the second appeal, that the pursuers have, in this regard, presented a case which demands that the facts should be ascertained before a final answer is given as to its relevancy. I also agree with the Lord Justice-Clerk in the second appeal that

"to cut and carve on the extent of the proof in the present case will serve no useful purpose, and may even complicate matters if, as seems likely, the two cases will be investigated together."

The fundamental approach adopted in the argument for the defenders is that in s. 37 (8) of the Electricity Act, 1947, the exercise of any undue discrimination against one user or class of users of electricity is merely a facet of showing undue preference to another user or class of users. The next step is that the cases decided about the undue preference of one customer over another under the Acts of Parliament governing railways shows that the question must be dealt with in two stages—viz.: First, whether there has been a preference—a question which, it is argued, can only consist in comparing a rate actually paid by one customer or class of customers with that paid by another; and it is only if preference in this sense is established that the second question arises whether the preference thus given is undue. By analogy it is argued that the question of preference and discrimination in connexion with the supply of electricity can only be decided in terms of the price actually charged to the rival users and, therefore, as it is admitted that the pursuers and other high voltage users pay less per unit than do the low voltage users, there can be no question of preference to the low or discrimination against the high voltage users respectively; and, therefore, that the question of undueness cannot arise at all. On the other hand, it is conceded that, in considering whether a proved preference or discrimination is undue, the question of cost to the defenders, amongst other things, may be considered. The Lord Justice-Clerk pointed out that the defenders are forced into this splitting up of the problem into two stages in order to reach a situation where they can get away from cost, which is fatal to them; but that it seems to ignore that what constitutes undue discrimination is fundamentally a question of degree. He also pointed out that the defenders' argument went practically the distance of saying that "preference" has become a term of art and that it has significance only in relation to rate adding: "Indeed this contention may well be essential to the defenders' argument". I agree with these comments.

It is easy to see how it is that, in the railway cases, "preference" and "a lower rate" came to be treated as more or less synonymous, more especially after s. 27 (1) of the Act of 1888 placed on the railway companies the onus of justifying the lower rate. In *Phipps v. London & North Western Ry. Co.* (10) ([1892] 2 Q.B. 229), a case much relied on by the defenders, LINDLEY, L.J., said (*ibid.*, at p. 251):

"That clause appears to me to be perfectly intelligible. The moment one of two traders on the same line finds that the other is being charged at a less rate than he is, he is entitled to say to the railway company, 'How do you justify that?' As I understand this section, the burden of proof is on the railway company to show that such lower charge or difference does not amount to an undue preference."

He continues in the next paragraph:

"That gives rise to the question, What is an undue preference? Now, if you look at the sections which relate to this matter, beginning with the equality clause, s. 90 of the Act of 1845, s. 2 of the Act of 1854, and this s. 27 of the Act of 1888, you find these expressions used, all of which appear to me to point to the same sort of mischief. You have 'undue', or 'unreasonable', or 'unfair', 'preference', or 'prejudice', or 'disadvantage',

A or 'favour'. What is undue, &c., is a question of degree, and being a question of degree, it is obviously a question of fact . . ."

In the same case, LORD HERSCHELL (*ibid.*, at p. 242), in considering whether the advantage of two competitive routes is a legitimate matter to be taken into account as between two traders, one of whom has but the other has not that advantage, says:

B "All that I have to say is that I cannot find anything in the Act which indicates that when you are left at large, for you are left at large, as to whether as between two traders the company is showing an undue and unreasonable preference to the one as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds."

C Moreover, it is not universally true that, even in the railway cases, "preference" only consists in a difference of rates. In *Murray v. Glasgow & South Western Ry. Co.* (5) ((1883), 11 R. (Ct. of Sess.) 205), another case much relied on in the argument for the defenders, LORD PRESIDENT INGLIS, discussing the remedy open to a complainant, said (*ibid.*, at p. 212):

D "It is to be observed that there may be other modes in which undue preferences may be granted by a railway company to one trader over another by which one loses and another gains time, a very important consideration in the eye of the trader. That is not an overcharge of rates, but that is one of the matters which are embraced in this statute."

E Further, as regards electricity, in *A.-G. v. Wimbledon Corpn.* (1) ([1940] 1 All E.R. 76), SIMONDS, J., held that there could be undue preference or discrimination in spite of equality of the charge if, as against the complainant, an objectionable condition is attached to an equal charge. In my opinion, LORD MACKINTOSH (1958 S.C. at p. 91) in the first appeal underrates the significance of this latter case, and is mistaken in thinking that *A.-G. v. Hackney Corpn.* (3) ([1918] 1 Ch. 372), is against the contention of the pursuers. WARRINGTON, L.J. (*ibid.*, at pp. 392, 393), clearly thought that the fact that the relative cost of the supply of energy for power was less than that for light, and that supply of energy for both was less than the supply for light alone were relevant factors, and that it was a commercial problem to be looked at broadly, and not with a meticulous examination as a question of mathematics of slight advantages or disadvantages in the manner of dealing with particular customers or classes of customers. In my opinion, there is no justification whatever for the contention that discrimination can only be considered in relation to price, and that it is only if the pursuers pay more that the undueness of discrimination in this limited sense can be considered.

H In my opinion, considerations that are relevant to the question whether a discrimination is undue are relevant to the question whether there is undue discrimination. I think that the phrase "*shall not exercise any undue discrimination*" has to be considered as a whole, and that a fair distribution of the cost of supplying electricity as between one class of users and another is not to be left out of consideration "any more", to revert to LORD HERSCHELL'S phrase already quoted, "than any other circumstance which would affect men's minds".

I It is a matter for the pursuers to establish at the proof that 5.55 per cent. is the lowest percentage of differential which avoids discrimination against them, but, taking this averment and the averment of the reduced percentages under the second, third and fourth tariff pro veritate, it is my opinion that these averments are relevant as showing the exercise of varying degrees of undue discrimination against high voltage users. It was suggested that, as the basic unit prices themselves show a preference in favour of the high voltage users, it is absurd to say that, at the same time, there is a discrimination against them. No doubt this

would be so if that were the case, but the so-called preference, which nobody has suggested in this case is an undue preference, in the fixing of the basic unit prices is exercised once for all when that differential is fixed, whereas the discrimination which lies in the adjustment of those prices by the operation of the fuel clause occurs progressively on each of the 264 occasions on which the price of coal rises by 1d. per ton between 38s. and 60s. A

In substance, I agree with the reasoning on this point of the Lord Justice-Clerk and LORD PATRICK in the first appeal. B

As regards the remedies, assuming that the averments are proved, the pursuers, in my opinion, are entitled to conclude both for repayment of the amounts overpaid and for declarator. I do not agree with the submission that the fact that the first three tariffs are now superseded would produce a bare declarator, if only because of the effect which declarator would have on the costs of the proceedings both in your Lordships' House and below. Counsel for the pursuers in the second appeal also satisfied me by reference to McLAREN'S PRACTICE (1916 at pp. 649, 650), and the cases there cited, that the court will allow an action of declarator to be brought by a party whose liability for a money payment under an Act of Parliament is in question with the object of construing the statute. This covers the present cases. C D

As regards the claim for the repayment of moneys overpaid, it is unnecessary to refer at length to *Parker v. Great Western Ry. Co.* (12) ((1844), 7 Man. & G. 253) or to *Great Western Ry. Co. v. Sutton* (6) ((1869), L.R. 4 H.L. 226), or *Lancashire & Yorkshire Ry. Co. v. Gidlow* (7) ((1875), L.R. 7 H.L. 517 at p. 527, per LORD CHELMSFORD). It is sufficient to say that, in *Maskell v. Horner* (13) ([1915] 3 K.B. 106), LORD READING, C.J., referring to these authorities, and in particular to the advice given by WILLES, J., in *Great Western Ry. Co. v. Sutton* (6) (L.R. 4 H.L. at p. 249)—where that learned judge said that he had E

"always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received"— F

said ([1915] 3 K.B. at p. 119), that such claims made in this form of action are treated as matters of ordinary practice and beyond discussion. It should be noted, too, that LORD PATRICK is correct in pointing out (in the first appeal) that LORD HERSCHELL's opinion in *Phipps v. London & North Western Ry. Co.* (10) ([1892] 2 Q.B. at p. 248), that no such action would lie is based on a faulty interpretation of the decision in *Denaby Main Colliery Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry. Co.* (11) ((1885), 11 App. Cas. 97). G

I agree with counsel for the defenders that, unlike the railway cases based on an equality clause, this is not a simple question of the recovery of the difference between two rates. But I do not agree with his submission that the court is singularly ill-fitted to deal with the question. On the contrary, I see no reason, when all the relevant factors have been established in the course of the proof, why a judge should not be able to arrive at a fair figure to reimburse the pursuers in respect of the loss, if any, they have sustained. Here, again, I agree with the Lord Justice-Clerk and with LORD PATRICK. H

For these reasons, I would dismiss both these appeals. I

LORD REID: My Lords, this is the second occasion on which the first of these two cases has been before your Lordships. On the first occasion ([1956] 3 All E.R. 199), the present appellants failed on the contentions which they had maintained in the Court of Session, but they also put forward contentions which they had not maintained below. This House refused to deal with these contentions and the case was sent back. The Record was then extensively amended

A and, as the case now stands, the main contention of the pursuers and present respondents is that three tariffs made by the original defenders, the South West Scotland Electricity Board, which were in operation successively between 1951 and 1955, and under which they paid for electricity supplied to them, contained provisions which unduly discriminated against them. They further claim that, if they are successful in proving undue discrimination, they are
B entitled to recover overpayments due to such discrimination.

These tariffs were in two parts. Against that part which imposes a charge per kilowatt of maximum demand no complaint is made, though there is a complaint against such a charge in the second case now before the House. The complaint in this case is against the other part of the tariffs which made charges per unit of power supplied. The respondents were, and are, users of electricity supplied
C at high voltage which, admittedly, costs less to supply than the same amount of power at low voltage. The appellants recognised this by charging a higher price per unit to low voltage consumers, but the respondents' case is that the difference of price under the tariffs does not adequately reflect the difference in cost and that, in fact, the price charged for high voltage supply was not as low as it ought to have been in comparison with the price charged to low voltage
D consumers. That, they say, constituted undue discrimination against them and other high voltage consumers.

The main contention of the appellants is that there can be no discrimination, let alone undue discrimination, against any consumer in respect of the price which he has to pay per unit if the price per unit charged to him is less than the price per unit charged to the other consumers with whom he makes a comparison.
E Determining whether there has been discrimination or preference in respect of charges must involve a comparison between the charge made to the pursuer and the charge made to some other consumer. Shortly stated, the appellants' contention is that what must alone be compared are the prices charged, while the respondents' contention is that, in making a comparison, one must have regard to the costs of supply to the two classes of customer. So the appellants maintain
F that the respondents' averments are irrelevant, and that the action should be dismissed because, admittedly, the price charged to them per unit was less than the price charged to low voltage consumers. The respondents maintain that they are entitled to proof of their averments, and they support the interlocutor of the Second Division under which proof before answer is ordered.

The last of these tariffs ceased to be in force on Dec. 31, 1955, while the former
G appeal to this House was pending. The original defenders, the South West Scotland Electricity Board, have now ceased to exist, their functions and liabilities having been taken over by the appellants, the South of Scotland Electricity Board, who have wider functions than the old board. In addition to seeking declarators that, in fixing their tariffs, the old board unduly discriminated against them, the respondents sue for the amount of the overcharges caused
H by such discrimination. In their defences, the appellants now plead that the action is incompetent. They say that, even if there was undue discrimination and even if the amount of overcharges which resulted from such discrimination could be proved, the respondents are not entitled in law to recover any such overcharges from them. Then they say that, if the respondents have no right to recover anything, the declarators sought ought not to be granted because they
I would have no practical value or effect.

The plea that the action is incompetent ought, in my opinion, to be disposed of now before proof is allowed, even though the proof to be allowed is only proof before answer. I would repel this plea because I think there is nothing in law to prevent recovery of any sums which can be proved to have been overcharged. The only reason advanced for the contrary view was that overcharges made by railway companies were said to be irrecoverable if they were due to the company having given an undue preference to another customer. It is, therefore, necessary to look at the railway legislation and the authorities under it.

The Railways Clauses Consolidation Act, 1845, and certain earlier private Acts, contained an equality clause which made it illegal for a company to charge one customer more than they charged another in similar circumstances, and it is quite clear that a person who proved breach of an equality clause could recover from the company any overcharge which he had paid, i.e., the difference between what he had paid and what he would have paid if the company had charged him as the equality clause required (*Great Western Ry. Co. v. Sutton* (6), (1869), L.R. 4 H.L. 226) and recovery was not prevented by the fact that, when he paid the charge demanded, he knew that he was being overcharged. Equality clauses were soon found to be an inadequate protection. They only applied where the journeys compared were precisely the same, so that a trader whose goods were carried a shorter distance than the goods of his competitor but who was charged more than his competitor got no relief under these clauses. So there was enacted the Railway and Canal Traffic Act, 1854. I need not quote s. 2. The effect of it was to prohibit any undue or unreasonable preference or advantage or prejudice or disadvantage, and this applied where the journeys were not identical. We were not referred to any earlier use of the expressions "preference" or "prejudice" in any Act in such a connexion, and, when prohibitions of undue preference were later introduced into Acts dealing with electricity and other matters, it is not unreasonable to suppose that Parliament had in mind the Act of 1854 and the way in which it had been interpreted by the courts. If there were clear and binding authority under the railway legislation that overcharges resulting from undue preference or prejudice could not be recovered, I might be inclined to hold that the same rule should apply here, but there is not. The Act of 1854 contained, in s. 3 and s. 6, provisions for an alternative form of remedy and a prohibition against proceeding by way of action, so cases under it which decided that it was not competent to sue for the amount of overcharges were really decided on the special terms of s. 3 and s. 6, and they can only assist in cases under other legislation, where there is nothing corresponding to s. 6 of the Act of 1854, in so far as they contain expressions of opinion as to the effect of undue preference clauses standing alone. We were referred in particular to the opinion of LORD PRESIDENT INGLIS in *Murray v. Glasgow & South Western Ry. Co.* (5) ((1883), 11 R. (Ct. of Sess.) 205) and the judgment of LORD HERSCHELL in *Phipps v. London & North Western Ry. Co.* (10) ([1892] 2 Q.B. 229). I agree with what has been said by my noble and learned friend, the Lord Chancellor, about these opinions, and with his approval of the criticism of them by LORD PATRICK, and I find no difficulty in holding that the plea to competency fails.

The main controversy turns on the meaning of s. 37 (8) of the Electricity Act, 1947. It required that the appellants, in fixing their tariffs, should not "show undue preference to any person or class of persons" and should not "exercise any undue discrimination against any person or class of persons". Before coming to the respondents' averments, I think it necessary to consider what is meant by the expressions "undue preference" and "undue discrimination". It was argued that these phrases are composite phrases, so that it is wrong to ask first was there a preference and then was it undue; in other words, an undue preference does not mean a preference which is undue. I cannot accept that argument. It appears to me to be a complete answer to a complaint of undue preference to prove that, in fact, there was no preference at all; and, similarly, with regard to discrimination. I cannot imagine a case in which it could be said: true there is no preference but there is an undue preference. It is undisputed that, whatever be the meaning of these terms, they imply a comparison of the treatment of the pursuer with the treatment of some other consumer. The section provides that "in fixing tariffs" there shall be no undue preference, etc. So the comparison must be between the effects of the tariff on the pursuer and on the other consumers. And any comparison must surely be made by reference to some criterion or "yardstick". The case for the respondents seems to me to amount to this: a board is prohibited by the section from

A fixing any tariff which results in unduly unfair treatment of any one consumer in comparison with any other, and, in judging what is unfair, a very wide inquiry is necessary. If that had been the intention of Parliament, I think that very different words would have been used to express it.

A tariff necessarily involves the grouping together of a large number of consumers. The cost of supplying one will be different on a minute analysis from the cost of supplying another, and, even on the wider basis of taking into account the whole circumstances, meticulous justice would require different charges for different consumers and would prevent any large-scale grouping. The Act of 1947 for the first time required tariffs to be fixed, and it must have been recognised that this would necessarily produce some measure of injustice by imposing the same charges in cases where costs of supply and other circumstances might justify a difference. It was left to the boards, under the general control of the Central Authority, to make such tariffs as they should think proper. The right of a customer to challenge a tariff by legal action is limited. He must be able to show that, in fixing the tariff, the board has shown undue preference or exercised undue discrimination. I read that as meaning that legal action is excluded unless there is preference or discrimination, and that, once preference or discrimination is established, the question then arises whether, in the whole circumstances, it was undue. And if I am entitled to look at the railway legislation where the expression undue preference originated, I am reinforced in this view. At first the customer had to prove that there was a preference and that it was undue, but, by the Railway and Canal Traffic Act, 1888, s. 27, once the customer had proved that there was a preference, the company had to discharge the burden of proving that the preference was justified—that it was not undue. There is high authority that this did not alter the substance of the law, and it is to my mind clear that there were always two steps—is there a preference and is it undue?

Once a preference has been shown to exist, there can be a very wide inquiry whether or not it was undue. So, ask the respondents, why should there not be that inquiry without the need first to show that there was a preference? I would answer that in this way: the whole idea of tariffs is to produce equality of charging over wide areas, and the Act of 1947 appears to me to be saying to the boards—if you depart from equality of charging you must be prepared to defend any inequality in a court of law by showing that there is good reason for it. That is a real safeguard, but it is a very different thing to say that it is open to every consumer to allege that a board has carried the policy of equality of charging too far and to attack the board's grouping by saying that justice requires that he should get better treatment than the rest of the group. That would open the door so widely that a court could, in effect, be required to review the whole policy of the board and of the Central Authority in relation to charging and the making of tariffs. If that had been the intention, I would have expected the Act to have been very differently drafted.

The respondents complain not of undue preference to others but of undue discrimination against themselves, and, if I am right so far, the first question to ask is whether there has been any discrimination against them. They argue that discrimination is not merely the converse of preference, but that it must be judged in a different way and by a different standard. Admittedly they pay less per unit of electricity than the consumers with whom they make a comparison but they say that, even if this is regarded as a preference to themselves, they are, nevertheless, being discriminated against because the preference given to them is unduly small. I find that very difficult. In the first place, it does not seem to me to accord with the ordinary use of language. If I already pay less than my competitor but justice requires that I should pay still less, I might well say that I am being unfairly treated, but it would not occur to me to say that the seller is exercising discrimination against me in comparison with the way he treats my competitor. Under this Act, preference or discrimination must be

established on a basis of comparison. It is not enough to say that you are paying more than is just, and the respondents' whole case is based on a comparison with the low voltage consumers who already pay more than they do per unit. The only argument that appears to me to have any weight is that "discrimination" appeared for the first time in the Electricity Act, 1947; in the earlier electricity legislation there was only a prohibition of undue preference. So it is possible to say that Parliament must have intended the new word to add something. It is certainly more appropriate where one person is being required to pay more than a large group of other people; one would, I think, say that discrimination is being exercised against him rather than that the others are getting a preference. This may be what Parliament had in view. But I cannot think that merely adding this new word was intended to have, or has, the effect of introducing an entirely new and different standard, so that, at one and the same time, the same person can be held to have a preference and yet to be discriminated against.

What, then, is the standard by which preference or discrimination is to be judged? The appellants say price charged to the consumer and the respondents say cost of supply. The Act uses these words in connexion with the fixing of tariffs which deal with prices and not with cost of supply, and one would expect these words in this context to refer to price. Moreover, prices are easily ascertained by inspection of the tariff but costs of supply are not; their ascertainment probably involves highly contentious questions of costing and the like. So, if preference is a matter of cost, it would be impossible to tell whether there is any preference or discrimination until an elaborate investigation had been made. Then again, prices remain stable until a tariff is altered, but costs of supply vary, and the costs of supply to a particular consumer may vary, not only with the general costs of production but with the way in which he spreads his demand. And, finally, I find no trace of cost of carrying the goods being held relevant under the railway legislation. It, therefore, appears to me that preference and discrimination here do not refer to cost of supply. But it is possible to have discrimination in some matter other than price which directly affects the consumer, for example, requiring him to observe some condition which is not imposed on other consumers.

Many authorities were cited in the course of argument. In the course of judgments dealing with quite different matters expressions are found which, taken by themselves, appear to assist one side or the other. I shall not detain your Lordships by dealing with them, because none of them appears to me to indicate that the learned judge had come to any conclusion about any of the questions now before the House; he may not even have had such questions in mind.

For the reasons which I have stated, I reject the respondents' contentions that undue discrimination means something other than a discrimination which is undue, that discrimination is something other than the converse of preference, and that it is to be judged by reference to costs of supply and not by prices charged. So I turn to the respondents' averments to see whether they disclose some specialties which cannot be decided without proof.

In the first action, the respondents lay great stress on the method by which the charges per unit to high voltage and low voltage consumers was determined. There were first basic prices per unit of .45d. and .475d. respectively which were to apply with the cost of coal at 38s. per ton, and then there was an additional amount of .0008d. per unit for every penny by which the cost of coal exceeded 38s. The difference between the basic charges for the two classes of consumer is 5.5 per cent. The addition made in respect of the rising cost of coal was the same for both classes, so that, although the charges per unit rose substantially as the cost of coal rose, the gap between the two charges remained .025d. and did not increase proportionally with the charges. The result was that, in the end, the gap represented only a proportion of 3.74 per

A cent. of the total charge. Admittedly, it is cheaper to supply at high voltage, and the main reason appears to be that electricity is generated at high voltage and must then be transformed before it can be supplied at low voltage. This process involves losses so that, to supply say 100 units at low voltage, more than 100 units must be generated. For this and other reasons the respondents say that the differential of 5·5 per cent. originally allowed by the appellants

B if coal cost 38s. is the minimum that ought to be allowed in every case if undue discrimination against them is to be avoided. They say that the differential ought to increase and not diminish as the cost of coal rises, but they accept this differential of 5·5 per cent. as adequate for the range of coal prices involved in this case.

C If the respondents are right that there can be discrimination against them although, in fact, they paid lower prices, then I think that their averments are clearly relevant. But if they are wrong on the meaning of discrimination then, apart from one matter to which I shall come, I do not see how their averments can be relevant. It is true that the appellants tied their charges to the cost of coal, and it is said that, on their own showing, it was manifestly unfair to add the same additional sums to both unit charges. Let me assume

D that that is so; I do not see how it helps them. If the respondents are right about the meaning of discrimination, they do not need this additional argument though these facts might help them at the proof. But if they are wrong about discrimination, that means that, however manifestly unfair the tariff might be, there would be no remedy under s. 37 (8) unless and until such unfairness resulted in their being charged more than the low voltage consumers. But

E there is one argument for the respondents which causes doubt in my mind. I have said that it is necessary to generate more than 100 units—say 105—in order to supply 100 units at low voltage. The appellants argue that a unit is a unit no matter at what voltage it is supplied, and that the only relevant comparison is between prices per unit. The respondents say that, even ruling out cost of production as irrelevant, price per unit is not the proper comparison;

F electricity at low voltage is, so to speak, a different article, and the appellants have to perform a costly service in converting high voltage electricity into low voltage. This, they say, cannot be left out of account in comparing prices; to compare like with like one must take the 105 units which are converted into 100 units at low voltage. I am not at all sure that this argument is open to the respondents on their present record. But if it is, it raises technical matters

G and I would not like to express any opinion about it without having evidence on it. If, therefore, your Lordships are of opinion that there should be proof before answer in the first case I would not dissent.

H The second action deals with two quite different matters. The first is, to my mind, indistinguishable from the matters raised in the first action. But the other requires separate consideration. The tariff in this case included (as did the tariffs in the other case) a charge per kilowatt of maximum demand supplied in each month, and that is defined as meaning twice the number of units consumed during that half-hour in the month in which the recorded consumption is highest. The respondents' case as stated in condescendence 11 is,

I "The said tariff further discriminates unduly against the [respondents] in respect that it fails to incorporate an annual maximum demand charge, i.e., one in which the consumer is given the option of paying as an annual charge ten times the maximum monthly demand charge."

Then they say that their annual load factor is eighty per cent., which is exceptionally high, and that it is cheaper to supply them than customers with a low load factor because their consumption does not rise in the winter months. Then they aver,

"In the circumstances condescended upon the most accurate measure of their utilisation of generation and distribution capacity is an annual

and not a monthly demand charge. The adoption of said annual demand charge recognises, as should be done in fixing a tariff without undue discrimination or undue preference, that consumers having a high load factor should not be charged on the same basis as those having a low load factor whose seasonal demands inflate the fixed costs of electricity supply. By charging the [respondents] on the basis of a monthly demand charge instead of an annual demand charge, the [appellants] by their failure to incorporate such a charge in their tariff, discriminate unduly against the [respondents] and against other consumers having a load factor above seventy per cent. of maximum supply throughout the year. The [respondents] believe and aver that the said percentage load factor is the highest that can be charged on a basis of monthly demand without undue discrimination being exercised against high load factor users."

Then they say that it is the usual practice of other boards to provide an annual demand charge. They admit that consumers with a high load factor already get an advantage, but say that that does not affect their claim.

There is no question here of the units of electricity supplied being different in any way. The only difference is that it is more economical to supply a consumer if his demand is regular and does not fluctuate. The respondents are content to pay the same price per unit as is paid by those with lower load factors, and they do not even say that the monthly maximum demand charge is excessive or seek repayment of part of it. They seek to dictate to the board what kind of tariff they should have; they do not object to anything in the present tariff, what they ask for is an optional alternative to part of it. And their money claim is for the amount they would have saved if they had been offered such an option and had taken it. The fact that this may have been the practice of other boards could only show that the appellants might have adopted this course; there is no compulsion on all boards to act in the same way.

I would hold these averments to be irrelevant even if, contrary to my view, a person who already pays less can be said to be discriminated against. It is one thing to say that a consumer can recover part of what he has paid under an existing tariff. But it appears to me to be going very much farther to say that the board was bound to make a different form of tariff, and that, if it had, the pursuer would have escaped more lightly, and then to sue for the difference between what the pursuer paid under the actual tariff and what he would have paid if a different tariff had been in operation.

When proof before answer is allowed on part of a case in the ordinary way, I would not refuse proof before answer on the rest. But the two parts of this case are quite different, and to allow proof on the second part would add considerably to the expense and to the time occupied. I would, therefore, allow this appeal to the extent of holding irrelevant the averments in condescendence 11 and condescendence 12 which are directed to support conclusion 1 (b) in the second action.

LORD TUCKER: My Lords, I agree that both these appeals should be dismissed for the reasons which have been stated in the opinion of my noble and learned friend, the Lord Chancellor.

LORD KEITH OF AVONHOLM: My Lords, when this case came formerly before your Lordships, in a somewhat different guise, on appeal by the present appellants, the appeal was dismissed, with the result that the case should normally have proceeded to a proof before answer, in accordance with the interlocutor of the Second Division dated June 10, 1955, affirmed by this House. At the previous hearing in this House, various questions were raised for the first time which the House declined to consider on the ground that they had not been taken and considered in the courts below and that your

A Lordships had not the benefit of judgments of the Court of Session on the points raised. It is not surprising that, after ventilation of these new points in this House, the appellants, on their return to the Court of Session, amended their record and stated four new pleas with the result that amendments were also made by the respondents. In the result there was presented to the Lord Ordinary (LORD HILL WATSON) what in material respects was a new record, B which he had to consider afresh, being so moved by the appellants, before proceeding to proof.

On the fresh arguments submitted to him, the Lord Ordinary held that the respondents were entitled to a proof before answer on the question whether the appellants had shown an undue preference to users of low voltage supply, and exercised undue discrimination against the respondents as users of high C voltage supply. He held that the respondents had made no relevant averments in support of declarators that the appellants' tariffs were ultra vires and ought to be reduced. He further held that the respondents had made no relevant averments for payment of overcharges. In the result, by interlocutor of May 31, 1957, he allowed the respondents a limited proof before answer of their D averments in support of their conclusions that the first-named appellants had exercised undue discrimination against industrial users of electricity metered at or above a voltage of 6,000 including the respondents, contrary to s. 37 (8) of the Electricity Act, 1947, in respect of three separate and consecutive industrial demand tariffs.

On a reclaiming motion to the Inner House, the Second Division, while E formally recalling the Lord Ordinary's interlocutor, in effect repeated it, with the addition of allowing the respondents a proof before answer on their conclusion for payment of overcharges. It is in this state that this case comes for a second time to your Lordships' House without any proof having yet been taken into the facts of the case. Though on the previous appeal this House sent the case back to the Court of Session for a proof before answer, no excep- F tion, in my opinion, can be taken, in light of what has subsequently happened, to the case returning here for further consideration of its relevancy on the amended pleadings. This possibility may not have been foreseen in some of the speeches on the former appeal to this House, but, in view of the procedure which has since been followed out before the Lord Ordinary and in the Inner House, no question as to the propriety of the present appeal arises.

G Two main questions have been argued. The argument, which this House refused to consider on the previous occasion, that the respondents have made no relevant averments of discrimination exercised against them, has been repeated. This argument has now received full consideration both by the Lord Ordinary and by their Lordships of the Second Division. It is also reinforced by an admission of the respondents, relied on by the appellants and added H to the Record since the case was last in this House, as follows:

"Admitted that the [respondents] have in fact been charged throughout a lower price than have low voltage consumers taking a supply under the same conditions as to load and load factor."

I Counsel on both sides have presented very closely reasoned arguments on this question. Shortly stated, for the appellants it was submitted that, in the matter of charges made for supply there is no warrant for preference or discrimination being considered except by reference to relative prices charged to two competitors for the service supplied. Reliance was placed on precedents under the Railway Acts and earlier Electricity Acts. The respondents on the other hand submit that, under the Electricity Act, 1947, discrimination can be exercised against a consumer by charging him more than is proportionate to the relative cost of supply to him and others like him as compared with the cost of supply to other consumers. In the present case, it is common

ground that the cost of supplying the respondents who are high voltage consumers is less than the cost of supplying low voltage consumers, and the complaint of the respondents is that the tariffs imposed on them do not fairly represent the relative difference in cost. The complaint is particularly directed to the operation of the cost of fuel variation clause. I dealt in detail with this clause on the previous appeal ([1956] 3 All E.R. at p. 204) and do not propose to explain its operation again. The respective contentions of the parties do not really turn on this clause. They have a much wider range. Nor does the argument touch the question whether there is undue discrimination. It is conceded that, if the respondents have relevantly averred discrimination, the question whether it is undue must be a matter of proof. The discrimination with which the Act is concerned is discrimination which is undue. It is conceded, as I understand, by the respondents that there may be discrimination which is not undue, and of which they could not complain. But the appellants' contention here is that there is no relevant averment of discrimination at all, whether due or undue.

In the Court of Session the Lord Ordinary, proceeding largely on the cost of fuel variation clause, considered that the respondents' averments were relevant to show a preference to users of low voltage supply and a discrimination against users of a high voltage supply. The Lord Ordinary said (1958 S.C. at p. 59):

"As counsel for the [respondents] put it 'the [appellants] have chosen to gear the price per unit to the cost of fuel by the fuel variation clause.'"

It may be observed that the Lord Ordinary seemed to regard preference and discrimination as correlative terms. What is a preference to A is a discrimination against B. Their Lordships of the Inner House, with the exception of LORD MACKINTOSH, have taken a less restricted view. "Discrimination" they regard, if I read their opinions correctly, as a somewhat elastic word not necessarily related to preference, and covering any kind of treatment that could not be regarded as fair on a basis of comparative costs. As LORD PATRICK puts it, the only clue the statute provides to the considerations which must determine the different rates to be levied on different classes of consumers is the fact that the system is one providing for the recovery of costs alone. He says (*ibid.*, at p. 76):

"Prima facie such a system, contemplating as it does different rates for different classes of consumers, would link the different rates in some way to the different costs of giving the different supplies."

I am not satisfied that very much the same might not have been said in the days of railway companies and electricity companies, with the profit element added, subject in the case of railway companies to the statutory maxima fixed by their special Acts. LORD MACKINTOSH dissented from the rest of their Lordships of the Second Division in this matter. He would make the matter of preference or discrimination depend on the relative position of the complaining consumer and his competitor in the matter of the price charged to each for his supply and not on the costs to the undertaker of giving the supply.

Like the Lord Ordinary, LORD MACKINTOSH necessarily treats preference and discrimination as correlative terms. But, unlike the Lord Ordinary, he considers that the respondents' averments show that, in fact, they were getting a preference in price over the low voltage consumers, and so there is no relevant averment of discrimination. I confess that this reading of the word "discrimination" in the Act of 1947 is the one that naturally occurs to me. The earlier Electricity Supply Acts prohibited undue preference but did not use the word "discrimination" or any corresponding expression. The Railways Clauses Consolidation Act, 1845, used the terms "prejudicing" or "favouring", and the Railway and Canal Traffic Act, 1854, in s. 2, used the terms "preference and advantage" and "prejudice and disadvantage" and in no case, so

A far as I have observed, have these expressions been regarded as other than expressions of the same thing from a different point of view. I think that counsel in his argument for the appellants was well warranted in saying that "preference" was an apt word to use with reference to a person who was receiving preferential treatment in comparison with most other persons, and "discrimination" the apt word to use with reference to a person to whom most other persons were being preferred. I find it difficult to think that Parliament intended the difference between "preference" and "discrimination" in s. 37 (8) to be anything different from the conception of the difference between "favouring" and "prejudicing" in the Act of 1845, or between "preference and advantage" and "prejudice and disadvantage" in the Act of 1854. The idea also that consumers of electricity are to have their tariffs regulated on the basis of the cost of supplying them seems to me to carry with it the most far-reaching consequences. In the matter of the supply of electricity, the conditions and the costs of supply vary infinitely from consumer to consumer. Carried to its logical conclusion, it would follow that the consumer or class of consumers whom it was most costly to supply would have to be charged proportionately high tariffs, if the board wished to escape complaint from other consumers of undue discrimination. I find great difficulty in seeing how this conception can be carried out consistently with such statutory directions as are contained, in the interests of "rural areas", in s. 1 (6) (b) of the Act of 1947, or with the provision for simplification and standardisation of methods of charge in s. 1 (6) (d) of the same Act. Complaint of discrimination, of course, would not be enough. It would have to be said that the discrimination was undue, and undueness, on the respondents' submissions, would have to be related to the cost of supply. In the present case, it may be that their task would be limited and made easier by the terms of the cost of fuel variation clauses in the respective tariffs, though it will be noted that the terms of these clauses vary with each tariff. But that is, in a sense, accidental to the present case and, if the respondents are right, I see no stopping place between examination of a cost of fuel variation clause and examination of the cost of any other component entering into the costs of supply, or, indeed, the costs at large of giving the supply. If costs are brought in as the criterion of discrimination, they must equally be brought in as the criterion of preference. Preference and discrimination becomes then not really a matter of comparison of prices or charges as between consumer and consumer but a comparison of prices with the costs of the producer. This amounts, as I see it, very much to saying that consumers are entitled to claim preferences. The statute only prohibits undue preferences. Equality of charge is not prohibited. Reference was made to a passage in the judgment of WARRINGTON, L.J., in *A.-G. v. Hackney Corpn.* (3) ([1918] 1 Ch. 372 at p. 393), where he says:

H "It is conceded that users of energy for power as a class are entitled to be charged at a lower rate than those who use it for light alone."

I Later he refers to consumers of energy for both power and light as "entitled to better terms" than consumers of energy for light alone. I do not read this reference as meaning that any consumer is entitled to demand a preference from the supplier in appropriate circumstances. I take the lord justice as meaning that, in a question with another consumer complaining of a preference, the preferred consumer may be heard to say "I am entitled to a preference over you". The passage, I think, has reference to the argument for the plaintiff (*ibid.*, at p. 375) thus stated:

"The mere fact that he takes eighty per cent. for power and twenty per cent. for light does not entitle the defendants to differentiate the charge for light as against non-power consumers."

When this case was last before this House I made some general observations on some problems arising on the case as then presented, intended to be of an entirely tentative character. I would refer only to one of these. I said ([1956] 3 All E.R. at p. 206):

"The question may be put thus: Whether discrimination may not be exercised against one consumer and a preference given to another where both are charged the same rate in circumstances which justify a differential rate between them. If the answer is 'Yes', it would equally follow that, where the differential was too small, a like complaint could be made."

In using the word "rate", I had in mind price, or tariff, though I may not have made that clear. I also had in mind *Phipps v. London & North Western Ry. Co.* (10) ([1892] 2 Q.B. 229), where the tariff charged to the complainant for carriage of his pig iron was 5s. 2d. per ton, whereas the charge to two of his competitors was 5s. 8d. per ton. But when these charges were related to carriage per mile, it was found that the complainant was being charged 1.05d. per ton mile and his competitors .95d. and .85d. respectively per ton mile. There was very good reason for calculating the charges on the basis of the ton mile, for s. 90 of the Railways Clauses Consolidation Act, 1845 (corresponding to s. 83 of the Scottish Act) provided for equality of rates "per ton per mile or otherwise". There is no equality clause in the Act of 1947, nor was there any common factor indicated in the equality section of the Electric Lighting Act, 1882, to which prices could be related, but it does not follow that some factor could not be found to provide a fair and proper basis for ascertaining whether there exists undue preference or undue discrimination. Even if cost be eliminated as a basis per se, other factors may come in in comparing the tariffs for a high voltage supply with those for a low voltage supply. I take one illustration. The price per unit consumed may show a preference to the high voltage customer over that charged to the low voltage customer. It may be, however, that, on the units generated to supply these respective consumers, the result comes out the other way, owing to variation in transmission and distribution or other losses between the two classes. I find myself unable, in these circumstances, to decide the question of undue preference or discrimination without evidence. Accordingly, though perhaps for different reasons from those moving the majority of their Lordships of the Second Division I agree that a proof before answer must be allowed on this branch of the case.

If there is to be an inquiry on the issue of undue discrimination there seems no strong ground for refusing an inquiry on the other main question in the case, the recovery of overcharges. This matter was also canvassed at the previous hearing in this House, though not with the same exhaustiveness as on this appeal, and some doubts were expressed as to the competency or appropriateness of this remedy. There seem to have been no instances of overcharges having ever been recovered in a case of undue preference under the Railway Acts or earlier Electricity Acts, except in the somewhat doubtful decision of *Budd v. London & North Western Ry. Co.* (9) ((1877), 4 Ry. & Can. Tr. Cas. 393), where the competency of such a remedy seems to have been assumed. *Great Western Ry. Co. v. Sutton* (6) ((1869), L.R. 4 H.L. 226) was a claim under an equality clause, and the point in the case was whether overcharges wrongfully imposed and paid under compulsion could be recovered as money had and received. *Lancashire & Yorkshire Ry. Co. v. Gidlow* (7) ((1875), L.R. 7 H.L. 517) was a case where damages were awarded in respect of illegal charges levied from the complainant and restrictions imposed in carrying his goods which were not warranted by the terms of the company's statute. So was it also in *London & North Western Ry. Co. v. Evershed* (8) ((1878), 3 App. Cas. 1029). But under the Railway Acts, the remedies in respect of undue preferences to competitors were defined by statute, and common law remedies held to be excluded. Under

A the Electricity Acts, the point seems never to have arisen. The attempt to reduce the tariffs complained of has now been abandoned and, until evidence has been led and it can be seen how the court approaches the problem of assessing overcharges, I find it unnecessary and undesirable to express any further views under this head.

B On the view I have taken I find it unnecessary to consider other submissions raised by counsel for the appellants. For the reasons given I would dismiss the appeal.

The general considerations to which I have already referred apply to conclusion 1 (A) of the action of the respondents in the second appeal against the appellants in that appeal, which is the subject-matter of the second appeal to this House. I find difficulty in connecting this action in any way with the earlier action for, although the respondents set forth the earlier tariffs imposed on their predecessors the British Oxygen Co., these appear to me to be entirely unconnected with the tariff complained of in this action. This tariff was fixed by a different board operating in a much wider area of supply and with wider powers, including both generating and distributing powers. While the appellants took over the functions of the South West Scotland Electricity Board who previously supplied the respondents' premises, that does not, in my opinion, associate them with the tariffs fixed by their predecessors. In the matter of the new tariff, it would seem that the appellants must be considered as an entirely independent authority. The respondents, however, still base their case on an inadequate differential as between high and low voltage users, and on this aspect of the case I can make no distinction between the two actions.

E This second action, however, raises a new point under conclusion 1 (B). The respondents claim special treatment in respect of what they say is their exceptionally high load factor of eighty per cent., and they invoke the example of tariffs in the area of other electricity authorities where they say such special treatment is accorded. They claim that special maximum demand charges should be allowed to consumers with a load factor above seventy per cent. of maximum supply throughout the year. Failure by the appellants to have incorporated such an allowance in their tariff is averred as the exercise of undue discrimination against the respondents. This raises in undiluted form the question of the relevance of equating charge to cost. It further seems to me to take an entirely arbitrary datum line of seventy per cent. In my opinion, the respondents have stated no relevant ground on which such a claim should

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G be allowed to go to proof.

In the result, I would in this case allow a proof before answer, excluding from probation any averments in support of conclusion 1 (B) of the summons.

Appeals dismissed.

Solicitors: *Blakeney & Co.*, agents for *Wright, Johnston & Mackenzie*, Glasgow, *Biggart, Lumsden & Co.*, Glasgow, and *Campbell Smith Mathison & Oliphant*, Edinburgh (for the appellants); *Simpson, North Harley & Co.*, agents for *Pringle & Clay*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re HUNT.

[COURT OF APPEAL (HODSON, ROBERT and PEARCE, L.J.J.), April 13, 14, 15, 1959.]

Arrest—Privilege from arrest—Persons attending court—Litigant in person arrested in court on order of court committing him to prison for contempt—Whether entitled to claim privilege from arrest.

The privilege, if it be a privilege, from arrest which attaches to suitors, jurors, witnesses and advocates while they are in the precincts of the court and also while they are coming to or going home from the court, is not the privilege of the litigant but the privilege of the court; accordingly it is open to the court itself to have a man arrested, if it thinks proper to do so under a committal order, even though he be a litigant before that court.

Cameron v. Lightfoot ((1778), 2 Wm. Bl. 1190) followed.

QUAERE: whether privilege from arrest applies to the arrest of a litigant on an order for his committal to prison which is disciplinary in character such as, in the present case, a committal for contempt of court in disobeying an order of the court that he should attend before an examiner for examination as to his means to pay a debt (see p. 256, letter F, and p. 257, letter F, post).

Re Freston ((1883), 11 Q.B.D. 545) considered.

Decision of the QUEEN'S BENCH DIVISIONAL COURT ([1959] 1 All E.R. 73) affirmed.

[As to privilege from arrest for contempt, see 8 HALSBURY'S LAWS (3rd Edn.) 45, 46, paras. 81, 82; and for cases on privilege from arrest, see 16 DIGEST 79, 80, 976-987.]

Cases referred to:

- (1) *Cameron v. Lightfoot*, (1778), 2 Wm. Bl. 1190; 96 E.R. 701; 21 Digest 467, 486.
- (2) *Re M'Williams*, (1803), 1 Sch. & Lef. 169; 16 Digest 9, 20i.
- (3) *Re Freston*, (1883), 11 Q.B.D. 545; 52 L.J.Q.B. 545; 49 L.T. 290; 16 Digest 9, 15.

Appeal.

Kenneth Douglas Hunt, the applicant, appealed against the decision of the Queen's Bench Divisional Court, dated Dec. 16, 1958, and reported [1959] 1 All E.R. 73, refusing his application for a writ of habeas corpus ad subjiciendum directed to the respondents, the Governor of Brixton Prison (in which the applicant was confined) and Allied Bakeries, Ltd. (on whose application WYNN-PARRY, J., had made the committal order on which the governor relied). The facts are stated in full in the judgment of HODSON, L.J.

The applicant appeared in person.

J. R. Cumming-Bruce for the Governor of Brixton Prison.

B. B. Gillis, Q.C., and *W. E. Denny* for Allied Bakeries, Ltd.

HODSON, L.J.: This is an appeal from the Divisional Court presided over by LORD PARKER, C.J., the other members of the court being CASSIDY, J., and McNAIR, J. The decision ([1959] 1 All E.R. 73) was given on Dec. 16, 1958, when they refused an application by Mr. Hunt for a writ of habeas corpus. Mr. Hunt, the applicant, was committed to prison, having been adjudged to be in contempt of an order of the court, by WYNN-PARRY, J., on Nov. 4, 1958. He was acting in person and conducted his own case and claimed privilege from arrest as he was in court, but nevertheless he was, in accordance with the ordinary practice in these cases, arrested in court. He has claimed that his arrest was contrary to law and that he is entitled to be released. In answer to the writ, the governor of the prison has relied on the order of WYNN-PARRY, J., dated Nov. 4, 1958, and the warrant of committal.

The applicant was not committed to prison, as he at one stage of his argument contended, for non-payment of a debt. He was committed to prison for refusing

A to obey an order of the court, the order being that he should attend before an examiner. It is true that the attendance before the examiner was in aid of the enforcement of a civil debt: the purpose of the examination was that he might be examined as to his means, but the contempt of court of which he was found guilty was the failure to obey an order. The court was acting in a matter of discipline, and the object of sending the applicant to prison was not only to punish him, but to induce him to take such steps as lay in his power to put the matter right by purging his contempt. He has taken no steps to that end. A number of appointments had previously been made for his examination which he did not attend, and he did that which he was entitled to do; he appealed to the Court of Appeal against the order of WYNN-PARRY, J. That appeal came before the court presided over by JENKINS, L.J., the other members of the court being ROMER, L.J., and ROXBURGH, J., and his appeal was dismissed.*

C On that appeal, again as he was entitled to do, he attacked the order of WYNN-PARRY, J. He raised a number of points, arguing that the decision was bad on the face of it, that the order was wrongly entitled, that the court had no jurisdiction to make such an order for various reasons, and also that the learned judge in imposing the penalty had no evidence to support the view which he entertained that the applicant had no intention of complying with the order of the court. The learned judge had this applicant before him, heard this applicant address him, and was able to form an assessment of his attitude. He had the history of the matter before him and the points which had been made. All those matters were ventilated before the Court of Appeal and adjudicated on.

The appeal having been dismissed, the applicant took another course which

E was open to him, his liberty having been taken from him. He applied for a writ of habeas corpus to the Queen's Bench Division. In that court he again took the same points as he had taken before the Court of Appeal, in order to show, if he could, that his arrest was wrongful on the ground that the learned judge, WYNN-PARRY, J., was wrong, whether the order was bad on the face of it or whether the learned judge in the exercise of his jurisdiction had erred. Neither

F the governor of the prison nor the opposite party in this matter having taken the point that those matters, having been determined by the Court of Appeal, were *res judicata*, the Queen's Bench Divisional Court listened to that argument and came to the conclusion that nothing had been said to cast any doubt on the conclusion reached by WYNN-PARRY, J., or on the conclusions reached by the members of the Court of Appeal who heard the appeal from WYNN-PARRY, J.

G This court has taken the same course. It also has had no objection taken by the governor of the prison or by the opposite party, and it has listened to the same arguments which were put forward, first, before the Court of Appeal, secondly, before the Divisional Court, and, thirdly, before this court. For my part I am of the same opinion as the Lord Chief Justice; I see nothing which causes me to doubt in any way the correctness of the decision reached either by

H WYNN-PARRY, J., or by the Court of Appeal which affirmed his decision. The Lord Chief Justice at the end of his judgment ([1959] 1 All E.R. at p. 76) referred to the question how far in habeas corpus proceedings the court can in any event inquire into how jurisdiction to arrest is exercised as opposed to the question whether there is jurisdiction to arrest. I have nothing to add to what the Lord Chief Justice said, which I read:

I "It may be that the true view is, and I think that the cases support it, that though this court always has power to inquire into the legality of the commitment, it will not inquire whether the power has been properly exercised."

I now leave the matters which have been repeated *ad nauseam* in various courts to come to the question which was raised for the first time in the proceeding for habeas corpus which in this respect are separate from the judgment of WYNN-PARRY, J. The applicant claims that he was wrongly arrested because

* This appeal is reported *Hunt v. Allied Bakeries, Ltd.* (No. 2) ([1959] 1 All E.R. 37).

he was arrested in court immediately after the committal order had been made, whereas he claims that he was privileged from arrest. He has taken a subsidiary point that even if the arrest in court could be justified, he was arrested too soon in time because although the committal order had been made, yet he had not then and did not until after the order was made apply for a stay of execution, nor had costs been dealt with. I will deal with that subsidiary point first to get it out of the way. In my judgment the matter had been disposed of when the committal order was made, and the only questions which remained were dealt with, albeit after he had been arrested, when the applicant was still present in court and when he was able to make an application, as he did, for a stay and to answer if he could any application made as to costs. No restraint was put on him to prevent him exercising his freedom in that matter, so there is no substance in that. So far as the facts of the case are concerned, there is no report of what took place before WYNN-PARRY, J., except a report in "The Times" newspaper which shows that an application for a stay was made, and it appears from that report that the judge made no answer, but refused sub silentio by directing that the next case be called on, whereas one of the counsel engaged in the case told the court yesterday that the application was refused by the word "No". To my mind it makes no difference which way it went. The application was made and dealt with, so there is no substance in the point that the arrest was in point of time too soon. A
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There remains the question whether or not the applicant, as a suitor in these courts, was protected from arrest. The privilege which is claimed by him is a privilege which attaches to suitors and to jurors, witnesses and advocates, and as the applicant, who has conducted his case with a high degree of intelligence and pertinacity, has submitted, is a privilege which extends to persons, if it exists at all, not only while they are in these precincts but also while they are coming to this court or going home after they have left the court. If the applicant were right in saying that he, as a person found guilty of contempt for disobedience of an order, cannot be arrested promptly by the court itself, it would produce an absurd situation, for indeed the court would be powerless to carry out its orders or to see that its orders were carried out until, presumably, the applicant had reached his home, wherever that home might be. It would be a kind of chase which would only start perhaps at Land's End or wherever the home of the litigant in a given case might be. That shows, I think, the absurdity of the proposition and its inherent improbability. E
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When one examines the position as to privilege from arrest, one finds that it is perfectly clear. It was stated by DE GREY, C.J., in *Cameron v. Lightfoot* (1) ((1778), 2 Wm. Bl. 1190). That was a case in which the privilege, which, of course, is a privilege of the court and not a privilege of the person at all, was in question because the plaintiff in a former cause endeavoured to arrest a litigant in another cause while he was dining at a tavern on his return from attending the Court of Common Pleas, and the question under discussion was whether that arrest was timely or not. The court put the matter very plainly in this way (*ibid.*, at p. 1192): G
H

"... in the present case, there is no irregularity in the process itself, but only in the time of executing it. The question therefore is, whether the privilege of the King's Court, extended to suitors redeundo, so vitiates an arrest, or suspends the operation of the writ, that the taking a man thereon becomes an act of trespass to the party taken. The ancient way of availing oneself of the privilege of the courts was by suing out a writ of privilege... But this privilege is not considered as the privilege of the person attending the court, but of the court which he attends. And therefore the allowing or not allowing the privilege is discretionary; and it hath been disallowed in collusive actions... and in vexatious ones..." I

That, I think, is really sufficient to dispose of the point which the applicant

A has made that he is entitled to protect himself from the very court which is acting against him. The proposition is, as I say, absurd and is supported by no authority whatsoever. The case has been dealt with, and I have dealt with it, on the basis that this is a class of ordinary contempt, which, although punishable as an offence and not a matter of mere technicality, would if the shelter of privilege were available enable this litigant to come within it. The applicant, as he undoubtedly was entitled to, invited the court so to hold, relying on the observations of LORD REDESDALE, L.C., in *Re M'Williams* (2) ((1803), 1 Sch. & Lef. 169 at p. 174), which are cited in *Re Freston* (3) ((1883), 11 Q.B.D. 545) by BRETT, M.R. (*ibid.*, at p. 553). LORD REDESDALE said:

"There can be no doubt that the thing to be considered is, not the form of the process but the cause of issuing it; if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience of some order of the court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature."

The applicant insists that whether this order was an order in respect of a debt or not, the object of it was to recover a debt by means of his examination before an examiner. I would also draw attention to the observations of the other members of the court who drew attention to the fact that disobediences to an order of the court are of various kinds and are often wilful. LINDLEY, L.J., referred (*ibid.*, at p. 556) to the fact that

"... some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest."

FRY, L.J., pointed out (*ibid.*, at p. 557)

"... that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist",

and he went on to say (*ibid.*):

"Further, if the attachment were mere process, Freston could obtain his discharge *ex debito justitiae* on showing that he had performed what was required by the master's order; I do not think that he could have done so in the present case..."

That was a case of a solicitor, and he was sent to prison, in the view of the Master of the Rolls, at any rate, because as an officer of the court he had disobeyed an order, and his particular offence was that as an officer of the court, he had special duties to perform. The fact remains that in this case the applicant is not in a position to say that he can obtain his release from prison as of right by payment of the debt. He has disobeyed an order, and although it is open to him to come to the court at any time and express his willingness to put the matter right so far as he can and seek to obtain his release, yet he is not in a position to say that he is entitled to his release as of right, nor is he in a position to say that this exercise of the court's power was not disciplinary and not of a punitive character. It was of that character.

There remains only one point with which I think that I need deal, and it is this. The applicant again, rightly I think, contends that where there is any doubt whether the liberty of the subject has been infringed, he should be released, and he prays in aid, as he says, doubts which were expressed in the course of argument before the Divisional Court and doubts which he says were expressed in the judgment of JENKINS, L.J. There is no trace of any doubt expressed in the judgment of the Divisional Court, although it is said that something was said in argument which gave rise to the view that the Lord Chief Justice entertained some doubt on some point or other. Further, with regard to JENKINS, L.J., it is said that one passage of his judgment (see [1959] 1 All E.R. at p. 40) shows that he had some doubt. The applicant says: that is enough for me; I must

be released. That I think shows a wrong appreciation on his part as to what is meant by the word "doubt". There was no doubt expressed in either of the judgments as far as I can see. The judgments were expressed with clarity and certainty. The fact that in arriving at their conclusions conscientious people may have difficulty or take up time in arriving at their conclusion does not in any sense of the word involve to my mind that there was any doubt in the sense in which the applicant uses the word. I would only add that so far as the illustration of JENKINS, L.J.'s judgment is concerned, there is nothing in that. The point of difficulty which occurred to him arose on the construction of the rule* which provides that a judge or officer of the court should appoint a day for the examination. The applicant in his researches discovered that an officer of the court could not practise as a barrister, and he also discovered that the lady who was appointed examiner was a barrister, and he argued from that that the order was bad. Of course, that does not assist the applicant at all. The only difficulty which arises on the form of the rule is whether the unfortunate lady appointed as the examiner has for ever after disqualified herself from acting as a barrister; it does not affect the validity of the order which the applicant has criticised.

For these reasons I would dismiss this appeal.

ROMER, L.J.: I agree. On the question to which my Lord has just referred, the point put forward by the applicant that he should be allowed to avail himself of any doubt arising in this case, I would like to say categorically that I entertain no doubt whatever either as to the legality of the committal order or as to the legality of the arrest.

On the question which was argued before the Divisional Court and which was argued before us, and which was not, as I do not think it could have been, argued before this court when it heard the applicant's appeal last November, as to his privilege from arrest in the court, we have not heard full argument on the question whether the privilege applies to an order such as that with which we are concerned and it is not necessary to express a concluded opinion on the question whether that privilege does exist or whether it does not. It is quite clear from the judgments of LINDLEY, L.J., and FRY, L.J., in *Re Freston* (3) ((1883), 11 Q.B.D. 545), to which my Lord has referred, if they accurately represent the law, that the privilege from arrest would not attach in this case. The committal order was quite plainly disciplinary in its effect, and, further, on the judgment of FRY, L.J., the applicant could not as of right obtain his release by performing his obligations under the order. In fact he could not perform his precise obligations under the order because the time had gone by, but, at all events, on the principle to which FRY, L.J., referred, the applicant would not be entitled to claim privilege from arrest on which he relied. It is not necessary to express a decided view about it, for the reason that, assuming that this privilege does exist, it is quite clear from the authorities to which the Divisional Court referred†, and, in particular, *Cameron v. Lightfoot* (1) ((1778), 2 Wm. Bl. 1190), to which my Lord has referred, that the privilege, if any, is not the privilege of the litigant but the privilege of the court, and if it be the privilege of the court, nothing could be plainer than that it is open to the court itself to have a man arrested under a committal order, if it thinks proper to do so, even though he be in that court.

With regard to the other matters on which the applicant has relied before us, every one of them was mentioned either directly or indirectly before this court when the appeal was heard last November, and whether or not the decision of the court on that appeal renders the matter *res judicata*, which it is not necessary

* R.S.C., Ord. 42, r. 32.

† The Divisional Court referred to *Cameron v. Lightfoot* (1) and also to *Re Evans, Evans v. Naton*, [1893] 1 Ch. 252. The decision of the Divisional Court is reported, see *Re Hunt* ([1959] 1 All E.R. 73).

A to decide, there is no reason at all to depart now from the conclusions which this court entertained and expressed on that occasion.

B Finally, I only want to make one point clear beyond all shadow of doubt. The applicant both yesterday and the day before yesterday made observations more than once from which anybody who heard them and was unacquainted with the history of this case might assume that he is in prison for life for non-payment of a debt. Neither limb of that proposition is true. He has not been committed for not paying a debt but for wilful disobedience of an order of the High Court. As to the suggestion that he is imprisoned for life, I would desire to say that he would pave the way towards securing his freedom at any time by giving an assurance to the learned judge, who made the order for his committal, that he will now, though belatedly, obey the order which so far he has refused to obey, and by carrying that assurance into effect.

C I agree that the appeal fails.

PEARCE, L.J.: I agree. The applicant has put forward many points with great ingenuity, but none of them throws any doubt on the validity of the committal order. These arguments have already been considered and rejected by this court on the appeal from the committal order. It may be debatable whether that judgment prevents their being raised de novo, but, at the least, it must carry great weight with us. I, too, agree with the view on this point expressed by the learned Lord Chief Justice. Even on the hypothesis that the whole matter can be considered de novo, I agree entirely with the views that were expressed by this court on the hearing of the former appeal.

E The applicant relies, however, on the further ground, which was not before this court on the former appeal, namely, that his arrest was wrongful. He claims a privilege from arrest as the personal prerogative of the litigant or witness, but I am satisfied that that privilege is the privilege of the court and did not prevent the court from properly ordering the applicant's arrest. It would, indeed, be strange if the court were powerless to enforce its committal while the litigant was in its precincts and if it had to wait until he had returned home before arresting him. I see nothing in the cases to justify such a proposition.

F The applicant's argument has proceeded on the hypothesis that he was at the material time in the class of persons to whom the court accords the privilege of freedom from arrest. But the words of two of the judgments in *Re Freston* (3) ((1883), 11 Q.B.D. 545), to which my Lord has already referred, throw some doubt on that hypothesis. WYNN-PARRY, J., found that the applicant was guilty of wilful disobedience to the order of the court. The committal was a punishment for that disobedience and not merely, as the applicant asserts, an inducement to him to comply with the order, and he could not by complying with the order claim to be released at once ex debito justitiæ. It is, therefore, at least arguable that the applicant was not at the time of the arrest in the class of persons to whom the court extends its privilege of freedom from arrest, but it is unnecessary to decide that point.

H For those reasons, and the reasons which have been given more fully by my Lords, I agree that the appeal fails and must be dismissed.

Appeal dismissed. Nominal order of 10s. costs to the Governor of Brixton Prison, and costs to Allied Bakeries, Ltd. Leave to appeal to the House of Lords refused.

Solicitors: Treasury Solicitor (for the Governor of Brixton Prison); A. Kramer & Co. (for Allied Bakeries, Ltd.).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

SKEGNESS URBAN DISTRICT COUNCIL v. DERBYSHIRE MINERS' WELFARE COMMITTEE.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Denning), December 15, 16, 17, 1958. March 24, April 30, 1959.]

Rates—Limitation of rates chargeable—Holiday camp for Derbyshire miners, their dependants and invitees—Camp established from compulsory contributions levied under statute—Accommodation and board at camp provided at cost—All Derbyshire miners employed by National Coal Board—Whether camp concerned with the advancement of "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

The ratepayers were the trustees of the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre. The holiday camp and ancillary premises which were the centre were occupied for the purpose of providing "a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district", including the workers' dependants and guests. The holiday camp was established under a fund raised by compulsory contributions levied under statute. The ratepayers were responsible for the expenses of maintaining and operating the camp, but received grants to cover capital expenditure from a social welfare organisation set up under statute. The ratepayers paid less than a rackrent for the premises, and they neither sought to nor did make a profit or loss on their operations. The workers benefiting under the trust were now all employed by the National Coal Board. On the question whether the holiday centre was a hereditament occupied for the purposes of an organisation whose main objects were "concerned with the advancement of . . . social welfare" within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, so as to be entitled to limitation of rates under s. 8 (2) of that Act, it was assumed that, whichever the organisation might be for whose purposes the centre was occupied, the sole object of the organisation was the provision of a holiday centre.

Held: the provision of the holiday centre was an object which was concerned with the advancement of social welfare within s. 8 (1) (a) of the Act of 1955, notwithstanding that (i) the proceeds of a statutory levy or contributions from the National Coal Board established or partly maintained the centre, and (ii) the class to be benefited was a limited one, because—

(a) as regards (i) above, the crucial test was the purpose to which the money was devoted, not whether it was derived from the benevolence of donors (*A.-G. v. Eastlake*, (1853), 11 Hare, 205, approved; see p. 263, letter E, post).

(b) as regards (ii) above, the analogy of charity law should not be imported into the construction of the relevant words of s. 8 (1) (a) of the Act of 1955 (see p. 263, letters F and G, post).

Per LORD DENNING: it is not always right to treat the occupiers as the organisation for the purposes of s. 8 (1) (a) of the Act of 1955 (see p. 265, letter F, post).

Decision of the COURT OF APPEAL, sub nom. *Derbyshire Miners' Welfare Committee v. Skegness Urban District Council* ([1957] 3 All E.R. 692) affirmed.

[**Editorial Note.** The present decision should be considered with that in *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* ([1958] 2 All E.R. 601), particularly in relation to the element of altruism.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

A Cases referred to:

- (1) *A.-G. v. Eastlake*, (1853), 11 Hare, 205; 2 Eq. Rep. 145; 22 L.T.O.S. 20; 18 J.P. 262; 68 E.R. 1249; 8 Digest (Repl.) 315, 9.
- (2) *A.-G. v. Dublin Corpn.*, (1827), 1 Bli. N.S. 312; 4 E.R. 888; 13 Digest (Repl.) 287, 1060.
- (3) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (4) *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council*, [1958] 2 All E.R. 601.

B Appeal.

C Appeal by the local authority, the Skegness Urban District Council, from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and ORMEROD, L.JJ.), dated Nov. 26, 1957, and reported sub nom. *Derbyshire Miners' Welfare Committee v. Skegness Urban District Council*, [1957] 3 All E.R. 692, affirming an order of the Queen's Bench Divisional Court (LORD GODDARD, C.J., HILBERY and DONOVAN, JJ.), dated May 9, 1957, and reported [1957] 2 All E.R. 405. The Divisional Court allowed the appeal by the ratepayers, the Derbyshire Miners' Welfare Committee, by way of Case Stated in respect of an adjudication of the Lincoln (Parts of Lindsey) Quarter Sessions, and held that the ratepayers were an organisation concerned with the advancement of social welfare within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and, therefore, entitled to the relief provided by s. 8 (2) of that Act. On Dec. 17, 1958, at the end of the original hearing of the appeal, their Lordships adjourned the hearing so that the Charity Commissioners could appear, which they did at the adjourned hearing on Mar. 24, 1959.

E Sir Arthur Comyns Carr, Q.C., and C. E. Scholefield, Q.C., for the appellants, the local authority.

Geoffrey Cross, Q.C., and J. Malcolm Milne for the respondents, the ratepayers.
J. W. Brunyate for the Charity Commissioners.

F Their Lordships took time for consideration.

Apr. 30. The following opinions were read.

G VISCOUNT SIMONDS: My Lords, the short question in this case is whether the respondents, a body known shortly as the Derbyshire Miners' Welfare Committee, as the occupiers of a certain hereditament in the urban district of Skegness, which I will describe later, are entitled to the benefit of the relief against rates provided by s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This question has been decided in their favour by the Court of Appeal, affirming a decision of a Divisional Court of the Queen's Bench Division. The contrary had been decided by the General Court of Quarter Sessions in and for the County of Lincoln (Parts of Lindsey).

H It will be convenient to refer first to the relevant statutory provision, but I will remind your Lordships that previously no charitable or kindred institution (with certain immaterial exceptions) could, as of right, claim exemption from any general rate. Some rating authorities had, however, been accustomed to make sympathetic assessments on charitable organisations as a matter of grace. Uniformity was introduced by the subsection to which I have referred. Subsection (2) provided as follows:

"For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—
(a) for the first year of the new list, the amount so chargeable shall not

exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; ”

Subsection (1) (a) of the same section was as follows:

“This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; ”

Uniformity was further secured by the fact that, by the Local Government Act, 1948, the duty of making and amending valuation lists was transferred from the rating authority to the valuation officers of the Commissioners of Inland Revenue. The first general revaluation undertaken by them became effective on Apr. 1, 1956, from which date also the present claim to relief took effect.

My Lords, though I have been able to state the question very shortly, I find the facts extremely obscure. In the rate book for the year ending Mar. 1, 1956, the respondents were shown as the occupiers of the hereditament in question described as “Holiday Camp and Premises ” with a rateable value of £1,476 and the rate payable was £1,758 18s. In the following year they were shown as occupiers of the same hereditament, but the rateable value was shown as £3,800 and the amount of rate as £3,040. Against this assessment they duly appealed to quarter sessions, and I have already stated the result of the proceedings up to the appeal to this House. So far all is clear, but, when I come to the Case Stated by the justices, on which the appeal proceeded, I find a great deal of confusion*. I do not seek to apportion the blame for this state of affairs, except to say that it would not be fair to lay any responsibility for it on the justices or their clerk. In para. 8 of the Case it was said that the following facts were proved or admitted (I paraphrase them): (i) that the respondents were in fact the trustees of a trust known as the Derbyshire Miners’ Welfare Convalescent Home and Holiday Centre; (ii) that “the Derbyshire Miners’ Welfare Committee ” was the short name by which they were generally known; and (iii) that they at all material times occupied the hereditament in question (and a further hereditament used as a convalescent home) for the purpose of a convalescent home and holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire). Details of the hereditament with particulars of the buildings on it were then given, and it was stated that the camp was provided by the Social Welfare Organisation set up under s. 13 of the Miners’ Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. It was further found that the organisation only made grants for capital expenditure, and that it had always been their practice in doing so to make it a condition that the trustees would be responsible for maintenance and operational expenses. They further found that it was being run by trustees who sought to make neither a profit nor a loss on their operations. It is to be noted that this finding has not been challenged. They found also that the trust was the subject of an order made by the Charity Commissioners on Feb. 20, 1953, and they referred to various admissions of which I may mention these, that the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields, that generally

* An account of the facts based on the Case Stated will be found in [1957] 2 All E.R. at pp. 406, 407 and at p. 407 of that report reference is made to the scheme established by the Charity Commissioners and to the finding of the Divisional Court that the lease of Dec. 6, 1940, was the dominant document.

A there were no vacancies left to be filled by vacancies from other coal fields, that a charge varying from £5 15s. for an adult to £1 10s. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness, and that drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in
B in the winter by local residents who became members of the club, and that a substantial profit was made out of the supply of drink, but that the charge for accommodation was so fixed that, taking all the operations together, the trustees made neither a profit nor a loss.

I need not state the contentions of the parties before the justices beyond saying that the respondents contended that the purposes of the trust were
C charitable or (alternatively) were concerned with the advancement of social welfare, while the appellants denied both contentions. The justices were of opinion that the purposes of the trust were not charitable and were not otherwise concerned with the advancement of social welfare. I call attention to the fact that the justices proceeded on the footing that the trust on which the hereditament was held was that created by the scheme made by the Charity
D Commissioners but, nevertheless, thought that they were not thereby precluded from saying that it was not charitable.

But, my Lords, when, on appeal, the case reached the Divisional Court, for the first time it was said and not denied that the governing document was not the scheme made by the Charity Commissioners but a lease of Dec. 6, 1940, which had not been produced at the hearing before the justices, and it was on
E the footing that the trusts declared by this lease were operative that the appeal was thenceforward argued. The scheme was ignored. No communication appears to have been made either to the Charity Commissioners or to the Attorney-General. This was an irregular course on any view, but the more irregular because the trustees, abandoning the scheme, abandoned also the argument that the trust on which the property was held was charitable. For the
F trust declared by the lease could not (apart possibly from the validating effect of the Recreational Charities Act, 1958) be so regarded. Counsel for the trustees were, in fact, content to rest their case on the alternative claim that the hereditament was occupied

“for the purposes of an organisation . . . which is not established or
G conducted for profit and whose main objects are . . . otherwise concerned with the advancement of . . . social welfare”,

and they may, perhaps, regard the success that has so far attended them as justifying that course. I have felt some doubt whether even at this stage it would not be the proper course to remit the case to quarter sessions for a restatement of the Case, and I should have had no hesitation in advising your Lordships
H to do so, if I had not been of opinion that the appeal must in any event fail. As matters stand, I propose, therefore, to deal with the case as it has been presented to the House.

It is necessary then to turn to the lease of Dec. 6, 1940. The parties thereto of the first part, the lessors, were a number of persons described as “the Trustees on behalf of the Derbyshire District Miners' Welfare Committee” and the
I parties of the second part thereafter called “the trustees” were a number of persons described as “the Trustees on behalf of the Derbyshire District Miners' Holiday Centre”. It recited that, by s. 20 of the Mining Industry Act, 1920, a fund was established, which was thereafter called “the Miners' Welfare Fund”, to be applied to purposes connected with (inter alia) the social well-being, recreation and conditions of living of workers in or about coal mines, and the duty of allocating money from the said fund was vested in the committee, thereafter called “the Miners' Welfare Committee” appointed under sub-s. (3) of the said section as varied by s. 4 of the Mining Industry (Welfare Fund) Act.

1939, and s. 15 of the Mining Industry Act, 1926, that a committee styled the "Derbyshire District Miners' Welfare Committee" constituted as therein mentioned had been set up to advise the Miners' Welfare Committee in regard to allocations from the said fund for the purposes aforesaid within the said district, and that the latter committee had, on the advice of the former, allocated a sum of £35,000 for the purpose of providing a holiday centre for the use and benefit of workers in or about coal mines, and more particularly such of them as were resident in the Derbyshire district, and that the trustees had been appointed to administer the said sum and such other sums, if any, as might thereafter be allocated, given or bequeathed for the purposes of the trusts thereafter declared. It was then, by the deed, witnessed that the lessors demised the hereditament which is the subject-matter of this appeal to the trustees for the term of twenty-one years from Jan. 1, 1939, at a yearly rent of £200. The trustees entered into the usual lessee's covenants and, after a number of other provisions which need not be stated, they declared that they would

"permit the demised premises to be used for the purpose of a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district (including the dependants and invitees of [such] workers)."

The lease also contained a provision in regard to keeping accounts and methods of charging which were relevant to the question whether the "organisation" was "established or conducted for profit" but, as that is not now suggested, it need not be further stated.

Much still remains obscure. It is not clear what was the relation of the parties to the lease to each other, nor in whom the hereditament was originally vested. It does not appear either from the recitals in the lease or from the Case Stated how the sum of £35,000 mentioned in the recitals was, in fact, expended, nor do the voluminous accounts which were put in evidence give any sure guide. I will, however, assume, as it has throughout been assumed, that this sum was in some way, either by purchase of the land or by the erection of buildings on it, expended for the purpose of a camp and holiday centre and that those who made use of it therefore got a benefit which could not be regarded as unsubstantial. I can also assume—and in this respect some assistance can be derived from the Case Stated—that, on the passing of the Miners' Welfare Act, 1952, the property passed to a body set up under that Act and called "the Social Welfare Organisation" to which the National Coal Board was under an obligation to pay sums necessary to meet the estimated costs of social welfare activities. These activities were defined* as meaning

"activities concerned with the maintenance or improvement of the health, social well-being, recreation or conditions of living of—(a) persons employed in or about coal mines . . ."

or their dependants. It is also pretty clear that the sum of £35,000 to which I have referred was not derived from any voluntary contributions, but was the fruit of a compulsory levy, and that any other sums that may be necessary for the maintenance of the camp, so far as it is not met out of charges to the beneficiaries, are provided by the National Coal Board. It is this fact on which the appellants largely rely.

My Lords, I turn again to the relevant section and note first the curious wording "occupied for the purposes of an organisation . . . whose main objects", etc. It is by no means clear to me what is the "organisation" whose main objects have to be considered. Is it the "Social Welfare Organisation" set up under the Act of 1952 to which I have already referred? Or is it the body of trustees who appear in fact to manage the holiday centre, or is it a committee, whether the Miners' Welfare Committee which has been mentioned or some

* In s. 16 (1) of the Miners' Welfare Act, 1952.

A other committee? It is not a satisfactory way of disposing of the case, but I see no alternative to saying that, whatever the "organisation" may be, its main object is nothing else than the provision of a holiday centre such as is described in the Case. If so, the question is whether such a provision is concerned with the advancement of social welfare.

B My Lords, this question surely admits of only one answer. I agree with what has been said by DONOVAN, J. ([1957] 2 All E.R. at p. 409), and ORMEROD, L.J. ([1957] 3 All E.R. at p. 696), on this point. It is unnecessary and probably impossible to give a comprehensive definition of social welfare. But it would be a strange definition which was not wide enough to include what is, under modern conditions, widely regarded as so important to happiness and general well-being as a so-called holiday centre. If this is so, why is not the hereditament here in question entitled to the benefit of the section? The alleged reasons appear to be these.

C In the first place, the appellants rely, as I have already indicated, on the fact that the holiday centre was provided and maintained by a statutory levy or by contributions from the National Coal Board so far as it was not provided and maintained at the expense of those who made use of it. They urge that D a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors, and that that element is absent in the present case. Next, they say, that, just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as E "otherwise concerned with the advancement of social welfare" unless it, too, has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived: see *A.-G. v. Eastlake* (1) ([1853], 11 Hare, 205). An elaborate argument was addressed to us to show that the decision in that case was based on a misunderstanding of what LORD ELDON said in *A.-G. v. Dublin Corpn.* (2) ([1827], 1 Bli. N.S. 312). But whether this be so or not, the decision has never, so far as I know, been questioned, and I think it was clearly right.

F In the next place, the appellants argued that the provision of a holiday centre in the present case did not advance social welfare because it provided a benefit for only a limited class in the community. Once again recourse was had to the analogy of charity law, and *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3) ([1951] 1 All E.R. 31), and similar cases were invoked to support this proposition. I make the answer that I made to the first argument. There G is no justification for supposing that the legislature intended to import the highly artificial considerations, which distinguish or disfigure the law of charity, into the latter part of the subsection. Neither the words themselves nor the context demand it, and I think that all the court has to do is to forget all the refinements of charity law and ask itself the simple question that I have already posed. I do not doubt that there will be borderline cases, but it does not H appear to me that, in the present case, the question is difficult to answer.

I Thirdly, it was argued that some distinction is to be made between the "advancement" of social welfare and the "provision" of social welfare, and that, in the present case, the main object of the "organisation" which we are considering (whatever that organisation may be) is not the advancement of social welfare but merely the provision of a holiday centre. On this point, which seems to me to be little more than playing with words, I will, with respect, adopt what ORMEROD, L.J. ([1957] 3 All E.R. at p. 696), said. The provision of a holiday centre of this nature appears to me precisely to be "concerned with the advancement of social welfare".

My Lords, before I conclude this opinion I must revert for a moment to a matter on which I have already made some observations. I have pointed out that the Divisional Court and Court of Appeal alike disregarded the fact that a scheme had been made by the Charity Commissioners which, if it was valid, imposed on the land, the subject of the contested rate, trusts different

from those created by the 1940 lease. At the end of the original hearing before this House, it appeared to their Lordships that this course ought not to be adopted without at least giving the commissioners an opportunity of being heard. They accordingly adjourned the hearing and, at the adjourned hearing, the commissioners attended by counsel and contended that, except as to some parcels of land comprised in the scheme, they had validly exercised their jurisdiction. They were, however, willing (as were counsel for the appellants and the respondents) that, so long as their position was not prejudiced, the case should be decided on the footing that the respondents at the relevant time in fact occupied the land in question on the trusts created by the 1940 lease, i.e., on the footing on which the case was decided in the courts below. In these circumstances, since that is, in any view, the footing most favourable to the appellants, their Lordships agreed to take an unusual and generally undesirable course and decide the case on what may after all prove to be a false assumption.

I have already stated the conclusion to which, on this footing, they have come. The appeal must be dismissed, but, in dealing with the costs, they must have regard to the fact that the respondents did not, until the case reached the Divisional Court, produce the 1940 lease which then became the most material document, and did not until the appeal had been opened in this House, produce other documents, which, had they been at the outset made known to the appellants, might have affected their conduct in these proceedings. The order will be that the parties will bear their own costs of this appeal, except that the respondents must pay the appellants' costs of the adjourned hearing on Mar. 24. The Charity Commissioners will bear their own costs.

My noble and learned friend, **LORD MORTON OF HENRYTON**, who is unable to be here today, has asked me to say that he concurs in the opinion which I have just read.

LORD REID: My Lords, I concur.

LORD KEITH OF AVONHOLM: My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

LORD DENNING: My Lords, for nearly forty years the coal industry has built up a special fund for welfare purposes. In the early days it was done by means of a compulsory levy on colliery owners and royalty owners. In recent times it has been done by way of grants by the National Coal Board. The fund has been held and controlled by various bodies, at first by a Miners' Welfare Committee, then by a Miners' Welfare Commission, and latterly by the Coal Industry Social Welfare Organisation. These bodies have all followed one another, each taking over from the one before, so I may perhaps describe them all as the "Social Welfare Organisation".

The Social Welfare Organisation has applied the fund in promoting the social well-being, recreation, and conditions of living of mine workers. It has done this in accordance with statutory provisions in that behalf. One of the activities which it has supported is a holiday centre at Skegness. This is especially for the use of miners from North Derbyshire. It is situated on an extensive piece of land next the sea and comprises a holiday camp complete with chalets, kitchen, dining hall, theatre, bars, lounges, shops and so forth. The Social Welfare Organisation provided the capital moneys by which this holiday centre was acquired and built. The justices at quarter sessions find that "this camp was provided by the social welfare organisation". The legal title is not, however, vested in the Social Welfare Organisation. It was at one time vested in a district committee but it has since been vested in the Official Trustee of Charity Lands; and it is included in a scheme prepared by the Charity Commissioners. The justices at quarter sessions so found, and their findings have, I think, been in substance re-established by the material

A brought before your Lordships by the Charity Commissioners. The Social Welfare Organisation has not itself administered or managed the holiday centre. This has been done, under the authority of the scheme, by a committee of eight persons, all of whom are connected with the coal industry in the East Midlands. Four of them are appointed by the employer's side (the National Coal Board) and four by the men's side (the National Union of Mineworkers).
 B These eight persons are described as "the Derbyshire Miners' Welfare Committee". They are, say the justices, the occupiers of the holiday centre. They are liable, therefore, for the rates payable on it. They also, I may remark, run a convalescent home next to the holiday centre. The only persons who use the holiday centre are mine workers and their families. The charge is £5 15s. for an adult and £1 10s. for a child. For this they get a week's holiday
 C with full board and return fare to and from Skegness. The charge for accommodation is thus very modest. This is because the committee do not seek to make any profit. Nor do the committee have to pay any rent. And they make a substantial profit on drinks and this is used to lower the charge for accommodation.

Such being the facts, if I were asked: "For what purpose is this land used? Is it used 'for the advancement of social welfare'?" I should probably say "Yes". But I would hasten to point out that the question is not "For
 D *what* purpose is the land used?" The question is: "For *whose* purpose is it used?" or more accurately: "For the purposes of *what organisation* is it used, or rather, occupied?" Many a holiday camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low
 E cost for people who could not otherwise afford them, but they do not obtain relief from rates on this score. The reason is because that organisation does not qualify under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* (4) ([1958] 2 All E.R. 601),
 F did not get relief, because the friendly society did not qualify. And I would add that it is not always right to take the occupier and treat him as the "organisation". In the case of a members' club, the committee of management occupy the club house, but it is occupied, not for the purposes of the committee-
 men, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and, in order to get relief from rates,
 G the club itself must qualify under s. 8 (1) (a).

What, then, is the relevant organisation in the present case? This is the crucial question, but it does not appear to have been discussed in the courts below. The relevant organisation may be the eight persons on the committee who run the holiday centre. Or it may be the Social Welfare Organisation
 H which has provided, and still provides, all the capital moneys that are needed. But neither of these organisations confine their activities to the holiday centre alone. The main object of the committee of eight, as appears from the scheme, is to provide and maintain a convalescent home for the miners of North Derbyshire, and, subject thereto, a holiday centre for them. The main object of the Social Welfare Organisation, as appears from the Miners' Welfare Act, 1952, is
 I to support and carry out "social welfare activities" throughout the coal industry of this country. But the discussion in the courts below has been on the footing that the relevant organisation (whatever it is) has as its sole object the provision of the holiday centre; and attention has, therefore, been concentrated on whether that object alone is concerned with the advancement of social welfare. Your Lordships have been invited to deal with the case on this same footing, and I suppose you may. All I am concerned to point out is that it is not the right footing. But, taking it as the only question, I agree that the provision

of this holiday centre is concerned with the advancement of social welfare. It fulfils all the criteria laid down by this House in the *National Deposit Friendly Society* case (4). I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son* (for the appellants); *Donald H. Haslam*, agent for *Lawrence C. Jenkins*, Nottingham (for the respondents); *Treasury Solicitor* (for the Charity Commissioners).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

BROWN v. BROWN.

[COURT OF APPEAL (Hodson, Sellers and Willmer, L.JJ.), March 24, April 20, 1959.]

Variation of Settlement (Matrimonial Causes)—*Freehold house purchased after marriage—Fee simple conveyed to husband and wife on trust for sale—"Upon trust for themselves as joint tenants"—Purchase money provided by mortgage and loan and by parties—Substantial contribution by wife—Conveyance a settlement—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.*

Land and a house on it were conveyed to a husband and wife as purchasers in fee simple on trust for sale, the net rents and profits until sale and the proceeds of sale to be held "upon trust for themselves as joint tenants". There had not been any severance of the equitable joint tenancy in the proceeds of sale. Of the total purchase price of £975, £540 was provided by a building society mortgage under a separate mortgage deed expressed to be supplemental to the conveyance, £235 was provided by a loan and the balance was provided by the parties. At the date of the application subsequently mentioned £214 4s. had been paid in respect of mortgage capital repayments, interest and costs, and £149 12s. had been paid in respect of the loan. Substantial contributions towards these sums had been made by the wife out of moneys earned by taking in paying guests and lodgers. Following the divorce of the parties, the wife applied for an order varying the conveyance as being a settlement within the meaning of s. 25 of the Matrimonial Causes Act, 1950.

Held: (i) there was power to vary the conveyance, since it was a settlement made by the parties on themselves, the legal interests and the beneficial interests (there having been no severance of the equitable interests) being such as to give it the attributes of a settlement.

(ii) the facts that the mortgage payments were still continuing and that various outgoings on the house had to be met periodically did not give the conveyance the attributes of a settlement, since none of the payments had to be made by virtue of the conveyance.

Judgment of DENNING, J., in *Smith v. Smith* ([1945] 1 All E.R. 584) applied on (i) above, and the criticism of it in *Prescott v. Fellowes* ([1958] 3 All E.R. 55) considered.

Appeal allowed.

A [As to settlements within the statutory power to vary ante-nuptial and post-nuptial settlements, see 12 HALSBURY'S LAWS (3rd Edn.) 451, 452, paras. 1015, 1016, note (q); and for cases on the subject, see 27 DIGEST (Repl.) 646-648, 6097-6106.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.]

B Cases referred to:

- (1) *Prescott (orse. Fellowes) v. Fellowes*, [1958] 1 All E.R. 824; *reversd.* C.A., [1958] 3 All E.R. 55; [1958] P. 260.
- (2) *Bosworthick v. Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 27 Digest (Repl.) 645, 6091.
- C** (3) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 27 Digest (Repl.) 647, 6101.
- (4) *Hubbard (orse. Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441; 27 Digest (Repl.) 645, 6090.

Appeal.

D The appellant, who was formerly the wife of the respondent, appealed against a decision of His Honour JUDGE SHEPHERD, sitting as commissioner on Dec. 5, 1958, at Truro, refusing to make an order, on an application by the appellant under the Matrimonial Causes Act, 1950, s. 25, varying a conveyance of land and a house at 22, New Street, Penzance, made to the appellant and the respondent, then her husband, on trust for sale. The appellant contended that the conveyance was a settlement for the purposes of the Act, and that an order could therefore be made under s. 25.

E *G. D. Petherick* for the appellant.

The husband did not appear and was not represented.

Cur. adv. vult.

F Apr. 20. **HODSON, L.J.:** The judgment that I am about to read is the judgment of the court. This is an appeal from a decision dated Dec. 5, 1958, of His Honour JUDGE SHEPHERD who, on a summons by the appellant for variation of a settlement comprised in a conveyance dated Oct. 20, 1952, between one Beatrice Greaves as vendor and the respondent and appellant as purchasers, made no order. The appellant appeared by counsel, but the respondent has not appeared either by counsel or in person. The appellant and respondent, formerly wife and husband respectively, were divorced by a decree absolute dated June 18, 1957.

G By the conveyance the vendor, in consideration of the sum of £975, conveyed to the purchasers in fee simple a parcel of land and a house thereon at 22, New Street, Penzance. By cl. 2 of the conveyance, the purchasers declared as follows:

H “(a) The purchasers shall hold the said property upon trust to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and other money applicable as capital and the net rents and profits thereof until sale upon trust for themselves as joint tenants.

I “(b) Until the expiration of twenty-one years from the death of the last survivor of the purchasers the trustee for the time being of this deed shall have power to mortgage charge lease or otherwise dispose of all or any part of the said property with all the powers in that behalf of an absolute owner.”

The appellant and respondent were and are trustees of the property which is the subject-matter of the conveyance. By a mortgage of the same date expressed to be supplemental to the conveyance the purchasers obtained an advance of £540 on a first mortgage to the Halifax Building Society. Part of the purchase price, £235, was found by a loan at four per cent. interest made by Mr. Greaves,

the vendor's husband. The balance was found by the parties out of their own resources. A

When the summons was issued, the building society had been paid £214 4s. by way of capital repayments, mortgage interest and costs, and £149 12s. had been paid to Mr. Greaves in respect of the loan. The appellant has contributed substantially towards these payments, especially towards those made to the building society out of moneys which she earned by taking in paying guests and lodgers. Since the issue of the summons some further payments have been made to the building society and to Mr. Greaves. B

The appellant's object in these proceedings is to obtain exclusive possession of the property so that she can earn her living as heretofore by taking in guests and lodgers. The jurisdiction of the court to vary settlements has recently been reviewed by the court in *Prescott (or, Fellows) v. Fellows* (1) ([1958] 3 All E.R. 55), where it was pointed out by ROMER, L.J., that it has long been established by decisions binding on this court that a disposition of property may constitute a "settlement" for the purposes of s. 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose. Attention was drawn to *Bosworthick v. Bosworthick* (2) ([1927] P. 64), where a wife executed a bond which secured to her husband an annuity for his life. This court held that the bond was a post-nuptial settlement, and the words of ROMER, J., sitting as a member of this court, were cited. He said (*ibid.*, at p. 72) that the authorities established C D

"... that where a husband had made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections." E

The court thus has to deal with two classes of documents, not only deeds vesting property in trustees and creating successive, legal or beneficial interests so as to have the attributes of a settlement familiar to conveyancers, but also other documents by which provision is made by one spouse for another, the commonest example of which is a deed of separation, which usually provides for regular payments to be made by one spouse to the other during their separation. In *Prescott v. Fellows* (1), it was held that the instrument in question fell into neither of these classes, and, accordingly, an out and out transfer of securities made by a wife to a husband in consideration of marriage was held not to be property settled over which the court could exercise its "variation" jurisdiction. It was there pointed out that it would be highly inconvenient, if not absurd, to hold all gifts made by one spouse to the other to be settlements, and it seems to us that it would be stretching the language of the section too far so to hold and thus to invite claims after divorce for the return, for example, of articles of clothing or personal adornment. F G

In the course of argument in *Prescott v. Fellows* (1) the court was referred to a decision of DENNING, J., in *Smith v. Smith* (3) ([1945] 1 All E.R. 584), which had stated the principle, as the court thought, too widely, so as to cover the transfer into a wife's name, not only of an annuity, but also of a house or shares. This dictum was wide enough to cover the transfer of securities which had been made to the husband by the wife and had been followed by STEVENSON, J., at first instance but seemed to this court to be clearly at variance with what had been decided in *Hubbard (or, Rogers) v. Hubbard* (4) ([1901] P. 157), where there was an assignment by a husband to a trustee of a leasehold house (in which the parties lived together) with some furniture on trust to assign the same to the wife absolutely. The trustee assigned the leasehold to the wife accordingly, but there was held not to be a settlement within the meaning of s. 5 of the Matrimonial Causes Act, 1859, the predecessor of the section now in force. The actual decision in *Smith v. Smith* (3) was not directly in point in *Prescott v. Fellows* (1), for the property held to be settled property in the former case was, like the property in this case, conveyed to the husband and the wife in H I

A fee simple on trust to sell the same with power to postpone any sale "and to stand possessed" of the net proceeds of sale

"and of the net rents and profits until sale in trust for the husband and wife as joint tenants beneficially."

B There was also, as here, a mortgage, but all repayments had been made before the decree. Neither *Smith v. Smith* (3) nor this case is the same as *Hubbard v. Hubbard* (4) where there was no joint tenancy and no trust for sale.

C The question is: Can the conveyance of Oct. 20, 1952, truly be regarded as a settlement, or is it to be treated, as was the assignment in *Hubbard v. Hubbard* (4), as being outside the scope of the section? The position is, we think, made clear by the relevant sections of the Law of Property Act, 1925, s. 23 to s. 38, the effect of which is summarised in the judgment of DENNING, J., in the following passage ([1945] 1 All E.R. at p. 586):

D "The result was that the husband and wife held a joint tenancy of the legal estate in the land (which could not be severed) and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking appropriate steps) . . . So long as the husband and wife were living together in the house, they, of course, shared the occupation and acquiesced in a postponement of sale, and if they had continued in that way until one died, the survivor would take the whole legal and beneficial interest in it. If they together let or sold the house, either of them could sever the equitable joint tenancy in the income or proceeds whereupon each would be entitled to one half. No letting or sale could, however, be effected by one without the consent of the other, except by order of the Court of Chancery, which would consider whether in the particular circumstances it was right and proper that such an order should be made."

F Neither party has given any notice of severance, and so long as the power of sale is postponed, and there is no severance, the joint tenancy continues until one dies and the other takes the whole legal and beneficial interest on survivorship.

G Without therefore resorting to the liberal construction of the word "settlement", which has been so much discussed in the authorities, it is in our judgment right to regard the conveyance here in question as a settlement by the parties on themselves as trustees, which by its terms created legal and beneficial interests such as to give it the attributes of a settlement. We respectfully agree, therefore, with that part of the judgment of DENNING, J., which deals solely with the instrument under his consideration.

H Counsel contended that the fact that the mortgage payments were still continuing and that various outgoings on the house had to be periodically met gave the conveyance the attributes of a settlement within what we have called the liberal construction of the section, but we reject this argument seeing that none of these payments have to be made by virtue of the conveyance. The mortgage payments, which are the payments principally relied on, are made not under the conveyance but under a separate instrument imposing obligations on the parties vis-à-vis the mortgagee.

I We would therefore allow the appeal on the ground we have stated, and remit the matter to the learned judge in order that he may exercise his discretion either in the manner indicated in the last paragraph of the report of the registrar or in some other manner as he thinks fit.

Appeal allowed.

Solicitors: Corbin, Greener & Cook, agents for Jewill, Hill & Bennett, Penzance (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ABBOTT v. PHILBIN (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Roxburgh, J.), March 17, 18, 19, 1959.]

Income Tax—Income—Option to purchase its shares sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares since date of option—Whether increase in value of shares taxable at date of exercise of the option—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156, Sch. E, Case I, r. 1.

Income Tax—Assessment—Option to purchase its shares sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares since date of option—In what year value of option assessable—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156, Sch. E, Case I, r. 1.

In accordance with the terms of an offer made by a limited company to certain of its executive officers, the taxpayer applied for and was granted on Oct. 7, 1954, in return for a payment of £20 an option to purchase up to two thousand £1 shares in the company at their then market price of 68s. 6d. each. The option was not transferable. In March, 1956, he exercised the option in respect of 250 shares. The value of the shares at that date had risen to 82s. per share and the taxpayer was assessed to income tax under Sch. E for the tax year 1955-56 in the sum of £166 in respect of the increase in value less a proportion of the £20 option payment. It was not disputed that the value of the option was taxable, but the taxpayer contended that any assessment in respect of it should be in the year 1954-55 and that the increase in value of the shares that he acquired was not an emolument of his office. On appeal,

Held: the option, which was a contract for value to allot shares on application for them and was a chose in action, was a perquisite of the taxpayer's office within r. 1 of Sch. E to the Income Tax Act, 1952, and, since the option could have been realised at or soon after the date of the contract of option (Oct. 7, 1954), any assessment of it to income tax as a perquisite fell to be made in the year of assessment 1954-55 (see p. 283, letter G, p. 284, letters B-C, and D, post); further, any increase in value of the chose in action was of a capital nature, not of a revenue nature, and thus the increase in value of the shares acquired by the exercise of the option was not taxable as additional remuneration of the taxpayer (see p. 280, letters G to I, p. 281, letter B, and p. 283, letter D, post).

Bridges v. Hewitt ([1957] 2 All E.R. 281) and *Forbes' Executors v. Inland Revenue Comrs.* ((1958), 38 Tax Cas. 12) distinguished.

Observations on the relation between English and Scottish law in tax appeals (see p. 281, letters G to I, post).

Appeal allowed.

[**Editorial Note.** The question on what principle the option should be valued was not before the court (see p. 284, letter H, post).]

The superseding provisions of s. 10 of and Sch. 2 to the Finance Act, 1956, contain in para. 1 of Sch. 2 the word "perquisite" which appears in r. 1 of Sch. 9 to the Income Tax Act, 1952.

As to emoluments chargeable to tax under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311-313, paras. 573, 574; and for cases on the subject, see 28 DIGEST 85-88, 490-507.

As to the basis of the charge to Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311, para. 572.

For the Income Tax Act, 1952, s. 156, Sch. E, Case I, see 31 HALSBURY'S STATUTES (2nd Edn.) 149; and for r. 1 of the Rules applicable to Sch. E, see *ibid.*, 522.

For the Finance Act, 1956, s. 10 and Sch. 2, see 36 HALSBURY'S STATUTES (2nd Edn.) 408, 448.]

A Cases referred to:

- (1) *Ede v. Wilson & Cornwall*, [1945] 1 All E.R. 367; 26 Tax Cas. 381; 2nd Digest Supp.
- (2) *Forbes Executors v. Inland Revenue Comrs.*, (1958), 38 Tax Cas. 12.
- (3) *Bridges (Inspector of Taxes) v. Hewitt*; *Bridges (Inspector of Taxes) v. Bearsley*, [1956] 3 All E.R. 789; *reversd.* C.A., [1957] 2 All E.R. 281; 37 Tax Cas. 289; 3rd Digest Supp.
- (4) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, 87.
- (5) *Tait v. Smith*, (1954), 35 Tax Cas. 79; 3rd Digest Supp.
- (6) *Salmon v. Weight (Inspector of Taxes)*, [1935] All E.R. Rep. 904; 153 L.T. 55; sub nom. *Weight v. Salmon*, 19 Tax Cas. 174; Digest Supp.

C Case Stated.

The taxpayer appealed against an assessment for 1955-56 made on him under Sch. E to the Income Tax Act, 1952, in respect of emoluments of his employment. The question for determination was whether he was assessable for 1955-56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in 1955-56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which he purchased the option. The Special Commissioners of Income Tax held that the taxpayer was assessable in 1955-56 and that the appeal failed. The taxpayer appealed by way of Case Stated to the High Court.

Heyworth Talbot, Q.C., and *D. C. Miller* for the taxpayer.

R. E. Borneman, Q.C., and *A. S. Orr* for the Crown.

ROXBURGH, J.: "At a meeting of the Commissioners for the Special

Purposes of the Income Tax Acts held on Feb. 24, 1958, E. C. Abbott (hereinafter called 'the appellant' [the taxpayer]) appealed against an assessment for the year 1955-56 made upon him under Sch. E to the Income Tax Act, 1952, in respect of emoluments from his employment. The question for [the commissioners'] decision was whether the appellant [taxpayer] was assessable for the year 1955-56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in the year 1955-56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which the option was purchased by him."

G Rule 1 of the Rules applicable to Sch. E provides:

"Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ."

H after making certain possible deductions.

The question is not whether the emolument in question falls within that rule as an emolument taxable under Sch. E because the taxpayer has conceded that it is so taxable. Counsel for the taxpayer conceded it at once, but he advanced the view that it was a perquisite and that it came within the Schedule on that ground. Counsel for the Crown says that he does not attach any importance to that question because it is within the Schedule. As he has not contended that it is not a perquisite—he asked me not to say that he conceded it, and I have chosen my words carefully—I see no reason why I should explain why I think counsel for the taxpayer was right in so describing it. In my judgment the emolument was a perquisite and no contention has been advanced before me to the contrary.

One of the principal arguments consistently advanced by counsel for the Crown has been that, once the perquisite is in the box, all considerations as to its quality are exhausted and one does not look any further into the questions

whence it was derived or why it was paid. That proposition seems to me to be contrary to logic, jurisprudence and the whole trend of authority. A

Dealing first with logic, one does not deprive persons of all symbols of identity by putting them into a box. When Noah put the animals into his box, he did not deprive them of both species and gender. That is the logic of the thing. From the point of view of jurisprudence, the question is not whether they are in the box but when they got into the box, to adopt counsel's metaphor. In other words, were they perquisites from the employment for the year of assessment? There would be no question at all for me to consider if it were true that, once the perquisite got into the box, all considerations as to its quality were exhausted and that one did not have to look any further into whence it was derived or why it was paid. Thirdly, the process which counsel so surprisingly disclaims is precisely that process adopted by every other judge who has had to deal with this question. B C

The Case Stated states that :

"The following facts were proved or admitted: (a) The [taxpayer] was at all material times the secretary of a company, E. S. & A. Robinson, Ltd. (hereinafter called 'the company') which carried on business as wholesale stationers." D

Annexed to the Case is a copy of a letter dated Oct. 6, 1954. It is not a true copy, but counsel agreed how it ought to be amended, i.e. in two respects: first that whereas, on the face of it, it is not addressed to anybody it is, in fact, addressed to the taxpayer; and, secondly, that the second paragraph ought to be amended by the insertion of certain figures into two blank spaces. I now read it as thus agreed to be amended: E

"Dear Mr. Abbott, Ordinary share options. The directors consider that it would be to the benefit of the company if certain executives of the company and of its subsidiary companies . . . were afforded an opportunity of obtaining an interest in, or increasing an existing interest in, the capital of the company. Accordingly, arrangements have been made under which options to subscribe up to a total of 250,000 ordinary shares of £1 each of the company at the middle price ruling on the Bristol Stock Exchange on the date of the grant of an option, may be granted to such directors and executives as are from time to time nominated by the managing directors. The options will be exercisable at any time within ten years from the date of grant." F G

That statement is not accurate because it is subsequently qualified, as will appear.

In *Ede v. Wilson & Cornwall* (1) ([1945] 1 All E.R. 367; 26 Tax Cas. 381), decided by WROTTESELEY, J., the directors of company A, as a reward for past services and a stimulus to future efforts, decided to allow the respondents, who held managerial offices in a subsidiary company B, to subscribe for certain shares in company A at their par value, which was considerably less than their current market value, on giving a verbal undertaking that they would not sell such shares without the permission of the directors of company A so long as they remained in the employ of company B. The respondents took advantage of the privilege and gave the required undertaking, and they were assessed to income tax under Sch. E on the difference between the par value of the shares so taken up and allotted to them and their market value at the time of the allotment. On appeal they contended that they were not employed by, and rendered no services to, company A; that they were debarred from realising profits on these shares by the verbal undertaking they had given; that they had received no income by the transaction, and that the profit (if any) should be assessed only when realised. The General Commissioners were of the opinion that no profit could reasonably arise from the transaction owing to the tie, and discharged the assessments. It was held that the commissioners had come to H I

A a wrong conclusion and that the privilege granted to the respondents represented money's worth and was assessable to income tax as a profit of their respective offices in company B, but that the cases must go back in order that the commissioners might decide the proper amounts of the assessments having regard to the restriction under which the respondents accepted the allotments. At the end of the judgment counsel for the Crown said (26 Tax Cas. at p. 389):

B "It will go back just to find the amount in accordance with your Lordship's judgment.' WROTTESELEY, J.: 'It may be very different in the hands of different persons.' Counsel for the taxpayers: 'It may be possible to agree it, of course, before we come to the commissioners'."

C If that is the method by which most questions of these awkward types regarding valuation have been resolved, that does not absolve the court from considering the principles on which valuations ought to be made if the parties do not agree a figure. There is no doubt at all what WROTTESELEY, J., meant when he said (*ibid.*):

D "It may be very different in the hands of different persons . . . To a well-to-do person with capital of his own already it may be worth the stock exchange value; to another man it may not."

If that is good law—I do not know how many of the 250,000 ordinary shares were, in fact, issued under this letter and it is no business of mine to ask—there may be some interesting and protracted valuations if they are conducted on the lines indicated by WROTTESELEY, J.

The letter of Oct. 6, 1954, continues:

E "On the nomination of the managing directors the directors have therefore decided to grant you, at the price of £1 for every 100 shares involved, an option to subscribe for 2,000 ordinary shares at 68s. 6d. per share. Kindly complete the enclosed application form and send it to the secretary by return, together with your cheque for £20 being the price of the option. In due course you will receive a certificate specifying the number of ordinary shares of the company in respect of which the option has been granted, the price payable for the shares, and other terms governing the contract of option. You will note that the option is not transferable and to the extent not previously exercised will expire upon your death or retirement, upon your service with the company and/or its subsidiaries ending, or on the tenth anniversary of the date of grant of the option, whichever first occurs. Upon an exercise of the option, the allotment of ordinary shares will be made, subject however to—(a) the prior receipt by the company's secretary of a form of application duly signed by the option holder stating the number of shares (which, it should be noted need not be all the shares in respect of which the option was granted) to be taken up and accompanied by payment in full of the price payable for the shares; (forms of application may be obtained from the secretary)."

H The point that all the shares need not be applied for is a matter of importance, which I shall have to consider in my judgment.

I "(b) the consent of H.M. Treasury or such other authority as may under regulations or enactments for the time being in force, be necessary. Allotments will not be made between the date of declaration of a dividend or other distribution on the ordinary share capital of the company and the date of payment of that dividend or other distribution. In the event of any change in the issued capital of the company taking effect while any option is outstanding (otherwise than by reason of the exercise of options), such option (including the number of shares affected and the price payable for the shares) will be appropriately modified by the directors. The directors whose decision in all matters relating to this scheme shall be final and binding, may at any time discontinue the grant of options or amend any of the above provisions

in any way they think fit, but they may not cancel or (subject to the preceding paragraph) modify the terms of options already granted." A

The language of this letter, which in this respect I do not differentiate from the language of many judges who have pronounced judgments on the nature of options, indicates the common confusion about the nature of options. English law has a somewhat unique view of options. Options are, of course, contractual rights. A contract of option is a contract recognised by the common law, and breach of it gives rise to an action for damages. Since the fusion of law and equity, however, options have been treated somewhat differently in theory if not entirely in practice, because of the Chancery tendency, notable everywhere in equity law, to treat contractual rights created on the payment of valuable consideration as being in the sphere of property rather than of contract. A layman does not talk about an option contract. He talks about the granting of an option, which immediately introduces, by implication, an equity conception of an option. B C

Paragraph 2 (f) of the Case reads:

"The [taxpayer] was included as one of the selected list of executives above referred to in respect of 2,000 shares in the company and on Oct. 7, 1954, he sent in an application to the company to purchase an option in respect of such 2,000 shares" D

—the very phrase "purchase an option" indicates the equity view of it as property rather than the common law view of it as paying a consideration for a contractual right—

"on the terms of the letter above referred to, forwarding with such application his cheque for £20, which was duly cashed by the company. E

A copy of such application is hereto attached marked C."

The application which is addressed to the secretary of the company—in fact himself—reads as follows:

"Dear Sir, I desire to purchase an option upon the terms set out in the company's letter of Oct. 6, 1954, to subscribe for up to 2,000 ordinary shares in the company and enclose my cheque in the company's favour for £20 being payment at the rate of £1 for every 100 of such ordinary shares to which the option is to apply. Dated this 7th day of October, 1954." F

That date was, of course, in the year of assessment 1954-55 and not in the year of assessment 1955-56. I record that because that is the whole point of this case. G

Owing to circumstances mentioned in the Case, the company had obtained, in response to an application on Mar. 4, 1955, the consent of Her Majesty's Treasury to the issue of shares in response to the exercise of options, and by a letter dated May 9, 1955, the option holders were so advised. In consequence of those circumstances, as I say, the taxpayer did not receive an option certificate until May 6, 1955. The certificate states on the face of it that the option was granted on Oct. 6, 1954. That is too much equity and too little common law. Not even in a court of equity could the option be deemed to be property until the consideration had been paid, because equity does not treat as creating property rights a contract for no consideration, and there was no deed of grant, nor would there be. As there was no deed of grant and as there was on Oct. 6, 1954, no contract for a valuable consideration, there could not therefore have been in law a grant of the option on Oct. 6, 1954. On the other hand, a somewhat serious question might have arisen whether there became a binding contract on Oct. 7, 1954, because of certain ambiguous phrases in the letter. Fortunately, I do not have to decide that question, because it was agreed by counsel that a binding agreement was concluded in the manner I have indicated by the letter of offer and the letter of acceptance of Oct. 7, 1954. Therefore, I am going to substitute, instead of the date stated on the certificate, the agreed date of Oct. 7, 1954. The certificate is quite short: H I

A "This is to certify that Edward Cranfield Abbott of 4, Harley Place, Clifton Down, Bristol 8 in consideration of the payment by him to the company of the sum of £20 was granted on Oct. 6, 1954 an option upon the terms and subject to the conditions set out on the back hereof, to subscribe at 68s. 6d. per share for 2,000 ordinary shares of £1 each in the capital of the company."

B I have already dealt with the date. Indorsed on the back of the option certificate it has some relevance to one of the matters that I hope to refer to in my judgment—is this:

"The within mentioned Edward Cranfield Abbott having exercised his option on Mar. 28, 1956, in respect of 250 shares this certificate now covers an option of 1,750 shares only."

C Paragraph 2 (g) and (h) of the Case reads:

"... On Mar. 28, 1956, the price of the company's shares having then risen to 82s., the [taxpayer] applied to the company for 250 ordinary shares at the option price of 68s. 6d. per share, sending with such application the sum of £856 5s. ... The [taxpayer] was duly allotted the 250 shares. (h) The [taxpayer] was assessed to tax under Sch. E for the year 1955-56 in the sum of £7,086 which included the sum of £166 in respect of the share transaction [the only figure relevant to the present case] such sum of £166 being made up as follows:

	£	s.	d.
250 shares taken up Mar. 28, 1956, when the middle market price was 82s.	1,025	0	0
	£	s.	d.
Deduct: option price 68s. 6d.	856	5	0
cost of option at £1 per 100 shares	2	10	0
	<hr/>		
	858	15	0
	<hr/>		
F	£166	5	0
	<hr/>		

Paragraph 3 of the Case reads:

"It was contended on behalf of the [taxpayer]: (a) that the contract of option vested a right of property in the [taxpayer] forthwith."

G I take it that that means this was a chose in action. If it did not mean that, that is what I think it should have meant.

"(b) that such right represented money's worth and was inherently capable of realisation; (c) that such right was, to the extent of any excess in value over the price paid therefor, an emolument of the [taxpayer's] employment assessable under Sch. E in the year of assessment 1954-55 and not otherwise."

H That particular contention was narrowed down by counsel for the taxpayer to the contention that it was a perquisite, and it is a view which I have accepted.

I " (d) that the shares issued to the [taxpayer] in the year 1956, were issued in virtue only of the right of property acquired by the [taxpayer] in the previous year of assessment; and (e) that any excess in value of the shares, when issued, over the price paid therefor represented an appreciation in the value of an item of property owned by the [taxpayer] and was not an emolument of his employment.

"4. It was contended on behalf of the [Crown]: (a) that when the shares were issued [I suppose that means "and not before"] to the [taxpayer] there arose or accrued to him a profit from his employment assessable to tax for the year 1955-56; (b) that the said profit so assessable amounted

to £166, computed as set out in para. 2 (h) above; and (c) that the appeal should therefore be dismissed and the assessment confirmed."

In para. 5 of the Case appears the finding of the commissioners, of which I need read only about five or six lines.

"We consider that the present case is indistinguishable from that of *Forbes' Executors v. Inland Revenue Comrs.* (2) ((1958), 38 Tax Cas. 12), and that the decision of the Court of Session in that case given on Jan. 16, 1958, is binding on us. In the present case the appellant paid a small sum for his option . . ."

—may I say at once that the size of the sum cannot be the criterion of the law; the law must be the same, and I shall come back to that point, whether the sum was £20 or £20,000—

"whereas Mr. Forbes was given his option, but we do not consider that difference material."

I need not read any more because the Special Commissioners plainly arrived at their conclusion on that ground alone. They considered that they were bound by a case which was indistinguishable because the distinction alleged did not in their opinion amount to a material difference. Therefore I do not think anyone can say, at any rate as regards this case, that I am bound by the finding of the commissioners, and no one has, in fact, said so.

Rule 1 of the Rules applicable to Sch. E groups together for the purpose of taxation a number of transactions or happenings which are, in my judgment, essentially different in character. Parliament can do that or anything else that it likes and can say that transactions essentially different in character are to be taxed under a particular Schedule, but, except where Parliament has said so in express terms, I dissent from the view that that process amalgamates essentially different transactions for all purposes. I do not think that it overrules or overrides the general law, except in so far as is necessary to give effect to the provisions for taxation embodied in the Act. That, I think, is the fundamental ground on which I have already rejected and still reject the argument of counsel for the Crown. Admittedly these perquisites are in the box, admittedly salaries are in the box, but that does not mean that salaries and perquisites have essentially the same characteristics, any more than if you put Jack and Jill in the box they would become of one sex together. It is necessary to remember, on any sensible view, that salaries are a revenue item but that transactions in relation to shares are generally not a revenue item. They are sometimes a revenue item but I should have thought that they generally were not. I believe that that distinction has been and ought to be preserved in dealing with perquisites.

In my view, it is very necessary to consider—and I thereby reject again the argument that has been put to me—what was the character of this perquisite. Was it primarily a revenue item or was it primarily a purchase, on favourable terms, of a capital asset, or a right to purchase on favourable terms a capital asset? I think that that distinction will reconcile the authority at present existing on this point, with the exception of *Forbes' case* (2) about which I shall have much to say. I have been referred to cases other than *Forbes' case* (2), and I have not ignored them in what I have just said. Undoubtedly the argument of counsel for the Crown rested mainly, though not entirely, on three passages in *Bridges (Inspector of Taxes) v. Hewitt* (3) ([1957] 2 All E.R. 281).

Apart from the submission with which I have already dealt, my note of the main submission of counsel for the Crown can be summarised as follows: He contended, I think, that the proper appreciation of the contract in the particular cases to which I have just referred made it necessary to isolate the option contract from the subsequent application for and allotment of shares, and that when this process had been carried out the benefit of the option contract was

A not a perquisite because it could not be turned to pecuniary account. He preferred to make use for this purpose of an extract from the speech of LORD HALSBURY, L.C., in *Tennant v. Smith* (4) ((1892), 3 Tax Cas. 158). I do not suggest that there is any distinction between the passage which he cited and the passage which is commonly cited from the speech of LORD WATSON (*ibid.*, at p. 167) but if there be any distinction I shall be in fashion if I prefer, as I do prefer, B the following extract from the speech of LORD WATSON, which can readily be read without appreciation of the facts of that particular case (*ibid.*):

C "Is it then a perquisite or a profit of his office? I do not think it comes within the category of profits, because that word in its ordinary acceptation appears to me to denote something acquired which the acquirer becomes possessed of, and can dispose of to his advantage, in other words money, or that which can be turned to pecuniary account."

In this case the taxpayer paid money, he did not receive it, but the question is: did he acquire something which could be turned to pecuniary account? Counsel for the Crown submitted that the option contract merely—and I stress the word "merely"—gave the appellant a right to exercise the option and D that as it was not transferable it was of no value. That submission, I think, was the actual basis of the decision of the Scottish court. Before commenting on that submission I propose to read some passages in the *Bridges* case (3). The facts and contentions were as follows. The taxpayers were at the material times respectively managing director and a director of a limited company which they had served for many years in those and other capacities. They had greatly helped E in building up the business and in running it when it had become established. Most of the shares in the company were held in trust, under the will of the former principal shareholder (who died in 1936), for his widow during her life and thereafter for his two sons in equal shares absolutely. The taxpayers wished to have a fairly substantial holding in the company. They had been under the impression that the former principal shareholder would bequeath them F shares by his will, but he had not done so. In due course they approached the sons about the matter and in 1945 the sons entered into covenants under which the taxpayers, in consideration of their continuing their engagements with the company for four years, were each to receive 8,000 of the shares within three months of the death of the widow. These shares were transferred to the taxpayers in July, 1953. On appeal to the Special Commissioners against assessments G to income tax under Sch. E made on them for 1953-54 in sums which included the value of the shares at the date of transfer, the taxpayers contended that the transfers were pure acts of bounty and in no sense rewards for past or future services; and that the stipulations that the covenants were in consideration of continued services were conventional (whatever that might mean) and inserted simply to give the taxpayers a procedural right to see on the H documents effectively. Alternatively, it was contended that, if the value of the shares transferred was income assessable under Sch. E, such income either arose on the execution of the deeds or should be spread over the four years 1945-46 to 1948-49. The Special Commissioners found that the transfers and covenants were not remuneration for the taxpayers' services in their current offices and held that neither the value of the shares nor the value of the covenants I represented income assessable under Sch. E. It was held (JENKINS, L.J., dissenting) that the shares were not profits from the taxpayers' current offices because they were not remuneration for services in those offices but testimonials (which under the covenants might not have accrued until after retirement) for what they had done, including what they had done before holding those offices. DANCEWERTS, J.'s judgment in favour of the Crown was reversed on appeal but it is not irrelevant to read what he said at a time when his decision would have stood, if not reversed. He said ([1956] 3 All E.R. at p. 798):

"Two alternative contentions were put forward on behalf of the taxpayers. The first of these was that, if the transaction fell within the terms of Sch. E, the income of the taxpayers was the value of the rights acquired in December, 1945, by the taxpayers under the deeds of covenant; this would mean that those values . . . and the assessment on them now, or at the material date of the assessments under appeal, would be out of time. Evidence was tendered that it was possible for a valuer to make an estimate of some sort as to the values in question. The commissioners treated the estimates as being such an uncertain matter that they could not amount to money's worth and, therefore, they were not a possible part of the taxpayers' income."

I can see what great difficulties regarding valuation would have arisen, not merely on questions of fact but also on questions of principle, but I do not think it could be argued that property could not be turned to pecuniary account, not because it was not capable of being sold at a profit, but because the commissioners could not value it. I cannot see how the question whether it amounts to money or money's worth could possibly depend on whether the commissioners could think of means of valuing it. I do think very difficult questions will arise, assuming that my judgment stands without being reversed. However, it has not been submitted to me that a valuation cannot be made. DANCKWERTS, J., went on ([1956] 3 All E.R. at p. 798):

"I do not think that this is the correct answer, but I do not think that the contention can succeed. Counsel for the taxpayers, in support of this contention, relied on *Tait v. Smith* (5) ((1954), 35 Tax Cas. 79), as well as *Salmon v. Weight* (6) ([1935] All E.R. Rep. 904); but I do not think that those cases have any application on the facts of the present case."

There is a clear example of a judge not adopting the submission which counsel for the Crown made to me and which I dealt with at the beginning of my judgment. He says (*ibid.*):

"If the conclusion is correct that the transfers of the shares were profits of the taxpayers' offices and remuneration for the services to be performed by them, they were paid for those services when the shares were transferred to them (though the shares were not immediately realised), and assessable accordingly."

I stress the words "were profits of the taxpayers' offices", about which there is no doubt, and the words "and remuneration for the services to be performed by them," as those two propositions are a condition precedent of that which DANCKWERTS, J., was about to say and that, in my view, discloses the kernel of the problem. Although DANCKWERTS, J.'s judgment was reversed, yet it was not reversed, so far as I can see, on that point.

JENKINS, L.J., in the Court of Appeal, was in a minority and therefore what he says on this topic may be obiter dictum, but I should be both disrespectful and unrealistic if I lightly disposed of what he said on that ground. On the contrary, I agree with him completely, bearing in mind one of the premises on which DANCKWERTS, J.'s statement of the law was founded and which recurs in JENKINS, L.J.'s statement of his view of the position. He says ([1957] 2 All E.R. at p. 294):

"As to the alternative contention to the effect that the proper subject of assessment consisted of the value of the rights acquired by the taxpayers under the deeds of covenant in December, 1945, which constituted income of the taxpayers for the financial year 1945-46: on the footing that the taxpayers fail in their main contention the position was that by the deeds of covenant the Hornby brothers covenanted that, in consideration of the taxpayers continuing their respective engagements with the company for four years from the date of the deeds, the Hornby brothers would transfer to them on the death of Mrs. Hornby the specified number of shares in the

A company by way of remuneration for the services rendered by them to the company during that period. The time at which the taxpayers were to receive this additional remuneration for their services to the company for this further period was thus fixed by the terms of the bargain as the death of Mrs. Hornby, or, to be strictly accurate, the expiration of three months from her death. In fact the taxpayers duly completed their four years' further service in Mrs. Hornby's lifetime, and the shares were transferred to them shortly before her death, although the Hornby brothers would have been entitled to withhold such transfer until three months after the happening of that event. I see no reason for treating the stipulated remuneration, i.e., the shares, as received or receivable on any earlier date than that on which the shares were actually transferred, which, as I have said, was in fact earlier than the date on which the Hornby brothers were obliged under the deeds of covenant to transfer the shares to the taxpayers."

I stress the words "the stipulated remuneration." Counsel for the Crown did not like my use of the word "received". I think that he was right and I ought to have said "received or receivable". In other words, I agree in toto with this passage in the judgment of JENKINS, L.J. He continued (*ibid.*):

"In *Salmon v. Weight* (6) the benefit held to constitute remuneration consisted of an immediate right to subscribe at par for shares worth in the market substantially more than par. In *Tait v. Smith* (5) it was held that the taxpayer was wrongly assessed for the year 1949-50 in respect of the surrender value of an endowment policy on his life which under the terms of his service he had become entitled to have immediately transferred to him in 1946. I do not think that either of these cases, on which counsel for the taxpayers relied, supports his contention that in the present case the taxable profit consisted of the value of the rights conferred by the deeds of covenant at the date of those deeds and not of the value of the shares at the date when they were transferred."

MORRIS, L.J., did not deal with this point, but SELLERS, L.J., says (*ibid.*, at p. 304):

"It is not, in my view, in harmony with the tax provisions that, if the transactions fell within the terms of Sch. E the income was the value of the rights acquired by the taxpayers when the deeds were entered into. I agree with the learned judge when he says . . ."

—and then he makes a citation from the very passage which I have read from the judgment of DANCKWERTS, J.

The argument which counsel for the taxpayer presented to me, as is obvious from the contentions which I have read from the Case, involves the proposition that a contractual right to receive payments in future, which is a chose in action, can, as it were, be capitalised at the date of the deed and be taxed as a perquisite. If one tries to apply that theory to an ordinary contract of service one comes to a complete standstill as regards common sense. That is the difficulty, in my view, of the argument which he presented to this court. One could look at a contract of service in the same way that he looks at this option contract. I am now talking not about additional remuneration but about a straight service contract, a contract by an employer to employ the taxpayer for ten years certain at a fixed salary of £1,000 a year. In jurisprudence, that is a chose in action and it is obviously one which can be turned to pecuniary account, although, of course, only by the most appalling imprudence. However, that does not seem to me to be a jurisprudential consideration. Some money could be raised by an equitable mortgage of such a contract—that is without doubt—and therefore one would reach the logical conclusion that in future salaries ought to be taxed, not when they are receivable, but when the contract to pay them is entered into. That is the way I thought the case for the Crown would be presented, and to which I have given a great deal of personal attention, because that

would obviously be wrong. I think that problem has undoubtedly been in the minds of other judges before me. A

I do not think that the Crown or the taxpayer has ever yet suggested that salaries should be dealt with in the manner in which counsel for the taxpayer has asked me to deal with this option contract. At any rate, no case has been cited to me and I should not think that one exists. Salaries are not dealt with as being the benefit of a chose in action which can be turned to pecuniary account. They are dealt with as sums of money received de anno in annum and taxed in the year in which they are received or receivable. I emphasise those words "received or receivable" because I would have thought that proposition could not be disputed or argued. That was the problem which, in a modified form, confronted JENKINS, L.J., because he, and also DANKWERTS, J., quite clearly took the view that in this particular case the shares were additional remuneration. They both used words to that effect, which I have already cited, and one could not have a method of dealing with additional remuneration which was different from the method of dealing with the ordinary remuneration of the particular individual under his service contract. Therefore, if I may say so with respect, in my view the three dicta in *Bridges v. Hewitt* (3) are plainly right. B C

Now in what respects does the *Bridges* case (3) differ from the present case? First of all, and, although this is not the most important distinction, it is nevertheless a real one, it is not an option case at all. Secondly, in my judgment it is distinguishable because it relates to a payment under a contract of service and not to a payment which comes as a result of service, which is quite a different matter. Most important of all to my mind—and here I differ completely from the Special Commissioners—it was not in the present case a reward for services at all, but a thing that was bought. The price paid is immaterial. It was bought, whether £20 or £20,000 was paid for it, and therefore it could not have been extra remuneration for services. However, that is exactly what JENKINS, L.J., thought in the *Bridges* case (3). If it had been taxable at all—and we know, in fact, that it was decided that it was not—as what would it have been taxable? D E

Is it possible to say that this case differs in principle from the *Bridges* case (3)? I think that it helps the Crown more than *Forbes'* case (2). In my judgment, it is not as though all the cases are on the *Bridges* (3) side of the line. A number of cases, most of them being referred to in what I have read, must be reconciled by some principle, and I think that there is a principle which quite plainly corresponds with the normal business sense of the community. That principle is that salaries, whether original or additional, fees derived in the course of one's employment, and wages are quite plainly revenue items and are therefore not to be capitalised and taxed on a capitalisation basis. On the other hand, however, option contracts bought for a valuable consideration are clearly, in the ordinary sense of the word, capital transactions. I do not think that anyone would suggest that a self-employed shareholder was taxable under Sch. D for profits which he might derive from having allotted to him, as a shareholder, a certain number of shares at a price well below the market value which he sold on the Stock Exchange at the market value. It is a well-known and frequent transaction in these days, and I believe—and it certainly has not been contended to the contrary before me—that the profit on such a transaction is not taxable under Sch. D, at any rate, because it is not an income item. Nor is it a revenue item. It is a capital profit. Schedule E cannot be dealt with in that way, because it includes something which is not in Sch. D, viz., perquisites. However, I do not think that a perquisite is to be treated as changing its whole nature and character merely because it is brought into the box in an omnibus provision dealing with salaries and wages. In my judgment, if the thing is a perquisite, the court must next see what is its nature. In looking at its nature the ordinary principles of English law must be applied—and I emphasise at the moment the word "English". Looking at this transaction, it may be that I shall be entitled to say that it is the sort of transaction which ought to be capitalised and taxed on F G H I

A the basis of a chose in action and not on the basis of a salary. If that is not so, it seems to me that the argument of counsel for the taxpayer would necessarily fail, and it is only because I have come to the conclusion that it is so that I have not called on him to reply.

B In my view, the distinction is this: Is this additional salary or is it a perquisite and something which is not income in any sense, except that it has been derived by virtue of the taxpayer's employment with the company? If it is that then, in my view, it gets out of the category of the *Bridges* (3) line of cases and gets into another category.

It is important in the Scottish case of *Forbes' Executors v. Inland Revenue Comrs.* (2) to realise what the document was on which the question was raised. Sub-paragraph (vii) of clause II of the Case (38 Tax Cas. at p. 13) reads:

C "On Sept. 18, 1944, a new minute of agreement was agreed and executed between Watt Torrance, Ltd., of the first part, Watt Torrance Woolwich, Ltd., of the second part and Mr. Forbes of the third part. The eleventh clause of this agreement provided that: 'So long as Mr. Forbes remains the managing director of the company [i.e., Watt Torrance, Ltd.] and of the Woolwich company he shall have the right to apply for and to be allotted shares of any denomination up to the number of ten thousand in either or each of the companies on payment in cash of the nominal or par value of the shares applied for'."

D We have here an option, but I do not think that that is the decisive factor. However, we have the eleventh clause of the service contract and, in my view, that is the decisive factor. We also have a factor which, if not decisive, is important, namely, that the employee did not have to pay anything for this option. He had to render services under his service contract. It seems to me that *Forbes' case* (2) is plainly a case of additional remuneration and that it falls into the group to which JENKINS, L.J., referred. If this case of *Forbes* (2) had come before me in an English court, I have little doubt that I should have reached the same conclusion as the Scottish court reached, but not on the same grounds. I should have done it on the grounds which I have already stated: that we are here concerned with additional remuneration, and that it is impossible to treat additional remuneration on a different basis from what I might call the primary or principal remuneration.

F It has been put to me that some sort of principle for construing contracts can be built up out of these two authorities, *Forbes* (2) and *Bridges* (3), and to that view I cannot assent. If any such thing had been contended, I should at once have said that it could not weigh with me. With certain immaterial modifications, the Income Tax Acts apply to both England and Scotland and I have always recognised that, if only as a matter of comity, I ought if possible to follow the decision of a Scottish court on the construction of the Income Tax Acts.

H Any contrary view would result in sending every case to the House of Lords, where alone the question is open, because these principles that I am stating do not, I believe, apply to the House of Lords. However, I have always understood that, not only are Scottish decisions not binding in England, but that they are not followed, even as a matter of comity, where there is a possibility that Scottish law may differ from English law. In an income tax case, there is a very special reason why that should be so. Under the general law, Scottish law is a question of fact, odd though that has always seemed to me to be, and it is the duty of the commissioners and not the duty of the judge to find facts. Therefore, in an income tax appeal, if the court had to be informed as to what the Scottish law was, the case would have to be remitted to the commissioners if they did not find it, and I cannot imagine anything more absurd than remitting a case to the Special Commissioners in order to find as a fact what Scottish law was. Surely, however, the answer is this: That I do not take judicial notice of Scottish law because it is not my duty to apply it, except to the undoubtedly

limited extent that the court may have expressed a view on the construction of something in the Income Tax Acts. A

I am anxious to say that because I am quite certain that what troubled LORD CLYDE (Lord President), was the difficulty which I have already indicated. He did not adopt the way out that I have suggested and he may ultimately tell me that that is not a good way out, and suggest another way, but I am fairly certain that he was not blind to the real difficulty of this case. As I say, I do not take judicial notice of Scottish law, and I am certainly not bound to assume that it is the same as English law. Indeed, a passage in the report of the case makes me think that it probably is different, although I am not holding as a fact that it is. B
LORD RUSSELL says (38 Tax Cas. at p. 20):

“Prima facie, therefore, it would seem that the obligation of the companies to allot shares to Mr. Forbes was dependent on the existence of a condition and was not enforceable until the condition was purified, viz., the delivery of cash representing the par value of the shares.” C

The word “purified” is not in the English legal vocabulary. It is not a term of art in England but it obviously is a term of art in Scotland—obviously, I say, from that paragraph. LORD RUSSELL has explained its meaning, but it seems to me to envisage some doctrine which, so far as I know, is quite alien to English law. Therefore, I decline to assume that, in approaching this contract, it makes no difference that the court which approached it was a Scottish court and not an English court. D

I have already said that I should have decided *Forbes’* case (2) in the same way that the Scottish court did, but not on the grounds stated by the Lord President. I am not for one moment suggesting that those grounds were not valid in Scottish law. I expect they were valid, but I doubt their validity in English law and I am entitled to do that. E

In my view, the ratio decidendi of the case was a conclusion reached on the construction of the contract, and the Lord President makes that plain. He says (*ibid.*, at p. 18): F

“It may be that some forms of option could involve a pecuniary benefit from the moment that they are granted, but the option in this case in my opinion did not. For the option itself could not be turned to pecuniary account.”

That shows plainly that the Lord President was not intending to lay down any general principle of construction applicable either to England or to Scotland, but was merely construing the contract with which he was concerned. However, I cannot leave it there, because there are certain propositions of law in his judgment which I should find very difficult to accept as propositions of English law, though they may be excellent propositions of Scottish law. The Lord President says (*ibid.*, at p. 17): G

“In my opinion the right which Mr. Forbes obtained on signing the agreement in 1944 was a right merely to apply for the shares: it gave him no right in or to any shares, for this could only emerge when he exercised his right and when he delivered to the company the par value of the shares he demanded.” H

I certainly assume that that is a proper statement of Scottish law, but I cannot accept it as a proper statement of English law, which, as I have mentioned, has been very much influenced by the reaction of the principles of equity on the common law. It is true that it gave him no right in or to any shares—I am speaking now of the contract which the Scottish court was construing—but according to English law it certainly would have given him a right to some shares. That is indisputable. In England the right may be contingent or conditional, but it is none the less a right. The right in the Scottish case was plainly contingent or conditional. I think that the right word would be conditional but it was I

A none the less a right. In Scottish law, apparently, that is not so, because the right could only emerge when exercised. That is not so in English law: the right emerges from the contract giving the right, however many conditions there may be precedent to the obligation on the other party to perform the contract. I feel bound to say that, because otherwise people will try to apply what is a proposition of Scottish law to the construction of English contracts.

B Nor can I readily follow why the non-transferability of that contract deprived the perquisite of all pecuniary value. Somewhat similar observations may perhaps be made as regards LORD CARMONT'S opinion. Sitting in an English court, I should have regarded the option contract as a complete conditional contract. By "complete" I mean complete as a contract but containing conditions. I could not have construed it, as LORD CARMONT appears to have done, C as containing a continuing offer which did not give any rights until the confirming offer was accepted by the employee, not by accepting the contract but by exercising the option. However, sitting here, I should have construed it as a contract for value to allot shares on application and payment for the shares. That is a very common transaction.

D The passage in LORD RUSSELL'S speech which I have previously cited also clearly seems to reflect some Scottish doctrine. Sitting as an English judge I could not accept it as a proposition of English law. My view of the benefit of this option contract is that it is not to be assimilated to and is not additional remuneration. It is a chose in action, which the employee was enabled to purchase on beneficial terms because of his employment, and that is why it is a perquisite. None the less, it is not in my view in any sense remuneration for E his services. I have not heard before of any employee having to pay for his own remuneration, and that is why I think this £20 is so important. It is not the amount, it is the effect. Who has ever heard before of an employee paying for his own remuneration, whether additional or anything else? In fact, that feature is absent from every case which has hitherto been decided on this topic. After all, it might have been a dead loss, the opposite of additional remuneration. F The figure here was £20 and the shares went up to 82s. we know. That did enable a profit to be made. However, the shares conceivably might have gone down until the company went into liquidation and then, so far from being additional remuneration, the £20 which had been spent would have been a dead loss. Nor can you say that it was only £20. It might have been £20,000 and exactly the same principle would apply. It cannot possibly be treated as G additional remuneration, as far as I can see. In my view, it was a perquisite and it was a perquisite which could be turned to pecuniary account.

How could it have been turned to pecuniary account? It would have been necessary to exercise the option by applying and paying for the shares at some time within the period permitted by the option contract. That was in fact done, and I cannot regard the doing of acts expressly or impliedly required by the H option contract itself in order to exercise the option in any other light than as turning the benefit of the chose in action to pecuniary account. Moreover, the pecuniary profit could easily have been obtained and could hereafter be obtained so long as the option subsisted without transferring the chose in action in this manner. The company's employee, the taxpayer, having made an application for shares and having paid for them at the rate of 68s. 6d. per share could have I sold those shares to a purchaser at a higher price before any shares had been allotted to him. A higher price was available, because these shares are marketable and the price went up to at least 82s. If the company had said that they refused to allot direct to the purchaser—I doubt whether they could have done so—the vendor, the employee, would have had to take the shares up as trustee for the purchaser and, subject to getting any necessary consent to transfer, he would immediately have transferred the shares to the purchaser. If the company refused to register the transfer, the vendor would have continued indefinitely to be trustee for the purchaser accountable to the purchaser and entitled to

be indemnified by the purchaser under the general law of trusts. I do not know whether Scottish law is different in that respect; it may well be. If so, I can quite understand why LORD CLYDE arrived at the conclusion that the chose in action could not be turned to pecuniary account. However, if the law in Scotland is the same as the law in England—and it may well not be, because the law of trusts is not always the same in Scotland—then perhaps no one suggested this method to the Lord President. I put it to counsel deliberately, in case there was a flaw in it. However, no one has suggested any flaw and there is no flaw, so far as I know.

It would therefore have been possible for the taxpayer to realise a profit on the shares without the slightest difficulty very soon after the option if he had wanted to, by going into Bristol Stock Exchange. It is not necessary that the profit should be capable of realisation within the year of assessment. If it were, this case on its facts might have presented some difficulty because of the necessity of obtaining Treasury consent. Immediately after his acceptance of the contract, he could have put in an application form and he would have been in a position to carry out the transaction the next day. The only bar to that transaction, if any, would have been the necessity for the company to obtain Treasury consent.

I think that it must follow that, if the chose in action was a perquisite received in the tax year 1954-55, and as it consisted of the benefit of the contract to have allotments of shares on certain terms, the shares, when allotted, could not be taxed in another year as a new or different perquisite or profit. At any rate, no such contention has been put before me. Any other view of the proper method of dealing with the option contract would have curious results. The price paid—although, in fact, it was only £20 it might have been £20,000—was for an option to acquire from time to time during a period of years not more than 2,000 shares. Why is the price apportionable, as the case suggests? This question is not material because of what I have held but, on the other footing, why would it be apportionable, as the case suggests? There might never be another exercise. I am, of course, only aware of the facts in the case. It is possible that it has been further exercised but there might never be a further exercise, in which case that would presumably be because it is not worth exercising. In other words, the price is not above 68s. 6d. If that be so, why should not the whole price, whatever it be—£20 or £20,000—be set against the realised profits? On the other hand, it may be exercisable again two, three or more times, in which case it might be that the cost price would have to be apportioned. However, the true position which would have to be known, in order to make a proper apportionment, could not be known until the option was fully exercised or had expired. As I say, that comment on apportionment is an obiter dictum which I make, because in my view the Special Commissioners were wrong and the benefit of the option contract was a perquisite which fell to be taxed in the financial year 1954-55.

It does not fall to me on this appeal to indicate whether it can be taxed, owing to difficulties of valuation, and, if so, on what principle it ought to be valued. Those are matters which will only arise if and when some assessment is raised in respect of the year 1954-55. Accordingly, I allow the appeal with costs.

Appeal allowed.

Solicitors: Allen & Overy (for the taxpayer); Solicitor of Inland Revenue.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A LAWS v. LONDON CHRONICLE (INDICATOR NEWSPAPERS), LTD.

COURT OF APPEAL (Lord Evershed, M.R., Lord Jenkins and Willmer, L.J.),
April 22, 1959.]

B Master and Servant—Wrongful dismissal—Advertisement representative—Summary dismissal—One act of disobedience.

C An employee of the defendant company, who had been engaged by the company as advertisement representative some three weeks previously, followed the advertisement manager of the company, her immediate superior, out of the room of the managing director after an embarrassing interview between the advertisement manager and the director, despite the latter's having said to her "Stay where you are". She left the room out of loyalty to her immediate superior, who had asked her to follow him, and because the situation was embarrassing and unpleasant. She was dismissed summarily for misconduct.

D **Held:** a single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions, as would an act of wilful disobedience; in the present case the plaintiff's conduct did not amount to such wilful disobedience and the dismissal was wrongful.

Dicta of LORD JAMES OF HEREFORD in *Clouston & Co., Ltd. v. Corry* ([1906] A.C. at p. 129) applied.

E *Turner v. Mason* ((1845), 14 M. & W. 112) explained and distinguished.
Appeal dismissed.

[As to the summary dismissal of a servant for disobedience, see 25 HALSBURY'S LAWS (3rd Edn.) 485, para. 933; and for cases on the subject, see 34 DIGEST 68-70, 461-473.]

F Cases referred to:

- (1) *Turner v. Mason*, (1845), 14 M. & W. 112; 2 Dow. & L. 898; 14 L.J.Ex. 311; 5 L.T.O.S. 97; 153 E.R. 411; 34 Digest 69, 463.
- (2) *Edwards v. Levy*, (1860), 2 F. & F. 94; 175 E.R. 974; 34 Digest 78, 553.
- (3) *Clouston & Co., Ltd. v. Corry*, [1906] A.C. 122; 75 L.J.P.C. 20; 93 L.T. 706; 34 Digest 74, 509.

G Appeal.

H This was an appeal by the defendant company, London Chronicle (Indicator Newspapers), Ltd., from a judgment of His Honour JUDGE DALE, at Westminster County Court, on Nov. 18, 1958, in an action by the plaintiff, Jean Maude Laws, for damages for wrongful dismissal. The defendant company, by its defence, denied that the plaintiff had been dismissed and further alleged that, if she had been dismissed, the company was entitled to dismiss her because of her wilful refusal to obey a reasonable and lawful order given to her by the chairman and managing director of the company. The learned county court judge found that the plaintiff had been dismissed, and held that she had been unlawfully dismissed, because the one act of disobedience which she had committed (namely, in leaving the chairman's room when he had told her to remain there, after a dispute between the chairman and the plaintiff's immediate superior) was not sufficiently grave to justify her dismissal. He gave judgment for the plaintiff for £45 (i.e. about a month's salary) and costs.

R. O. C. Stable for the defendant company.

S. M. Stewart for the plaintiff.

I LORD EVERSHED, M.R.: The plaintiff in this action, Miss Jean Maude Laws, was engaged by the defendant company, London Chronicle (Indicator Newspapers), Ltd., on May 28, 1958. As appears from a letter addressed to her

on that day, she was employed* as "advertisement representative" and paid a salary plus commission on all advertising "sold" (as the phrase goes) by her. Her engagement was terminable by a month's notice on either side. The writer of the letter concluded by wishing her success and expressing trust "that your association with us will be a long and happy one". That rosy hope was, however, doomed to early disappointment; for there occurred, on the afternoon of Friday, June 20, 1958—three weeks only after she had come—a somewhat unedifying episode. The chairman and managing director of the defendant company, Mr. Brittain, had asked a Mr. Blakey to come and advise him and the company on matters of business efficiency, and on the afternoon of June 20 the advertisement staff of the paper (namely, Mr. Delderfield, the advertisement manager, and the two persons under his charge, Mr. St. George and the plaintiff) were requested, or invited, or, if you will, ordered, to attend in Mr. Brittain's room to hear the observations of Mr. Blakey. While they were there, an unfortunate scene broke out between Mr. Brittain, on the one hand, and Mr. Delderfield, on the other. It was, indeed, suggested—with what justification I know not—that Mr. Delderfield was drunk, and the proceedings were interrupted by a request on Mr. Brittain's part that somebody should supply Mr. Delderfield with black coffee. Mr. Delderfield obviously behaved badly, and announced at some stage that he would have no more of it and would go, "taking the staff with him"—meaning thereby the plaintiff and Mr. St. George; and it seems quite clear (although the plaintiff did not herself say so in her examination-in-chief) that he expressly invited Mr. St. George and the plaintiff to accompany him out of the room. In the middle of this unhappy incident Mr. Brittain (whom the judge described as a kindly employer) turned to Mr. St. George and the plaintiff and said "Stay where you are"—as a man might who wished to put an end to disorderly behaviour. Unfortunately, the plaintiff and Mr. St. George followed Mr. Delderfield out of the room. On the following Monday (June 23), when the plaintiff attended the premises of the defendant company, she was handed a letter addressed to her by Mr. Campbell, the secretary, which stated:

"It is impossible for the company to overlook your behaviour and actions in leaving the conference last Friday in defiance of the managing director's request that you remain."

As a result of what occurred on June 23 between the plaintiff and Mr. Campbell, she left the service of the defendant company. In this action she sued for damages for wrongful dismissal on June 23. The damages which she is entitled to recover, if her cause of action is well-founded, are £45.

At the trial, the defendant company denied both the dismissal and, if there was dismissal, that it was wrongful. However, the defendant company has in this court accepted the finding that the plaintiff was dismissed. Indeed, it is the corner-stone of the case of counsel for the defendant company, that, in the circumstances, there was nothing that a self-respecting employer could have done but to dismiss summarily: for here was an order given—"Stay where you are"—and disobeyed. Counsel cited authority—of antiquity, but none the less of respectability—to show (as he contended) that disobedience of any order that was lawful entitled the employer to dismiss the servant summarily. The authority which he cited is *Turner v. Mason* (1) (1845), 14 M. & W. 112. In that case, a domestic servant—quite deliberately, because she had made a request which was rejected—absented herself during a night when she should have been on duty; and her plea of justification was that her mother was desperately ill, though it is not clear that she so informed her employer. She was dismissed, and the Court of Exchequer affirmed the view that the dismissal was justified. I will not read the judgments of POLLOCK, C.B., and of PARKE, ALDERSON and ROLEE, B.B., but it would, in my judgment, be going too far to say that any of

* The employment was to commence on June 2, 1958.

A those learned judges laid it down as a proposition of law that every act of disobedience of a lawful order would entitle the employer to dismiss. I think that that cannot be extracted from the judgments, and I am satisfied that it is too narrow a proposition as one of law.

B The law to be applied is stated, for example, in 25 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), pp. 485, 486, to which counsel for the defendants referred us in reply, and I will cite a sentence or two as a foundation to what follows. In para. 933, at p. 485, it is stated: "Wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal". Then, in para. 934, at p. 485:

C "Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal."

Later, in para. 935, at p. 486:

D "There is good ground for the dismissal of a servant if he is habitually neglectful in respect of the duties for which he was engaged . . ."

E And in one of the footnotes on p. 486 (note (q)) there is a reference to *Edwards v. Levy* (2) ((1860), 2 F. & F. 94 at p. 95) and it is stated that in that case

" . . . it was pointed out that a single instance of insolence in the case of a servant in such a position as that of a newspaper critic would hardly justify dismissal."

F To my mind, the proper conclusion to be drawn from the passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

G In a passage which I have read from 25 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 485, para. 934, there is a statement " . . . there is no fixed rule of law defining the degree of misconduct which will justify dismissal ". That statement is derived from a passage in the judgment of the Privy Council delivered by LORD JAMES OF HEREFORD in *Clouston & Co., Ltd. v. Corry* (3) ([1906] A.C. 122), a case to which counsel for the plaintiff referred. I will read a rather larger passage which provides the context. LORD JAMES said (*ibid.*, at p. 129):

H "Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

I In the present case, the learned judge, in the course of his judgment, said:

"It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature."

Later he concluded, in the plaintiff's favour, that what she had done, or not done, on June 20, 1958, was not sufficiently grave to justify dismissal. With all respect to the learned judge, I think that his proposition is not justified

in the form in which he stated it. I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

If I have stated correctly the basis of the law to be applied, let me return to the facts of this case. I do not narrate again the circumstances in Mr. Brittain's room on the afternoon of June 20, 1958; but what the plaintiff said about it, in her examination-in-chief, was this:

"I left because I owed loyalty to Mr. Delderfield who was my direct superior and I was very embarrassed and felt it impossible to stay. I did not know what to do, I was so upset."

I have no doubt that the learned judge, who saw the witnesses, believed her: for, in the final paragraph of his judgment, he said:

"She had served loyally until then. There was this row between her immediate superior Delderfield and Brittain. Only thing Brittain said to her was 'You stay where you are'. She did not do so but walked out of the room. Till then she had been a good girl. This was the one and only act of disobedience. She was put in a difficult position."

As I have said, I take it (and no ground for a contrary view has been put to us) that the learned judge accepted her as a witness of truth. The situation was plainly one which was as embarrassing as it was unpleasant for her; and in the circumstances, with her immediate superior walking out and asking her to follow, I am satisfied that it cannot be said that her conduct amounted to such a wilful disobedience of an order, such a deliberate disregard of the conditions of service, as justified the employer in saying: "I accept your repudiation. I treat the contract as ended. I summarily dismiss you".

I am a little comforted by the circumstance that, when Mr. Campbell wrote his letter on Monday, June 23, 1958, he referred to Mr. Brittain's remark: "You stay where you are", not as an order, but as a "request". It was, in truth, not really an order related to her duties as advertisement representative: it was a wise direction for him to have given in order to try to create out of disorder something more seemly in his room on the afternoon in question. For those reasons, though I have felt that the learned judge in his brief statement may not quite correctly have stated the law to be applied, and to that extent I accept the argument put to us by counsel for the defendant company, none the less in the end I come unhesitatingly to the same conclusion as that of the learned judge, and would dismiss the appeal.

LORD JENKINS: I agree and cannot usefully add anything.

WILLMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Oswald Hickson, Collier & Co.* (for the defendant company);
Tyrrrell Lewis & Co. (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A MIDLAND SILICONES. LTD. v. SCRUTTONS. LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), April 21, 22, 23, 24, 28, 1959.]

B *Shipping—Carriage by sea—Negligence—Limitation of liability in contract of carriage—Whether stevedores entitled to rely on contract contained in bill of lading as limiting their liability to cargo-owner—Whether “carrier” in United States Act, and in bill of lading included stevedores—United States Carriage of Goods by Sea Act, 1936, s. 4 (5).*

C The plaintiffs were consignees, and at all material times owners, of a drum bought on terms c.i.f. London and consigned to them from America by ship. The bill of lading incorporated s. 4 (5)* of the United States Carriage of Goods by Sea Act, 1936, which, in the circumstances, would limit the liability of the shipowners (as carriers) to \$500. The shipowners employed the defendant stevedores as their agents in unloading and delivering goods to consignees, and the contract (dated in 1952) between the shipowners and the stevedores stated that the stevedores would be responsible for any negligence of their servants, but should “have such protection as is afforded by the terms” of the bill of lading. The consignees did not know of the contract of 1952. Servants of the defendants, when handling the drum in the course of their duties regarding unloading and delivery, negligently dropped it causing damage amounting to £593 12s. 2d. In an action by the consignees for this sum as damages the defendant stevedores contended that they were entitled to limit their liability to \$500 by virtue of the contract of carriage (evidenced by the bill of lading) between the shipowners and the consignees, either because there was an implied term that the benefit of the contract should enure to the stevedores or because the shipowners contracted on behalf of the stevedores in this respect or because the stevedores were sub-bailees of the goods.

F **Held:** (i) the bill of lading did not on its true construction purport to govern the relations between the stevedores and the consignees (see p. 293, letter E, post), and the stevedores were not entitled to limit their liability by virtue of it, because they were not parties to the contract of carriage and had given no consideration to the consignees (see p. 299, letter G, post).

G Principle stated by VISCOUNT HALDANE, L.C., in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* ([1915] A.C. at p. 853) followed: *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* ([1956] 1 Lloyd's Rep. 346) applied.

Diets of DENNING, L.J., in *Smith v. River Douglas Catchment Board* ([1949] 2 All E.R. at p. 188) and in *White v. Warrick (John) & Co., Ltd.* ([1953] 2 All E.R. at p. 1026) and in *Adler v. Dickson* ([1954] 3 All E.R. at p. 400) not followed.

H (ii) moreover the stevedores were never in contractual relation with the consignees as undisclosed principals of the shipowners (see p. 294, letter D, post); nor should any term giving the stevedores the benefit of the limitation clause in the bill of lading be implied on the facts of this case, as there had been no invitation, expressed or implied by the consignees to the defendants to handle their goods (see p. 296, letter F, post); nor was it material whether the defendants were or were not sub-bailees, since any right to possession of the goods that they had was given to them by the shipowners (see p. 296, letter I, post).

I Per CURRIAM: there is no authority for the principle of vicarious immunity from liability for torts and SCRUTTON, L.J., in *Merssey Shipping & Transport Co., Ltd. v. Bea, Ltd.* (1925), 21 Lloyd's Rep. at p. 378) incorrectly stated its effect (see p. 295, letter H, post).

* For the terms of s. 4 (5), see p. 291, letter G, post; and for the relevant provisions regarding the meaning of “carrier” in the United States Carriage of Goods by Sea Act, 1936, or the bill of lading, see p. 293, letters B to D, post.

Speeches in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* ([1924] A.C. 522) analysed. A

[As to the rights of strangers to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66-68, paras. 110-117; and for cases on the subject, see 12 DIGEST (Repl.) 45-51, 227-278.]

Cases referred to:

- (1) *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.*, [1956] 1 Lloyd's Rep. 346. B
- (2) *Herd & Co. v. Knawill Machinery Corpn.*
- (3) *Dunlop Pneumatic Tyre Co., Ltd v. Selfridge & Co., Ltd*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest (Repl.) 234, 1754.
- (4) *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.*, (1925), 21 Lloyd's Rep. 375. C
- (5) *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; *reversing* sub nom. *Paterson, Zochonis & Co. v. Elder, Dempster & Co.*, [1923] 1 K.B. 420; 41 Digest 478, 3118.
- (6) *Collins & Co. v. Panama Ry. Co.*, (1952), 197 Fed. Rep. (2nd Series) 893; [1952] American Maritime Cases 2054.
- (7) *Adler v. Dickson*, [1954] 3 All E.R. 21; *aff'd* C.A., [1954] 3 All E.R. 397; [1955] 1 Q.B. 158; 3rd Digest Supp. D
- (8) *Quinn v. Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 42 Digest 971, 30.
- (9) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 42 Digest 972, 35.
- (10) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp. E
- (11) *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman*, [1943] 2 All E.R. 768; [1944] Ch. 83; 113 L.J.Ch. 33; 170 L.T. 9; 2nd Digest Supp. F
- (12) *Dutton v. Poole*, (1678), 1 Freem. K.B. 471; T.Jo. 102; 1 Vent. 332; 3 Keb. 786, 814, 830, 836; 2 Lev. 210; T. Raym. 302; 89 E.R. 352; 12 Digest (Repl.) 47, 251.
- (13) *Martyn v. Hind*, (1779), 1 Doug. K.B. 142; 2 Cowp. 437; 99 E.R. 94; 19 Digest 428, 2652.
- (14) *Tweddle v. Atkinson*, (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 121 E.R. 762; 12 Digest (Repl.) 45, 227. G
- (15) *White v. Warrick (John) & Co., Ltd.*, [1953] 2 All E.R. 1021; 3rd Digest Supp.
- (16) *Cosgrove v. Horsfall*, (1945), 175 L.T. 334; 2nd Digest Supp.
- (17) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158; [1954] 2 Q.B. 402; 3rd Digest Supp. H

Action.

In this action *Midland Silicones, Ltd.*, the plaintiffs, claimed damages of £593 12s. 2d. from *Scruttons, Ltd.*, the defendants, who carried on business as stevedores, in respect of the negligent handling of the plaintiffs' goods, a drum of chemicals, at the Royal Victoria Docks, in the Port of London. The following facts were agreed between the parties. On or about Mar. 26, 1957, the drum containing chemicals, bought by the plaintiffs on terms c.i.f. London, was shipped in New York by consignors, for carriage to London, on the s.s. *American Reporter*, a vessel which was owned by United States Lines Co., the carriers of goods (referred to hereinafter as "the shipowners"). The drum was consigned to the order of the plaintiffs on the terms of the shipowners' standard form bill of lading, this bill being dated Mar. 26, 1957. On Apr. 1, 1957, the bill was forwarded by the consignors to the plaintiffs who then became and at all material times remained the owners of the drum and its contents. Under an agreement I

A dated Aug. 11, 1952, made between the shipowners and the defendants, the defendants had agreed to discharge the shipowners' vessels at the Port of London and to act as agents for the shipowners in the delivery of goods to consignees. Under the terms of that agreement it was provided that the defendants (the stevedores) were to be responsible for any damage to goods caused by any negligence to themselves or their servants but that the stevedores should "have such protection as is afforded by the terms, conditions and exceptions of the bills of lading westbound and eastbound". The plaintiffs were not at any material time aware of the existence of the 1952 agreement. The vessel having arrived at the Royal Victoria Docks on about Apr. 14, 1957, the drum was unloaded by the defendants' servants, but as the plaintiffs had not yet obtained customs clearance, they were unable to take delivery of the drum immediately on its discharge from the vessel, and the drum was stored temporarily in a shed, leased by the shipowners from the Port of London Authority. The plaintiffs obtained customs clearance on May 1, 1957, and on May 3 they applied for delivery of the drum to cartage contractors. Servants of the defendants then moved the drum to an opening in the top floor of the shed and were in the process of lowering it into the haulage contractors' lorry, which was stationed on a part of the wharf leased to the shipowners, when they negligently dropped it and damaged it causing loss, the value of which was £593 12s. 2d.

The bill of lading dated Mar. 26, 1957, under which the plaintiffs' drum was carried in the shipowners' vessel, was in the shipowners' standard short form bill of lading but incorporated their standard long form bill of lading. Clause 1 of the short form provided that its terms and the terms of the long form bill "shall govern the relations whatsoever they may be, between shipper consignee and carrier, master and ship in every contingency, wheresoever and whensoever occurring and whether the carrier be acting as such or as bailee". An identical provision appeared in the long form bill of lading. By cl. 3 of the short form (the clause paramount), and also by cl. 1 of the long form, the provisions of the United States Carriage of Goods by Sea Act, 1936, were incorporated into the bill of lading and it was provided that the provisions of that Act, with certain irrelevant exceptions, "shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier". Section 4 (5) of the United States Act thus incorporated into the bill of lading provides:

G "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the transportation of goods in an amount exceeding 500 dollars per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

By cl. 24 of the long form bill it was provided:

H "In the event of any loss, damage or delay to or in connexion with goods exceeding in actual value 500 dollars per package lawful money of the United States . . . the value of the goods shall be deemed to be 500 dollars per package . . . and the carriers' liability, if any, shall be determined on the basis of a value of 500 dollars per package . . . unless the nature and a higher value shall be declared by the shipper in writing before shipment and inserted in the bill of lading."

I The shippers did not declare the value of the plaintiffs' drum, nor was its value inserted in the bill of lading. By s. 1 (a) of the United States Carriage of Goods by Sea Act, 1936, "The term 'carrier' includes the owner or the charterer who enters into a contract . . . with a shipper". By cl. 3 of the long form bill of lading, "the word 'carrier' shall . . . include the ship . . . her owner, operator and demise charterer, and also any time charterer or person to the extent bound by this bill of lading, whether acting as carrier or bailee".

The defendants contended that they were entitled to limit their liability for damages to the sum of 500 dollars (£179 1s.) under the terms of the contract of affreightment made between the plaintiffs (the cargo-owners) and the ship-owners as evidenced in the bill of lading. They so contended on the following grounds: that the limitation of liability conferred on the shipowners (the carriers) by s. 4 (5) of the United States Act, and incorporated into the bill of lading, enured for the benefit of the shipowners' servants and agents including the defendants who performed the duties of the shipowners under the Act; alternatively, that it was an implied term of the contract that the exceptions, immunities and limitations contained and incorporated therein should enure for the benefit, inter alia, of the defendants. The defendants further contended that the shipowners issued the bill of lading as the defendants' agents; alternatively, that the defendants were in possession of the drum as sub-bailees of the plaintiffs, the bailment being subject to the terms, conditions and exceptions of the contract of carriage; finally, the defendants contended that as they were performing the shipowners' duties in relation to the drum under the bill of lading, there was an implied contract between the plaintiffs, the defendants and the shipowners that the defendants were entitled to the benefits of the contract including the provisions limiting liability for damage to goods.

A. A. Mocatta, Q.C., and M. R. E. Kerr for the plaintiffs.

Eustace Roskill, Q.C., and R. P. Colinvaux for the defendants.

Cur. adv. vult.

Apr. 28. **DIPLOCK, J.**, read the following judgment: This is a test case brought to determine whether stevedores engaged by the shipowner (or carrier), who, in performance of their functions as stevedores, in loading, unloading or delivering cargo, tortiously damage that cargo, can, in an action for tort brought against them by the cargo-owner, rely on any immunity from or limitation of liability contained in the contract of affreightment made between the cargo-owner and the shipowner (or carrier) by whom the stevedores are engaged.

This question has been much debated in this country in the past twenty-five years, but has not yet been authoritatively decided here. In Australia it was authoritatively decided in the negative by a majority judgment of the High Court of Australia in 1956 (*Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* (1), [1956] 1 Lloyd's Rep. 346). This overruled two earlier decisions by lower courts. In the United States, after considerable litigation with varying results, it was authoritatively decided in the same sense as recently as last week by a unanimous judgment of the United States Supreme Court in *Herd & Co. v. Knarwill Machinery Corpn.* (2) the reference to which I cannot give.

The facts of this case (which are agreed) were intended to and I think succeeded in raising the bald point of principle.

[His LORDSHIP stated the relevant facts and continued:] It is sufficient to say that the act of lowering the plaintiffs' drum on to the lorry which was negligently performed by the defendants' servants was (1) an act which fell within the scope of the defendants' servants' employment by the defendants, (2) an act which, by the terms of their contract with the shipowners*, the defendants had contracted with the shipowners to do, and (3) an act which, by the terms of the bill of lading and the events which happened, the shipowners had contracted with the plaintiffs to do.

The defendants do not dispute that they are vicariously liable for the tortious acts of their servants committed in the course of their employment by the defendants. They contend, however, that they are entitled in the present action to limit their liability to the equivalent of five hundred U.S. dollars or £179 1s. and that judgment for no greater sum should be awarded against them.

Since a tortfeasor, and his employer who is vicariously liable for his tort, is in general liable for the full extent of the damage caused by the tort, it is for the

* United States Lines Company.

A defendants to show some principle of law which qualifies this general rule in the present case. They point, in the first instance, to the bill of lading signed on behalf of the shipowners, which contains the terms of the contract under which the drum was carried.

[HIS LORDSHIP referred to cl. 1* of the short form bill and commented that stevedores were not mentioned therein; he then referred to the terms of the bill of lading incorporating the United States Carriage of Goods by Sea Act, 1936, and to the provisions of s. 4 (5)† of that Act, and read cl. 24 of the bill of lading‡. HIS LORDSHIP continued:] The United States Carriage of Goods by Sea Act, like the corresponding United Kingdom Act§, contains no definition of "carrier", but provides by s. 1 (a): "The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper"; and so far as reliance is placed on the incorporation in the bill of lading of s. 4 (5) of the United States Act, no express definition of "carrier" contained in the bill of lading can extend the meaning of the word "carrier" in that subsection.

So far as reliance is place on cl. 24 of the long form, one must read into that clause the express provisions of cl. 3, which provide:

D "In this bill of lading . . . the word 'carrier' shall . . . include the ship . . . her owner, operator and demise charterer, and also any time charterer or person, to the extent bound by this bill of lading, whether acting as carrier or bailee."

This does not include stevedores unless they are, by some other principle of law, bound by the bill of lading.

E It does not, therefore, seem to me that the words either of the Act or of the bill of lading relating to the meaning of the word "carrier" so extend its meaning as to include stevedores engaged by the carrier, and I hold that the bill of lading, on its true construction, does not purport, by any express words, to "govern the relations whatsoever they may be between the shipper or consignee" and any stevedores engaged by the carrier. In so far as my so holding depends on the true construction of the United States Carriage of Goods by Sea Act, I have the powerful support of the United States Supreme Court.

F In so holding I have not overlooked, although I have rejected, the arguments of counsel for the defendants to the contrary based on cl. 4¶ and cl. 17¶ of the long form bill of lading, the former of which seems to me to be no more than an elaboration of the well-known English "demise clause", while the latter merely G authorises the carrier or master to appoint stevedores and other agents, which he would be entitled to do even if that clause were absent.

The limitation of liability on which the defendants seek to rely is thus contained, and contained only, in a contract which they did not execute and which does not purport expressly to be made on their behalf. One starts, therefore, with two principles which—regret them though some may—were described by H VISCOUNT HALDANE, L.C., in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (3) ([1915] A.C. 847 at p. 853) in a decision binding on me as fundamental in the law of England.

"One is that only a person who is a party to a contract can sue on it.

* For the terms of cl. 1 of the short form bill of lading, see p. 291, letter E, ante.

† Section 4 (5) of the United States Act is set out at p. 291, letter G, ante.

‡ Clause 24 of the bill of lading is stated, so far as relevant, at p. 291, letter H, ante.

§ The Carriage of Goods by Sea Act, 1924.

¶ Clause 4 of the long form bill of lading provided, inter alia: "If it shall be adjudged that the United States Line Co., or any person other than the owner or demise charterer is the carrier or bailor of the goods, all rights, exemptions, immunities and limitations of liability provided by law and all terms of this bill of lading shall be available to it or such other person". Clause 17 of the long form bill provided, among other provisions, "and the carrier and master have the right to appoint stevedores, master-porters or other agents . . ."

Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established."

Either of the principles seems at first sight fatal to the defendants' claim to limit their liability. They were not ostensible or disclosed parties to the contract contained in the bill of lading. That the shipowners had agreed or would agree to engage them to discharge the plaintiffs' goods was unknown to the plaintiffs.

To seek to overcome this difficulty by asserting that the shipowners contracted as agents for the defendants as undisclosed principals leads immediately to an insoluble problem as to which of the many terms of the entire contract of carriage were entered into on behalf of the defendants and what contractual obligations, if any, the defendants undertook by virtue of the bill of lading in relation to the goods. It seems to me to be quite impossible to say that the defendants were ever in any contractual relationship with the plaintiffs as the undisclosed principals of the shipowners. If then the well-known rule as to the right of an undisclosed principal to sue on a contract made on his behalf is to be regarded as an exception to the first of LORD HALDANE's fundamental principles—and he clearly did not so regard it—it does not, in my view, assist the defendants in this case, nor do either of the two well-recognised exceptions, namely, a right to take the benefit of a contract which is conferred by way of property (as, for example, under a trust or by way of assignment) or a right to enforce covenants running with the land, which are in this respect assimilated to proprietary rights.

The defendants, however, contend that there is another exception which covers the present case. The principle relied on was expressed, in its neatest form, as one would expect, by SCRUTTON, L.J., in *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.* (4) ((1925), 21 Lloyd's Rep. 375 at p. 378) as follows:

"... where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the benefit of the contract made with their employers on whose behalf they were acting."

This was admittedly obiter, but was said by SCRUTTON, L.J., (*ibid.*) to be the effect of the decision of the House of Lords in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5) ([1924] A.C. 522). If the House of Lords did really lay down this principle (which I may conveniently describe in a phrase borrowed from HOLMES, J., the United States judge, in his dissenting judgment in *Collins & Co. v. Panama Ry. Co.* (6) ((1952), 197 Fed. Rep. (2nd Series) 893), as "vicarious immunity from liability for torts") it disposes of the present case in the defendants' favour. BANKES, L.J., however, in *Mersey Shipping & Transport Co., Ltd. v. Rea, Ltd.* (4) expressed a different view as to the ratio decidendi of *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5). While I think that SCRUTTON, L.J.'s dictum accurately reflects his own ratio decidendi in his dissenting judgment in the *Elder, Dempster* case (5) in the Court of Appeal ([1923] 1 K.B. 420), I cannot accept that it represents that of the majority of the House of Lords.

Elder, Dempster & Co. v. Paterson, Zochonis & Co. (5) was a case in which the facts were very special. Goods were shipped on a ship owned by Griffiths Lewis Steam Navigation Co. and time chartered on a gross time charter by them to Elder, Dempster & Co. Mate's receipts were issued in the name of the African Steamship Co. and bills of lading were headed with the names of the African Steamship Co. and the British & African Steam Navigation Co., Ltd., followed by

- A the words "Managers Elder, Dempster & Co., Ltd.". The body of the bill of lading, which contained no definition of the word "shipowners", expressly stated that its terms and conditions constituted "the contract between the shippers and the shipowners". One bill of lading was signed "P. Bedford, Master", the other "P. Bedford, Agent". It was the master's personal negligence in the stowage of the cargo which caused the damage to the goods. The
- B relevant issue was whether Griffiths Lewis Steam Navigation Co., as employers of the master, when sued in tort by the cargo-owning consignors, could rely on a contractual immunity from liability for damage due to bad stowage conferred on the "shipowners" by a condition in the bill of lading. Their Lordships' opinions have been so closely and so recently analysed by PILCHER, J.*, and by the Court of Appeal in England in *Adler v. Dickson* (7) ([1954] 3 All E.R. 397),
- C and by the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* (1), with such differing results, that I propose to add as little as possible to the literature on this fascinating topic. I accordingly limit myself to expressing my own and very hesitant view that: (1) VISCOUNT CAVE's ratio decidendi was, first, that Griffiths Lewis Steam Navigation Co. were parties to the contract of carriage, that is, that P. Bedford signed on their behalf as well as
- D on behalf of the charterers. This I call the "express contract" theory. Alternatively, LORD CAVE was prepared to base his decision on the theory of vicarious immunity from liability for torts. (2) VISCOUNT FINLAY's ratio decidendi was that when the cargo-owners delivered possession of the goods to the Griffiths Lewis Steam Navigation Co., an implied contract was thereby made between them and Griffiths Lewis Steam Navigation Co. that the latter should carry the
- E goods on the terms of the bill of lading. I call this, for convenience, the "implied contract" theory; but also observe that there are some words in LORD FINLAY's speech which suggest that he may, like LORD CAVE, have been adopting the express contract theory. (3) LORD SUMNER's first and preferred ratio decidendi was the implied contract theory. Alternatively, he suggested that the master, whose negligence was the cause of the damage, was not acting as agent for
- F Griffiths Lewis Steam Navigation Co. so as to make them vicariously liable for his negligence. (4) LORD DUNEDIN agreed with LORD SUMNER. (5) LORD CARSON agreed with both LORD SUMNER and LORD CAVE, which gives him four different ratio decidendi. If it be permitted to count heads, three (LORDS DUNEDIN, SUMNER and CARSON), or if LORD FINLAY is included, as probably he should be, four of their Lordships approved the implied contract theory, and three (LORDS
- G SUMNER, DUNEDIN and CARSON), as second choice, preferred the "master not the servant of the shipowners" theory. Two (LORDS CAVE and CARSON), or possibly three if LORD FINLAY can be included, adopted the express contract theory. Two only (LORDS CAVE and CARSON) adopted the vicarious immunity theory.

- I respectfully agree with JENKINS and MORRIS, L.JJ., in *Adler v. Dickson* (7)
- H and with FULLAGER, J., and KITTO, J., in *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* (1) ([1956] 1 Lloyd's Rep. 346), and with the Supreme Court of the United States that *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5) is no authority for the principle of vicarious immunity from liability for torts†, and that SCRUTTON, L.J., incorrectly stated its effect.

- I It is, I think, a case which must be read with the warning given by the EARL OF HALSBURY, L.C., in *Quinn v. Leathem* (8) ([1901] A.C. 495 at p. 506)‡, referring to *Allen v. Flood* (9) ([1898] A.C. 1), that

"... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole

* *Adler v. Dickson* (7), [1954] 3 All E.R. 21.

† This principle is stated at p. 294, letters F to H, ante.

‡ See generally, 22 HALSBURY'S LAWS (3rd Edn.) 796, para. 1682.

law, but governed and qualified by the particular facts of the case in which such expressions are to be found . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

But to reject SCRUTTON, L.J.'s explanation of the ratio decidendi of the *Elder, Dempster* case (5) does not dispose of the case which I have to decide. Counsel for the defendants seeks, in the first place, to bring it within the implied contract theory, or, failing that, he relies on statements to be found in some recent cases asserting the existence of a general principle on which a jus quaesitum tertio arising out of contract is recognised in English law.

As regards the implied contract theory, from what facts is any contract between the plaintiffs and the defendants to be implied? If, as in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5) A invites B to do something to A's goods which B is under no antecedent contractual duty to A to do, it may be reasonable to imply an agreement between A and B as to the terms on which that thing shall be done, and this is so whether or not the invitation is accompanied by a bailment of the goods by A to B, although such a bailment may make it easier to imply a contract. The fact that B is under a contractual duty to C, unenforceable by A, to do that very thing to A's goods does not prevent one implying a contract between A and B, although it may be relevant to the question whether any contract between A and B is to be implied and to its terms, if such a contract is to be implied. Whether or not the implication of such a contract from the special facts in the *Elder, Dempster* case (5) was the real ratio decidendi of the majority of the House of Lords, this theory involves no novel principles of law. But it does involve an invitation (which I concede may be an implied invitation) by A to B in his own right to do something to A's goods and not an invitation to B's principal, C, addressed to C through B as C's agent to accept the invitation. In the present case, it does not seem to me that the plaintiffs ever invited the defendants to do anything to the plaintiff's goods. They were told by the shipowners to apply to the defendants for delivery of their goods. They did so; that is all. It was the shipowners who requested the defendants to handle the plaintiffs' goods, and the shipowners did so pursuant to their own contract with the defendants, with the object of performing, through the agency of the defendants, the shipowners' own contract with the plaintiffs. It would be flouting reality to suggest that such request to the defendants was made by the shipowners as agents for the plaintiffs, yet if it was not, I can see no ground on which any contract between the plaintiffs and the defendants can be implied from the mere fact that the shipowners requested the defendants to handle the plaintiffs' goods and to deliver them to the plaintiffs on the plaintiffs demanding them.

Counsel for the defendants has insisted much that the defendants were sub-bailees of the goods of the plaintiffs at the time when the damage was caused. If the doctrine of sub-bailment is not too esoteric for my understanding, I take this to mean that the shipowners, being then entitled to possession of the plaintiffs' goods, transferred to the defendants such exclusive right of possession as would in the old days have entitled the defendants to sue in trover, and would even today entitle them to be prosecuted for the offence of larceny as a bailee instead of simple larceny. I doubt whether, on the facts, the defendants were ever bailees, whether sub, bald or simple, of the drum of chemicals, but as such possession as they had was given them by the shipowners and not by the plaintiffs, it seems to me quite immaterial whether they were or were not.

Where possession of goods is handed over by the cargo-owner himself (as was assumed to be the case in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5)) the bailment of goods to the person to whom the goods are handed over may.

A as I have said, be one of the relevant circumstances from which a contract between the cargo-owner and that person may be implied; but I desire to guard myself against any suggestion that when a cargo-owning consignor, who has already made a contract of carriage with a shipowner whereby the shipowner undertakes the loading, delivers his goods to stevedores engaged by the shipowner in order that the goods may be loaded on the ship, any inference can be drawn that possession of the goods is handed over to the stevedores otherwise than as agents for the shipowner or that there is any invitation to the stevedores in their own right to load the cargo-owner's goods from which a contract between cargo-owner and stevedores can be implied.

C It remains, finally, to deal with those recent statements of a general principle, laid down principally by LORD DENNING, on which counsel for the defendants in the last resort relies. It is convenient to deal with them chronologically. The fountain head (if I may borrow a metaphor from the subject-matter of the case) is the judgment of DENNING, L.J., in *Smith v. River Douglas Catchment Board* (10) ([1949] 2 All E.R. 179). In that case the learned lord justice enunciates the principle (*ibid.*, at p. 188) that

D "... a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise: and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it . . ."

E The proviso makes this statement unexceptional and not particularly helpful to the defendants. Even assuming in their favour that the limitation of liability in the bill of lading was made for the defendants' benefit, although the bill of lading does not say so, the question would still remain whether the defendants have "sufficient interest to entitle" them "to enforce it".

F What is a "sufficient interest" is not exhaustively defined in *Smith v. River Douglas Catchment Board* (10), but the examples given of the general principle ([1949] 2 All E.R. at pp. 188, 189), all fall into a number of classes, of which three are covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties. So far there is nothing novel, although views might differ whether these three species belonged to a common genus. But there is a fourth class, defined G broadly as "promises made in favour of an interested person". With the greatest respect, the two twentieth century cases cited in support of the existence of this fourth class do not appear to me to support it; and one, *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman* (11) ([1943] 2 All E.R. 768 at p. 779) appears, if anything, to negative its existence, while the seventeenth century case cited, *Dutton v. Poole* (12) ((1678), 1 Freem. H K.B. 471), which was referred to with approval as late as 1779 in *Martyn v. Hind* (13) ((1779), 1 Doug. K.B. 142) was, as I read it, based on the view that natural love and affection of parent for child was good consideration in law, a doctrine which, even if it had not been treated as overruled at least since 1861 (see *Tredelle v. Atkinson* (14) (1861), 1 B. & S. 393) would be of little assistance to the defendants in the present case.

I The ground of the actual decision of the majority of the Court of Appeal in *Smith v. River Douglas Catchment Board* (10) was that it was a case of a covenant running with the land, and as DENNING, L.J., himself so held, any exposition of a wider principle was unnecessary and, therefore, obiter.

Four years later, in *White v. John Warrick & Co., Ltd.* (15) ([1953] 2 All E.R. 1021), DENNING, L.J., treated *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5) as an example of the general principle to which he had referred in *Smith v. River Douglas Catchment Board* (10). The decision in the *Elder, Dempster* case (5) he said ([1953] 2 All E.R. at p. 1026):

"... was that, when a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption."

If one disregards the adverb and adjectives, which were, I think, intended to convey moral overtones rather than to qualify the legal principle, which appears to state the broad proposition that where a person has entered into a contract with another, intending to benefit a third person who is not a party to that contract and has expressed that intention in the contract, that third person can sue him on the contract to enforce the benefit, I do not think, for the reasons that I have already given, that the *Elder, Dempster* case (5) decides any such thing, which seems to me, with respect, to be even wider than the general principle as enunciated by the learned lord justice in *Smith v. River Douglas Catchment Board* (10).

White v. John Warrick & Co., Ltd. (15) was a case between the immediate parties to a contract. DENNING, L.J.'s observations, which I have cited, were expressly obiter. They are contrary to the opinions of JENKINS and MORRIS, L.J.J., in *Adler v. Dickson* (7) ([1954] 3 All E.R. 397), and I should have thought, with great respect, in direct conflict with the decision of the Court of Appeal in *Cosgrove v. Horsfall* (16) ((1945), 175 L.T. 334), where the successful plaintiff had, in plain words, agreed in a contract with the London Passenger Transport Board to exempt the defendant, who was not a party to the contract, from liability.

In the following year in *Adler v. Dickson* (7) ([1954] 3 All E.R. 397), itself, DENNING, L.J. (ibid., at p. 400) expressed the view that the cases on carriage of goods

"... undoubtedly show that, when a carrier issues a bill of lading for goods, the exception clauses therein enure for the benefit, not only of the carrier himself, but also for the benefit of the shipowner, the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract."

For this statement, which was no doubt correct in 1954 if the Australian and United States cases were treated as authoritative, he cited *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (5), the two Australian cases which have since been overruled by the High Court of Australia, and two United States cases which were overruled last week by the Supreme Court of the United States.

But DENNING, L.J., treated the position of the stevedores not as governed by any ratio decidendi which he discerned in the speeches in the House of Lords in the *Elder, Dempster* case (5), but as an example of the general principle laid down in his own judgment in *Smith v. River Douglas Catchment Board* (10), saying ([1954] 3 All E.R. at p. 401):

"... the reason why the stevedores and others are protected is because, although they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was made for their benefit whilst they were so performing it. The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication which is just as good: and they have a sufficient interest to entitle them to enforce it. Their interest lies in this: they participated in so far as it affected them and can take those benefits of it which appertain to their interest therein."

The last sentence, at first sight, makes the general principle first laid down in *Smith v. River Douglas Catchment Board* (10) much more precise, and that laid down in *White v. John Warrick & Co., Ltd.* (15) more restricted, for it defines, as neither of those cases sought to do, outside the more conventional categories

A of covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties, what constitutes a sufficient interest to entitle a third person to enforce provisions of a contract to which he is not a party. But on analysis I doubt whether it carries the matter any further than *Smith v. River Douglas Catchment Board* (10) and *White v. John Warrick & Co., Ltd.* (15), since ex hypothesi the exemption clause relates only to the performance of the contract; no one not "participating" in its performance would be doing anything which fell within the terms of the exemption clause, and no other interest in the third party is indicated save that the exemption clause was made for his benefit. It seems to me to do no more than to re-assert, but not to explain or to qualify, the very broad proposition laid down by the same learned lord justice in *White v. John Warrick & Co., Ltd.* (15).

C LORD DENNING's observations in all three cases relied on by counsel for the defendants were obiter. They seem to me, with great respect, to be in direct conflict with *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (3) and *Cosgrove v. Horsfall* (16) both of which are binding on me, and I do not think that I would be entitled to follow them, even if I were satisfied (as I am not) that the exemption clause in the bill of lading in the present case was expressly, or by necessary implication, made for the defendants' benefit.

D I ought, finally, to refer briefly to a recent decision of DEVLIN, J., in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (17) ([1954] 2 All E.R. 158). The facts of that case were far removed from the present case, and the actual decision is readily explicable on the implied contract theory. MORRIS, L.J., so treated it, I think, in *Adler v. Dickson* (7). It may be that this does not represent DEVLIN, J.'s actual ratio decidendi, for he was obviously influenced by the earlier Australian and United States cases, which had not been then overruled. It does appear from his references to *Smith v. River Douglas Catchment Board* (10) and *White v. John Warrick & Co., Ltd.* (15) that he treated *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (17) as falling within the wide principle stated in the dicta of LORD DENNING which I have cited. I have already, however, given my reasons for thinking that there is no such wide principle recognised in English law*.

G I myself think that the present case is governed by the simple, fundamental, though no doubt old-fashioned, principles laid down by LORD HALDANE and approved by the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (3) ([1915] A.C. 847), and that the defendants cannot limit their liability to the plaintiffs in tort by relying on a contract between the plaintiffs and a third party to which they were not parties, and for which they gave no consideration to the plaintiffs. If in so deciding I am differing from the views expressed obiter by such distinguished lawyers as SCRUTTON, L.J., and LORD DENNING, I am fortified by the knowledge that a similar conclusion has been reached by the High Court of Australia and the Supreme Court of the United States for reasons much better and, in the latter case, more succinctly expressed than my own.

There will be judgment for the plaintiffs for £593 12s. 2d.

Judgment for the plaintiffs.

Solicitors: *Ince & Co.* (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* Compare *Green v. Russell* reported subsequently in this volume.

LEAHY AND OTHERS v. ATTORNEY-GENERAL OF NEW SOUTH WALES AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Somervell of Harrow and Lord Denning), January 22, 26, 27, 29, April 20, 1959.]

Charity—Unincorporated association—Whether bequest valid as absolute gift to existing members or invalid as an endowment tending to perpetuity.

Privy Council—Australia—New South Wales—Charity—Perpetuity—Purposes partly charitable and partly non-charitable—Power of selection amongst orders of nuns which were charitable and orders of nuns which were not charitable—Conveyancing Act, 1919-1954 (New South Wales), s. 37D.

By his will dated Feb. 16, 1954, a testator who died on Jan. 11, 1955, provided (by cl. 3): "As to my property known as 'Elmslea' . . . and the whole of the furniture contained in the homestead thereon upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my executors . . . shall select . . ." Elmslea was a grazing property of 730 acres with a furnished homestead containing twenty rooms and a number of outbuildings. By cl. 5 of his will the testator provided: "As to all the rest and residue of my estate both real and personal . . . upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such convents as my said executors . . . shall select either by way of building a new convent . . . or the alteration of . . . existing buildings occupied as a convent or in the provision of furnishings . . . and I declare that my said executors . . . shall have the sole and absolute discretion of deciding where any such premises shall be built or altered . . . and the order or orders of nuns who shall benefit . . . the receipt of the reverend mother . . . shall be a sufficient discharge . . ." Questions arose as to the validity of cl. 3 and cl. 5. Among the orders of nuns within the scope of the clauses were contemplative orders, gifts to whom were not in law charitable. It was conceded that, as the executors then had, under cl. 5, a power of selection among orders which were charitable and orders which were not charitable, the disposition in that clause of residue was invalid unless it was saved by the Conveyancing Act, 1919-1954, s. 37D*, under which any invalidated trust would have effect as if no application of trust funds for a non-charitable purpose had been directed. It was argued that cl. 3 constituted an absolute gift to the order selected by the executors, viz., a gift which the members of the order at the time of the testator's death could expend.

Held: (i) the bequest made by cl. 5 was validated by s. 37D, because that section applied although the testator had not expressly indicated alternative purposes, the one charitable and the other not charitable, but had used a compendious expression apt to include both charitable and non-charitable purposes (see p. 304, letters F and I, post).

Re Belcher ([1950] V.L.R. 11) disapproved.

(ii) the bequest in cl. 3 was valid only by reason of s. 37D and the power of selection conferred by cl. 3 did not enable a contemplative order of nuns to be selected validly because—

(a) though prima facie a bequest to an unincorporated association of persons for the purposes of the association was a bequest to the members at the time of the testator's death and in this sense was an absolute gift and valid, yet the testator's will contained ample indications to displace that prima facie conclusion (see p. 307, letter C, and p. 311, letter H, post), and

(b) the bequest showed an intention to create a trust not merely for the benefit of the existing members of the selected order but also for the benefit of

* This section is printed at p. 303, letters H and I, post.

A the order as a continuing society, and therefore, if the selected order were a non-charitable body, the bequest would fail as the trust would infringe the rule against perpetuities (see p. 312, letter B, and p. 310, letter 1, post).

Dicta of LORD BUCKMASTER in *Re Macaulay's Estate* ([1943] Ch. at p. 436) applied.

Appeal dismissed.

B [As to application of the rule against perpetuities to charities, see 4 HALSBURY'S LAWS (3rd Edn.) 300-302, paras. 618-620; and for cases on the subject, see 8 DIGEST (Repl.) 437-440, 1278-1305.]

Cases referred to:

- (1) *Re Belcher*, [1950] V.L.R. 11; A.L.R. 138; 2nd Digest Supp.
- C (2) *Re Hollole (decd.)*, [1945] V.L.R. 295.
- (3) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest (Repl.) 359, 378.
- (4) *Re Ogden, Brydon v. Samuel*, [1933] All E.R. Rep. 720; [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- D (5) *Cocks v. Manners*, (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest (Repl.) 325, 86.
- (6) *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; 83 L.J.Ch. 687; 110 L.T. 898; 8 Digest (Repl.) 338, 200.
- (7) *Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 8 Digest (Repl.) 356, 352.
- E (8) *Re Drummond, Ashworth v. Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest (Repl.) 320, 52.
- (9) *Re Taylor, Midland Bank Executor & Trustee Co., Ltd. v. Smith*, [1940] 2 All E.R. 637; [1940] Ch. 481; 109 L.J.Ch. 188; 163 L.T. 51; 8 Digest (Repl.) 321, 57.
- F (10) *Re Price, Midland Bank Executor & Trustee Co., Ltd. v. Harwood*, [1943] 2 All E.R. 505; [1943] Ch. 422; 112 L.J.Ch. 273; 169 L.T. 121; 8 Digest (Repl.) 328, 112.
- (11) *Re Prevost, Lloyds Bank, Ltd. v. Barclays Bank, Ltd.*, [1930] 2 Ch. 383; 99 L.J.Ch. 425; 143 L.T. 743; 8 Digest (Repl.) 357, 354.
- (12) *Re Ray's Will Trusts, Public Trustee v. Barry*, [1936] 2 All E.R. 93; [1936] Ch. 520; 105 L.J.Ch. 257; 155 L.T. 405; Digest Supp.
- G (13) *Carne v. Long*, (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 45 E.R. 550; 8 Digest (Repl.) 437, 1278.
- (14) *Re Macaulay's Estate, Macaulay v. O'Donnell*, [1943] Ch. 435, n.; 8 Digest (Repl.) 438, 1287.
- (15) *Re Dean, Cooper-Dean v. Stevens*, (1889), 41 Ch.D. 552; 58 L.J.Ch. 693; 60 L.T. 813; 8 Digest (Repl.) 357, 362.
- H (16) *Re Thompson, Public Trustee v. Lloyd*, [1933] All E.R. Rep. 805; [1934] Ch. 342; 103 L.J.Ch. 162; 150 L.T. 451; Digest Supp.
- (17) *Morice v. Durham (Bp.)*, (1804), 9 Ves. 399; (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest (Repl.) 390, 836.
- (18) *Re Cain, National Trustees Executors & Agency Co. of Australasia, Ltd. v. Jeffrey*, [1950] V.L.R. 382; A.L.R. 796; 8 Digest (Repl.) 352, 137.

I Appeal.

Appeal by special leave by Doris Caroline Mary Leahy (widow of Francis George Leahy), Francis John Leahy, Henry Joseph Leahy, Dorothy Margaret Hull, James Patrick Leahy, Michael Maurice Leahy, George Bonaventure Leahy and Genevieve Mary Leahy (the children of Francis George Leahy) from two orders of the High Court of Australia (DIXON, C.J., McTIERNAN, WILLIAMS, WEBB and KITTO, J.J.), dated Mar. 11, 1958, allowing an appeal by the respondent, the Attorney General in and for the State of New South Wales, from a

declaration contained in a decretal order of the Supreme Court of New South Wales in its equitable jurisdiction (MYERS, J.), dated Apr. 11, 1957, and dismissing an appeal by the respondents John Francis Donnelly, Clement Osborne Wright and John Mede Mullen, executors and trustees of the will of Francis George Leahy, from another declaration contained in the decretal order. The facts appear in the judgment of the Board.

A. B. Kerrigan, Q.C., and *D. S. Hicks* (both of the Australian Bar) for the appellants.

B. P. Macfarlane, Q.C., and *D. G. McGregor* (both of the Australian Bar) for the respondent trustees.

L. N. Bowen, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the respondent, the Attorney-General of New South Wales.

VISCOUNT SIMONDS: The appellants in this case are the widow and children of a wealthy Australian, Francis George Leahy, who died on Jan. 11, 1955. The respondents are the trustees of his will, which was made on Feb. 16, 1954, and Her Majesty's Attorney-General in and for the State of New South Wales.

The questions raised in the appeal concern the validity of the dispositions made by two clauses of the will which may at once be conveniently referred to and, so far as is necessary, stated verbatim. By his will the testator, after appointing executors and trustees and giving legacies of £1,000 each to the reverend mother or person in charge for the time being of St. Joseph's Convent at Bungendore in the State of New South Wales and to the rector for the time being of the Passionist Fathers, Mary's Mount, Goulburn, with specific directions as to the disposal of such sums, and after making certain dispositions in favour of members of his family which need not be further mentioned, by cl. 3 provided as follows:

"As to my property known as 'Elmslea' situated at Bungendore aforesaid and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select and I again direct that the selection of the order of nuns or brothers as the case may be to benefit under this clause of my will shall be in the sole and absolute discretion of my said executors and trustees."

By cl. 4, he devised and bequeathed certain other property in New South Wales on certain trusts and subject to certain conditions in favour of an order of nursing sisters known as "the Nursing Sisters of the Little Company of Mary", and by cl. 5 he disposed of the residue of his real and personal property in the following terms:

"As to all the rest and residue of my estate both real and personal of whatsoever kind or nature and wheresoever situated upon trust to use the income as well as the capital to arise from any sale thereof in the provision of amenities in such convents as my said executors and trustees shall select either by way of building a new convent where they think necessary or the alteration of or addition to existing buildings occupied as a convent or in the provision of furnishings in any such convent or convents and I declare that my said executors and trustees shall have the sole and absolute discretion of deciding where any such premises shall be built or altered or repaired and the order or orders of nuns who shall benefit under the terms of this clause the receipt of the reverend mother for the time being of that particular order of nuns or convent shall be a sufficient discharge to my said executors and trustees for any payment under this clause."

Finally, the testator directed that the trustees should be at liberty to sell and dispose of the whole or any part of his real or personal estate as they in their

A absolute discretion should think fit, and in the meantime should have the wide powers of leasing and management therein mentioned.

It will be observed that, in the relevant clauses of the will, the testator referred to "orders of nuns". It was, however, held in the High Court of Australia and has not been disputed before their Lordships that this phrase was not used in its strict canonical sense, but included also congregations of sisters of which
B there are a considerable number in Australia. It further appeared that among the orders represented in Australia are contemplative orders. Such orders are not regarded as charitable in the legal sense of that word.

In these circumstances, questions arose as to the validity of the dispositions made by cl. 3 and cl. 5. It was conceded that, as the trustees had, under cl. 5, a power of selection among orders which were charitable and orders which were
C not charitable, the disposition of residue was invalid unless it was saved by the provisions of s. 37D of the Conveyancing Act, 1919-1954. In regard to cl. 3, the position was different. The respondent trustees urged as a second line of defence that the same section saved from invalidity the disposition made by that clause. But this alone was not enough for them; for, even if the plea was successful, it would not enable them to select a contemplative order as a beneficiary.
D Accordingly, they urged that cl. 3 was, in effect, an absolute gift to the order which they might select; if so, no question of invalidity would arise; they would have freedom of choice amongst all orders, including contemplative orders.

On these questions coming before the Supreme Court of New South Wales on an originating summons issued by the trustees, it was held by MYERS J., (i) that there was no territorial limitation in the will which would restrict the selection
E by the trustees to orders in New South Wales or Australia, that once the recipient, whether an order of nuns or the Christian Brothers, had been selected the gift was an absolute one to the selected body and that, as there was no uncertainty or perpetuity, the disposition by cl. 3 was valid, but (ii) that the disposition of residue by cl. 5 was invalid, in that it involved the devotion of property to purposes not necessarily charitable for a period longer than that permitted by the rule against perpetuities and was not, in his opinion, saved by s. 37D of the
F Conveyancing Act, 1919-1954. On appeal to the High Court of Australia, that court (i) affirmed the order of MYERS J., in regard to the disposition made by cl. 3 holding (by a majority) that an absolute gift was thereby established in favour of the selected beneficiary, and (unanimously) that, in any case, it was saved by s. 37D, but (ii) allowed the appeal in regard to the disposition made by
G cl. 5, holding (again unanimously) that it was saved from invalidity by the section. From this order the testator's widow and children appeal to Her Majesty in Council.

Section 37D of the Conveyancing Act, 1919-1954, which has been the subject of much judicial discussion, as has its prototype, s. 131 of the Property Law
H Act, 1928, of the State of Victoria, is in the following terms:

"(1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

"(2) Any such trust shall be construed and given effect to in the same
I manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

"(3) This section shall not apply to any trust declared before or to the will of any testator dying before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938."

The genesis and purpose of this section are clear. As the law stood before its enactment, a gift to such charitable or other purposes as trustees might think

fit was void, and this was the law whether the alternative to charitable purposes was the vague and general expression "other purposes" or a less vague but still indefinite expression such as "benevolent purposes" or even a precisely defined non-charitable institution. Equally, the gift was invalid if it was given for a purpose expressed in a compendious phrase which embraced both charitable and non-charitable objects. It was to remedy this state of the law that the section was enacted, and their Lordships will observe at once that there is no reason to confine its operation to those cases in which the invalidity of the alternative gift is due to one cause rather than another. The language is clear and admits of no qualification. It applies alike to invalidity due to uncertainty or to perpetuity.

The disposition made by cl. 5 will first be considered. A preliminary point can be disposed of. It was argued on behalf of the appellants that the word "amenities" was of such vague and uncertain meaning as to invalidate the whole gift. This argument ignores the fact that the testator, in the succeeding sentence of his will, explains what he means by "amenities" in language which cannot fairly be challenged on the ground of uncertainty. Their Lordships, therefore, approach the question of the application of the section on the footing that the gift would be valid if all convents could be regarded as charitable, but, as they cannot, the section must be invoked to save it. They would only interpolate that, on the question (on which there was a difference of opinion in the courts of Australia) whether the orders among which the trustees have a power of selection are in any way limited to orders operating in New South Wales at the date of the death of the testator, they agree with the view expressed by the chief justice (DIXON, C.J.) and McTIERNAN, J., that the language of the will does not admit of any territorial limitation being placed on the orders which may benefit by the gift. This does not appear to affect in any way the question whether the section is applicable.

The real question can now be stated. It is whether the section only applies where the testator has expressly indicated alternative purposes, the one charitable, the other non-charitable or not necessarily charitable, or applies also where the gift is for a purpose described in a compendious expression which is apt to include both charitable and non-charitable purposes. In the latter case, the further question will arise whether the section applies if the area of choice, however wide and indeterminate, admits of a charitable application, or whether some specific indication of a charitable intention is demanded—a question of great nicety to which further reference will be made.

On the main question, their Lordships are in agreement with the unanimous opinion of the learned judges of the High Court. The trust being declared to be the provision of amenities in convents in such manner as is prescribed with the further direction that the trustees are to have an absolute discretion as to the order or orders of nuns who shall benefit, can it be predicated of it that it would be invalid (but for the section) by reason that some non-charitable and invalid purpose as well as some charitable purpose is, or could be, deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed? For the sake of simplicity, this may be regarded as a gift for the benefit of such order of nuns as the trustees may select. If the testator had expanded these words into "for such order of nuns whether active or contemplative, as my trustees shall select", the gift would, but for the section, have been invalid, but the section would, as counsel for the appellants was constrained to admit, have clearly applied. But the area of selection is the same whether these words are expanded or not. Both orders, the charitable and non-charitable, both purposes, the valid and the invalid, are embraced in the single phrase "orders of nuns". It appears to their Lordships not only that the language of the section on a reasonable construction covers the case of a composite expression embracing charitable and non-charitable purposes, but that, as the present case forcibly illustrates, a contrary view leads

A to a result which cannot sensibly have been intended by the legislature. This conclusion accords with the overwhelming weight of authority in the courts of New South Wales and of Victoria, and also of New Zealand where a similar Act is in force. The relevant cases are discussed in the several judgments of the High Court of Australia in the case now under appeal. Their Lordships respectfully concur in what is there said. They indorse the view that the judgment in B *Re Belcher* (1) ([1950] V.L.R. 11) cannot be supported. Some reliance was placed by the appellants on the expression "is or could be deemed to be included", but it is difficult to see how it helps them. On the contrary, as is pointed out by KITTO, J., these words seem particularly appropriate to the case of a composite expression. There is no need for them if there is a clear-cut alternative between charitable and non-charitable purposes.

C But, though their Lordships are of opinion that the section may operate where there is a composite expression covering charitable and non-charitable purposes, and does so in the present case, it is clear that not every expression which might possibly justify a charitable application is brought within it. For instance, in *Re Hollole (decd.)* (2) ([1945] V.L.R. 295), there was a gift to a trustee "to be disposed of by him as he may deem best". The trustee might, presumably, have deemed it best to dispose of it for a charitable purpose, and, if he had done so, could not be said to have exceeded his powers. Yet O'BRYAN, J., held that the gift was not saved by the section, and his decision has been rightly approved in the High Court. This was a clear case, because the testator did not designate any purpose at all but, in effect, delegated his testamentary power in a manner that the law does not permit. Greater difficulty will arise where the E permissible objects of choice are described in a composite expression which, though not so vague and general as to amount to a delegation of testamentary power, does not very clearly indicate a charitable intention on the part of the testator. The chief justice and McTIERNAN, J., say:

"In the present case there is reference to a distributable class which, while not exclusively charitable, is predominantly charitable in character."

F The same concept appears in a different form in the judgment of WILLIAMS, J., and WEBB, J. They say:

"One can also agree with him [i.e., MYERS, J.] that in order to satisfy the section the application of the whole fund to charity must be one way of completely satisfying the intention of the testator. But if the trust either G directs or allows this to be done, the testator's intention will be completely satisfied if the trust funds are so applied . . ."

Thus, whether the gift be to orders of nuns, an object so predominantly charitable that a charitable intention on the part of the testator can fairly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable H purposes, the section will apply. Inevitably there will be marginal cases, where an expression is used which does not significantly indicate a charitable intention, and their Lordships do not propose to catalogue the expressions which will, or will not, attract the section. It may be sufficient to say that, in the chequered I history of this branch of the law, the misuse of the words "benevolent" and "philanthropic" have more than any others disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts.

The disposition made by cl. 3 must now be considered. As has already been pointed out, it will in any case be saved by the section so far as orders other than contemplative orders are concerned, but the trustees are anxious to preserve their right to select such orders. They can only do so if the gift is what is called an absolute gift to the selected order, an expression which may require examination. On this question, there has been a sharp division of opinion in the High Court. WILLIAMS, J., and WEBB, J., agreed with MYERS, J., that the

disposition by cl. 3 was valid. They held that it provided for an immediate gift to the particular religious community selected by the trustees, and that it was immaterial whether the order was charitable or not because the gift was not a gift in perpetuity. They said (and these are the significant words):

"It is given to the individuals comprising the community selected by the trustees at the date of the death of the testator. It is given to them for the benefit of the community."

KITTO, J., reached the same conclusion. He thought that the selected order would take the gift immediately and absolutely, and could expend immediately the whole of what is received. He said:

"There is no attempt to create a perpetual endowment."

A different view was taken by the chief justice and McTIERNAN, J. After an exhaustive examination of the problem and of the relevant authorities, they concluded that the provision made by cl. 3 was intended as a trust operating for the furtherance of the purpose of the order as a body of religious women or, in the case of the Christian Brothers, as a teaching order. They said:

"The membership of any order chosen would be indeterminate and the trust was intended to apply to those who should become members at any time. There was no intention to restrain the operation of the trust to those presently members or to make the alienation of the property a question for the governing body of the order chosen or any section or part of that order."

They, therefore, held that, unless the trust could be supported as a charity, it must fail.

The brief passages that have been cited from the judgments in the High Court sufficiently indicate the question that must be answered and the difficulty of solving it. It arises out of the artificial and anomalous conception of an unincorporated society which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members. In law, a gift to such a society simpliciter (i.e., where, to use the words of LORD PARKER OF WADDINGTON in *Boorman v. Secular Society, Ltd.* (3) ([1917] A.C. 406 at p. 437) neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is for this reason that the prudent conveyancer provides that a receipt by the treasurer or other proper officer of the recipient society for a legacy to the society shall be a sufficient discharge to executors. If it were not so, the executors could only get a valid discharge by obtaining a receipt from every member. This must be qualified by saying that, by their rules, the members might have authorised one of themselves to receive a gift on behalf of them all.

It is in the light of this fundamental proposition that the statements, to which reference has been made, must be examined. What is meant when it is said that a gift is made to the individuals comprising the community and the words are added "it is given to them for the benefit of the community"? If it is a gift to individuals, each of them is entitled to his distributive share (unless he has previously bound himself by the rules of the society that it shall be devoted to some other purpose). It is difficult to see what is added by the words "for the benefit of the community". If they are intended to import a trust, who are the beneficiaries? If the present members are the beneficiaries, the words add nothing and are meaningless. If some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void. For it is uncertain and beyond doubt tends to a perpetuity.

The question, then, appears to be whether, even if the gift to a selected order

A of nuns is, prima facie, a gift to the individual members of that order, there are other considerations arising out of the terms of the will, or the nature of the society, its organisation and rules, or the subject-matter of the gift which should lead the court to conclude that, though, prima facie, the gift is an absolute one (absolute both in quality of estate and in freedom from restriction) to individual nuns, yet it is invalid because it is in the nature of an endowment and tends to a perpetuity or for any other reason. This raises a problem which is not easy to solve as the divergent opinions in the High Court indicate.

The prima facie validity of such a gift (by which term their Lordships intend a bequest or demise) is a convenient starting point for the examination of the relevant law. For, as LORD TOMLIN (sitting at first instance in the Chancery Division) said in *Re Ogden, Brydon v. Samuel* (4) ([1933] All E.R. Rep. 720 at p. 721), a gift to a voluntary association of persons for the general purposes of the association is an absolute gift and, prima facie, a good gift. He was echoing the words of LORD PARKER OF WADDINGTON in *Bowman's* case (3) ([1917] A.C. at p. 442) that a gift to an unincorporated association for the attainment of its purposes "may . . . be upheld as an absolute gift to its members". These words must receive careful consideration, for it is to be noted that it is because

D the gift can be upheld as a gift to the individual members that it is valid, even though it is given for the general purposes of the association. If the words "for the general purposes of the association" were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object; so, also, a trust may be created for the benefit

E of persons as cestuis que trustent, but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it. (On this point something will be added later.) It is, therefore, by disregarding the words "for the general purposes of the association" (which are assumed not to be charitable purposes) and treating the gift as an absolute gift to individuals that it can be sustained. The same conclusion had been reached fifty years before

F in *Cocks v. Manners* (5) ((1871), L.R. 12 Eq. 574), where a bequest of a share of residue to the "Dominican convent at Carisbrooke (payable to the superior for the time being)" was held a valid gift to the individual members of that society. In that case, no difficulty was created by the addition of words which might suggest that the community as a whole, not its members individually,

G should be the beneficiary. So, also with *Re Smith, Johnson v. Bright-Smith* (6) ([1914] 1 Ch. 937). There the bequest was to "the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset" absolutely. JOYCE, J., had no difficulty in construing this as a gift individually to the small number of persons who had associated themselves together at Clevedon under monastic vows. Greater difficulty must be felt when the gift is in such terms

H that, though it is clearly not contemplated that the individual members shall divide it amongst themselves, yet it is, prima facie, a gift to the individuals and, there being nothing in the constitution of the society to prohibit it, they can dispose of it as they think fit. Of this type of case *Re Clarke, Clarke v. Clarke* (7) ([1901] 2 Ch. 110) may be taken as an example. There the bequest

I was to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to the corps. The learned judge (BYRNE, J.) was able to uphold this as a valid gift on the ground that all the members of the association could join together to dispose of the funds or the barracks. He assumed (however little the testator may have intended it) that the gift was to the individual members in the name of the society or of the committee of the society. This might be regarded as an extreme case had it not been followed by *Re Drummond, Ashworth v. Drummond* (8) ([1914] 2 Ch. 90). In that case a testator devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion and

to stand possessed of the proceeds on trust for the Old Bradfordians' Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees. By a codicil, the testator declared that he desired that the said moneys should be used by the club for such purpose as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a club-house for the use of the members, with various other powers, including the founding of scholarships, as the committee for the time being should think best in the interests of the club or the school. EVE, J., said (*ibid.*, at p. 97) that he could not hold, as the result of the will and codicil together, that the residuary gift to the Old Bradfordians' Club was a gift to the members individually, but there was, in his opinion, a trust, and there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity. He cited only *Re Clarke* (7), though other cases had been referred to in argument, and he ignored that BYRNE, J., had been able to reach his conclusion in that case just because he regarded the gift as a gift to the individual members of the corps who could together dispose of its assets as they thought fit. The learned judge added (*ibid.*) that the legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might think fit for the benefit of the class intended. There was, therefore, a valid gift to the club for such purposes as the committee should determine for the old boys or members of the club. Their Lordships have thought it desirable to state *Drummond's* case (8) at some length, both because it provides an interesting contrast to cases that will be referred to later and was itself an authority relied on by FARWELL, J., in *Re Taylor, Midland Bank Executor & Trustee Co., Ltd. v. Smith* (9) ([1940] 2 All E.R. 637) and by COHEN, J., in *Re Price, Midland Bank Executor & Trustee Co., Ltd. v. Harwood* (10) ([1943] 2 All E.R. 505). In the former case, the learned judge observed ([1940] 2 All E.R. at p. 642) that *Re Clarke* (7) showed that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund, or the purpose for which the institution was created, prevent the members from dealing with it, both capital and income, in any way they please. It does not appear that he was making any distinction between a gift to a voluntary body of persons and a gift to a fund for such a body. Two other cases had in the meantime been decided to which reference may be made. In *Re Provost, Lloyds Bank, Ltd. v. Barclays Bank, Ltd.* (11) ([1930] 2 Ch. 383), a testator had devised and bequeathed the whole of his residuary estate to the trustees of the London Library, to be held by them on trust for the general purposes of that institution, including the benefit of the staff. This case, too, came before EVE, J., who held that the gift was valid on the ground that it was a gift to the trustees of the library on trust to be expended in carrying out the objects of the society according to its rules and that, inasmuch as there was nothing in the terms of the gift or in the rules of the library to prevent the expenditure of the corpus of the property, the gift did not fail for perpetuity. Here there was no question of a gift to an unincorporated society which was to be regarded as a gift to its individual members and capable of being dealt with by them as they should think fit. The learned judge nevertheless regarded it as falling within the class of case of which *Cocks v. Manners* (5) was the leading authority. Nearer to *Cocks v. Manners* (5), and nearer, too, to the present case, was *Re Ray's Will Trusts, Public Trustee v. Barry* (12) ([1936] 2 All E.R. 93). In that case, a testatrix who was a nun in a convent, by her will gave all her property to the person who at the time of her death should be, or should act as, the abbess of the convent. The will was witnessed by two nuns belonging to the convent, one of whom was subsequently elected abbess and held that office at the time of the death of the testatrix. The substantial question was whether the gift was

A invalidated by s. 15 of the Wills Act, 1837, and it was held not to be so invalidated because the gift was not to the abbess personally but in trust for, and as an addition to, the funds of the community. As to this, CLATSON, J., made the following observations (*ibid.*, at p. 97), which state the point at issue:

B "Another form of gift would be a gift to the controlling officer of a society in his capacity of officer, to be dealt with as he, in his official capacity of officer according to the duties of the office, would deal with the other funds which, as such officer of the voluntary society, it would be his duty to deal with . . . This, again, is a perfectly good gift to which the court would give effect, subject only to this point, which sometimes causes trouble, that, if the framing of the gift indicates that the legacy is not to be used at once and immediately for the purposes of the voluntary society, but is to be subject to the fetter that it is to be set aside and the income only of it is to be used, the capital being preserved as what one may call for convenience an endowment of the voluntary society, the court would not give effect to that gift, because it infringes the rule of the court that no gift, subject to the exception laid down in the case of a charitable gift, is to tend to a perpetuity, and a gift to endow a voluntary society necessarily, of course, tends to a perpetuity."

The cases that have been referred to (and many others might have been referred to in the courts of Australia, England and Ireland) are all cases in which gifts have been upheld as valid either on the ground that, where a society has been named as legatee, its members could demand that the gift should be dealt with as they should together think fit; or on the ground that a trust had been established (as in *Re Drummond* (8)) which did not create a perpetuity. It will be sufficient to mention one only of the cases in which a different conclusion has been reached, before coming to a recent decision of the House of Lords which must be regarded as of paramount authority. In *Carme v. Long* (13) (1860), 2 De G.F. & J. 75, the testator devised his mansion house after the death of his wife to the trustees of the Penzance Public Library to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library. It appeared that the library was established and kept on foot by the subscriptions of certain inhabitants of Penzance, that the subscribers were elected by ballot and the library managed by officers chosen from amongst themselves by the subscribers, that the property in the books and everything else belonging to the library was vested in trustees for the subscribers, and that it was provided that the institution should not be broken up so long as ten members remained. It was urged that the gift was to a number of private persons and there were, in truth, no other beneficiaries. But CAMPBELL, L.C., rejected the plea in words which, often though they have been cited, will bear repetition (*ibid.*, at p. 79):

H "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and I the testator must be presumed to have known what the regulations were."

This was, perhaps, a clear case where, both from the terms of the gift and the nature of the society, a perpetuity was indicated.

These Lordships must now turn to the recent case of *Re Macaulay's Estate, Macaulay v. O'Donnell* (14) ([1943] Ch. 435, n.), which appears to be reported only in a footnote to *Re Price* (10) ([1943] Ch. 422). There the gift was to the Folkestone Lodge of the Theosophical Society absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone. It was assumed

that the donee "the lodge" was a body of persons. The decision of the House of Lords in July, 1933, to which both LORD BUCKMASTER and LORD TOMLIN were parties, was that the gift was invalid. A portion of LORD BUCKMASTER'S speech may well be quoted. He had previously referred to *Re Drummond* (8) and *Carne v. Long* (13).

"A group of people defined and bound together by rules and called by a distinctive name can be the subject of gift as well as any individual or incorporated body. The real question is what is the actual purpose for which the gift is made. There is no perpetuity if the gift is for the individual members for their own benefit, but that, I think, is clearly not the meaning of this gift. Nor again is there a perpetuity if the society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit . . . If the gift is to be for the endowment of the society, to be held as an endowment and the society is, according to its form, perpetual, the gift is bad, but, if the gift is an immediate beneficial legacy, it is good."

In the result he held the gift for the maintenance and improvement of the Theosophical Lodge at Folkestone to be invalid. Their Lordships respectfully doubt whether the passage in LORD BUCKMASTER'S speech in which he suggests the alternative ground of validity: viz., that the society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit, presents a true alternative. It is only because the society, i.e., the individuals constituting it, are the beneficiaries, that they can dispose of the gift. LORD TOMLIN came to the same conclusion. He found in the words of the will "for the maintenance and improvement" a sufficient indication that it was the permanence of the lodge at Folkestone that the testatrix was seeking to secure and this, he thought, necessarily involved endowment. Therefore, a perpetuity was created. A passage from the judgment of LORD HANWORTH, M.R. (which has been obtained from the records), may usefully be cited. He said:

"the problem may be stated in this way. If the gift is in truth to the present members of the society described by their society name so that they have the beneficial use of the property and can, if they please, alienate and put the proceeds in their own pocket, then there is a present gift to individuals which is good; but if the gift is intended for the good not only of the present but of future members so that the present members are in the position of trustees and have no right to appropriate the property or its proceeds for their personal benefit then the gift is invalid. It may be invalid by reason of there being a trust created, or it may be by reason of the terms that the period allowed by the rule against perpetuities would be exceeded."

It is not very clear what is intended by the dichotomy suggested in the last sentence of the citation, but the penultimate sentence goes to the root of the matter. At the risk of repetition, their Lordships would point out that, if a gift is made to individuals whether under their own names or in the name of their society and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If, at the death of the testator, the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and not so ascertainable, the trust must fail. Of such a trust, no better example could be found than a gift to an order for the benefit of a community of nuns once it is established that the community is not confined to living and ascertainable persons. A wider question is opened if it appears that the trust is not for persons but for a non-charitable

A purpose. As has been pointed out, no one can enforce such a trust. What follows? Ex hypothesi, the trustees are not themselves the beneficiaries yet the trust fund is in their hands and they may, or may not, think fit to carry out their testator's wishes. If so, it would seem that the testator has imperfectly exercised his testamentary power; he has delegated it, for the disposal of his property lies with them not with him. Accordingly, the subject-matter of the gift will be undisposed of or fall into the residuary estate, as the case may be. Their Lordships do not ignore that, from this fundamental rule, there has, from time to time, been a deviation: see for example, *Re Dean, Cooper-Dean v. Stevens* (15) ((1889), 41 Ch.D. 552), *Re Thompson, Public Trustee v. Lloyd* (16) ([1933] All E.R. Rep. 805); and that attempts have been made to explain or justify such cases (see, in particular, GRAY ON PERPETUITIES (4th Edn.), pp. 776 et seq.). But the rule as stated in *Morice v. Bishop of Durham* (17) ((1804), 9 Ves. 399 (per SIR WILLIAM GRANT, M.R.) (1805), 10 Ves. 522 (per LORD ELDON, L.C.)) continues to supply the guiding principle. It may be difficult to reconcile this principle with the decision of *Drummond's case* (8), but the learned judge did treat that case as governed by *Cocks v. Manners* (5) and, if so, must have assumed that, when the will trustees had got the trust fund in their hands, they could be compelled by the members of the Old Bradfordians' Club or of the school to apply it as they thought fit. But it is difficult to see how he made such an assumption or arrived at the conclusion that no perpetuity had been created. No similar difficulty arises in regard to the observations of LORD BUCKMASTER and LORD TOMLIN which have already been cited. The effect is the same whether the gift is to A., B. and C. or to a society of A., B. and C. and no others on such terms that they can spend both capital and income as they think fit.

It is significant of the fine distinctions that are made in these cases that, in *Re Price* (10), the learned judge to whose attention *Re Macaulay's Estate* (14) had been called held that a gift of a share of residue to the Anthroposophical Society in Great Britain

F "to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder Dr. Rudolf Steiner",

was a valid gift.

G Before turning once more and finally to the terms of the present gift, their Lordships must mention *Re Cain, National Trustees Executors & Agency Co. of Australasia, Ltd. v. Jeffrey* (18) ([1950] V.L.R. 382). In that case, DEAN, J., has made an exhaustive examination of the relevant case law which must prove of great value in similar cases.

H It must now be asked then whether, in the present case, there are sufficient indications to displace the prima facie conclusion that the gift made by cl. 3 of the will is to the individual members of the selected order of nuns at the date of the testator's death so that they can together dispose of it as they think fit. It appears to their Lordships that such indications are ample. In the first place, it is not altogether irrelevant that the gift is in terms on trust for a selected order. It is true that this can in law be regarded as a trust in favour of each and every member of the order. But at least the form of the gift is not to the members, and it may be questioned whether the testator understood the niceties of the law. In the second place, the members of the selected order may be numerous, very numerous perhaps, and they may be spread over the world. If the gift is to the individuals, it is to all members who were living at the death of the testator, but only to them. It is not easy to believe that the testator intended an "immediate beneficial legacy" (to use the words of LORD BUCKMASTER) to such a body of beneficiaries. In the third place, the subject-matter of the gift cannot be ignored. It appears from the evidence filed in the case that Elmslea is a grazing property of about 730 acres with a furnished

homestead containing twenty rooms and a number of outbuildings. With the greatest respect to those learned judges who have taken a different view, their Lordships do not find it possible to regard all the individual members of an order as intended to become the beneficial owners of such a property. Little or no evidence has been given about the organisation and rules of the several orders, but it is at least permissible to doubt whether it is a common feature of them that all their members regard themselves or are to be regarded as having the capacity of (say) the Corps of Commissionaires (see *Re Clarke* (7)) to put an end to their association and distribute its assets. On the contrary, it seems reasonably clear that, however little the testator understood the effect in law of a gift to an unincorporated body of persons by their society name, his intention was to create a trust not merely for the benefit of the existing members of the selected order but for its benefit as a continuing society and for the furtherance of its work. Different views have been held on the question whether the legal title remains in the will trustees after they have selected an order. KIRTO, J. (expressly), and WILLIAMS, J., and WEBB, J. (by implication), held that "when a body is selected by the trustees the property will be at home" and will vest presumably in some authorised person or persons. (The Roman Catholic Charities Land Act, 1942, was not invoked in the High Court and becomes irrelevant if the chosen order is not a charity.) The Chief Justice and McTIERNAN, J., were of opinion that the trustees were intended, subject to the power of sale, to remain the repository of the whole legal title and to administer the trust by affording the enjoyment to the selected order. The latter view is attractive if only because of the difficulty of transferring title when the above-mentioned Act does not apply. But their Lordships do not think it necessary for the purpose of this case to decide the question. No difficulty will arise if only a charitable body can be selected. If the choice is wider, the question will not arise. The dominant and sufficiently expressed intention of the testator is, in their opinion (again in the words of LORD BUCKMASTER), that "the gift is to be for the endowment of the society, to be held as an endowment" and that "as the society is, according to its form, perpetual" the gift must, if it is to a non-charitable body, fail.

Their Lordships, therefore, humbly advise Her Majesty that the appeal should be dismissed, but that the gift made by cl. 3 of the will is valid by reason only of the provisions of s. 37D of the Conveyancing Act, 1919-1954, and that the power of selection thereby given to the trustees does not extend to contemplative orders of nuns. The costs of all parties will be paid out of the estate of the testator. The costs of all the respondents will be taxed as between solicitor and client.

Appeal dismissed.

Solicitors: *Waterhouse & Co.* (for the appellants); *Bell, Brodick & Gray* (for the respondent trustees); *Light & Fulton* (for the respondent, the Attorney-General of New South Wales).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A **COGLEY v. SHERWOOD; CAR HIRE GROUP (SKYPORT) LTD. v. SHERWOOD; HOWE v. KAVANAUGH; CAR HIRE GROUP (SKYPORT) LTD. v. KAVANAUGH.**

QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.),
April 21, 22, 1959.]

B *Road Traffic Hackney carriage Metropolitan police area "Plying for hire"*
—Private hire service—Service advertised but vehicles to be hired not marked
or exhibited as such—Hire arranged at office—Metropolitan Public Carriage
Act, 1869 (32 & 33 Vict. c. 115), s. 7.

A hackney or stage carriage does not ply for hire within the
meaning of the Metropolitan Public Carriage Act, 1869*, unless it is exhibited
as being for hire.

C *Griffin v. Grey Coaches, Ltd.* ((1928), 45 T.L.R. 109) explained and distinguished; dicta in *Gilbert v. McKay* ([1946] 1 All E.R. at p. 459), and *Cavill v. Amos* ((1900), 16 T.L.R. at p. 157) not followed.

D A car hire service was run from two offices in the public parts of an
airport, and was advertised extensively by signs both at the offices and in
other public parts of the airport. To hire a car a member of the public
went to either office and asked to be driven to a named destination: he was
escorted from the office to a standing place appointed by the owners of the
airport where cars and their drivers were waiting, shown into a particular
car, and driven to his destination, where the driver asked, and the passenger
paid, a fare based on the distance travelled, in accordance with the scale of
charges exhibited at the airport. One standing place was a roadway to
which the public had access, but the marks on the roadway defining the
standing could not easily be seen when the cars were parked there. The
cars appeared to be private cars, the drivers' uniforms were similar to those
worn by private chauffeurs, and so the cars at the standings did not give
the appearance of being cars available for hire.

E **F** **Held:** the cars were not exhibited, and so were not plying for hire within
the meaning of the Act.

Appeal allowed.

[As to the meaning of plying for hire, see 31 HALSBURY'S LAWS (2nd Edn.)
704, para. 1053, note (1); and for cases on the subject, see 42 DIGEST 853-856,
77-94.]

G For the Metropolitan Public Carriage Act, 1869, s. 4, s. 7, see 24 HALSBURY'S
STATUTES (2nd Edn.) 869, 871.]

Cases referred to:

- (1) *Griffin v. Grey Coaches, Ltd.*, (1928), 45 T.L.R. 109; 42 Digest 855, 92.
(2) *Allen v. Tunbridge*, (1871), L.R. 6 C.P. 481; 40 L.J.M.C. 197; 24 L.T. 796;
sub nom. *Allen v. Troughbridge*, 35 J.P. 695; 42 Digest 853, 78.
H (3) *Armstrong v. Oyle*, [1926] 2 K.B. 438; 95 L.J.K.B. 908; 135 L.T. 118;
90 J.P. 146; 42 Digest 854, 85.
(4) *Case v. Storey*, (1869), L.R. 4 Exch. 319; 38 L.J.M.C. 113; 20 L.T. 618;
33 J.P. 470; 42 Digest 859, 120.
(5) *Clarke v. Stanford*, (1871), L.R. 6 Q.B. 357; 40 L.J.M.C. 151; 24 L.T. 389;
35 J.P. 662; 42 Digest 853, 77.
I (6) *Gilbert v. McKay*, [1946] 1 All E.R. 458; 174 L.T. 196; 110 J.P. 186;
2nd Digest Supp.
(7) *Cavill v. Amos*, (1900), 64 J.P. 309; 16 T.L.R. 156; 42 Digest 855, 89.

Case Stated.

This was an appeal by way of Case Stated by justices for the county of Middle-
sex, in respect of their adjudication as a magistrates' court sitting at Uxbridge

* The relevant provisions of the Metropolitan Public Carriage Act, 1869, are set out
at p. 311, letters D to G, post, in the judgment of LORD PARKER, C.J.

on Jan. 19, 1959. The justices had convicted the appellants, and given them absolute discharges, on four informations charging offences against the Metropolitan Public Carriage Act, 1869, s. 7, in that the appellants were respectively the owners and drivers of two unlicensed hackney carriages which had plied for hire without a licence in the Metropolitan Police District.

The appellant company's business, which was to let cars on hire, mainly with chauffeurs, to persons requiring immediate transport, was conducted at both the passenger terminals at London Airport. By virtue of a contract between the company and the Minister of Transport and Civil Aviation, at each terminal the company had a desk in the public part and a standing for its cars conveniently placed so as to make the cars readily available to anyone who had hired a car at the desk, and agreed to hire the cars at an agreed scale of charges based on the type of car supplied and the distance travelled. At the Central Terminal the standing was a roadway to which the public did not have access. Both standings were defined by marks on the roadway, but the marks were not easily seen when cars were parked there. The drivers' uniforms were similar to those of private chauffeurs and the cars appeared to be private cars: they did not give the appearance of being available for hire. At both terminals the company also had more remote parking space from which the standings were replenished as and when cars there were hired and driven away. The company's desks were plainly visible to arriving passengers, and notices and advertisements displayed at the desks and elsewhere, in addition to telephone facilities and a push button bell, provided a clear intimation to members of the public at the airport of the availability to them of the company's services.

On Oct. 28, 1958, the two prosecutors, who were taxi-drivers, each went to different desks and asked to be driven to different destinations. At one desk the clerk wrote on a printed form the name of a driver and the reference number of one of the company's cars; the passenger was escorted to the car, which was at the appropriate standing, and driven to his destination by the appellant Cogley. At the other terminal the desk clerk made entries in a book and the passenger, the other prosecutor, was escorted to another car owned by the company, which was at the appropriate standing, and was driven to his destination by the appellant Howe. Each passenger was asked for and paid to his driver a fare calculated at the agreed scale of charges. The airport was within the Metropolitan Police District and neither car was a licensed hackney carriage. The justices held that the cars were plying for hire, and accordingly convicted the company and each driver of offences against s. 7. The company and the drivers appealed.

Neil Lawson, Q.C., and W. A. Macpherson for the appellants.

J. W. Borders for the respondents.

J. R. Cumming-Bruce for the Minister of Transport and Civil Aviation.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the county of Middlesex sitting at Uxbridge, before whom four informations were preferred charging offences against s. 7 of the Metropolitan Public Carriage Act, 1869, in that the appellants were respectively the owners and drivers of two unlicensed hackney carriages, which had unlawfully plied for hire without a licence. The magistrates, after very careful consideration of the authorities, felt constrained to hold that the offences were proved. They convicted the appellants accordingly, but gave them an absolute discharge, ordering in the case of the appellant company that it should pay twelve guineas costs.

The facts giving rise to this matter are shortly as follows: at London Airport there are two sets of buildings for handling passengers, the Central Terminal and the North Terminal. The appellant company, the Car Hire Group (Skyport) Ltd., are, as their name indicates, a car hire concern. They hire out cars which can be driven by customers themselves, but the major part of their business is the hiring out of cars with chauffeurs. They carry on business at London Airport

A at both terminals under an agreement with the Minister of Transport, who has afforded them standing room for their cars and also facilities in both buildings in the nature of a desk where orders can be taken by people arriving at the airport for transport to their destination in the company's cars. At those desks are extensive advertisements of the facilities available, and those advertisements also appear in other parts of the premises. At each terminal the company is allowed to use a place where its vehicles can stand. In one case, the Central Terminal, the standing is in a roadway to which the public have no access; at the other terminal they stand on a roadway to which the public has access, but there is nothing at the stand which indicates that the vehicles are for hire. They appear to any member of the public to be ordinary private cars accompanied by private chauffeurs.

C On Oct. 28, 1958, the two respondents, who are taxi-cab drivers, for the purpose of testing the position, went and hired two cars, one car at the Central Terminal and one at the North Terminal. It is as a result of that that these informations are laid, informations against the driver of the car hired at the Central Terminal and the appellant company, the owners of the car, and two similar informations in regard to the car hired at the North Terminal. It was broadly on those facts that the magistrates held that both cars were plying for hire within the Metropolitan Public Carriage Act, 1869.

The Act provides, so far as it is relevant to these proceedings, by s. 2:

"The limits of this Act shall be the Metropolitan Police District, and the City of London and the liberties thereof."

By s. 4, which is the definition section, it is provided:

E "In this Act 'stage carriage' shall mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein.

F "'Hackney carriage' shall mean any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage."

Finally by s. 7, it is provided:

"If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding £5 for every day during which such unlicensed carriage plies . . ."

G It is quite clear that London Airport is within the limits of the Act, and therefore the only question falling to be determined in these proceedings is whether either or both of the two cars I have mentioned were plying for hire. If they were, then they were clearly unlicensed, and an offence was committed.

H The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and, like the magistrates, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire". One reason, of course, is that these cases all come before the court on Case Stated, and the question whether a particular vehicle is plying for hire, being largely one of degree and therefore of fact, has to be approached by considering whether there was evidence to support the magistrates' finding.

I In those circumstances it was unnecessary, and clearly inadvisable, for the court to attempt to lay down an exhaustive definition. Indeed, that was specifically referred to by LORD HEWART, C.J., in *Griffin v. Grey Coaches, Ltd.* (1) (1928), 45 T.L.R. 109. LORD HEWART, C.J., said (*ibid.*, at p. 110):

"In the course of the argument reference has been made to a considerable number of cases, and attention has been directed to the occasional narrowness of the field of argument and decision in those cases. But it is to be

observed that cases on this interesting question of plying for hire usually turn upon the question whether there was or was not evidence in the particular facts of the case justifying the conclusion arrived at by the justices. Nowhere is there any attempt to formulate an exhaustive definition of the meaning of the term 'plying for hire' . . . "

For myself I think that the proper course is to start with the words of the Act and to construe them, before seeing whether there are any decisions binding on us which constrain us to put a different construction on the words. Approaching the matter in this way, the first thing that strikes one is that the Act is dealing with carriages plying for hire, not with persons carrying on the business of letting out carriages. It is the carriage that must ply for hire, and though a human agency must clearly be involved, the Act is directing one's attention to the carriage under consideration and posing the question: is *it* plying for hire? While no doubt in 1869 persons were engaged in letting out carriages on hire, the legislature clearly could not then envisage the considerable business which has grown up of recent years of hiring out cars. Indeed today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word. It seems to me that the Act is *prima facie* dealing with a particular carriage whose owner or driver invites the public to be conveyed in it.

The idea is well set out by MONTAGUE SMITH, J., in *Allen v. Tunbridge* (2) ((1871), L.R. 6 C.P. 481) where the learned judge says (*ibid.*, at p. 485):

"I am of the same opinion upon the authority of the case* in the Queen's Bench. It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage."

Indeed that passage was approved in *Armstrong v. Ogle* (3) ([1926] 2 K.B. 438). In that case LORD HEWART, C.J., said (*ibid.*, at p. 445):

"What is the principle to be applied? It was stated in a single sentence by MONTAGUE SMITH, J., in *Allen v. Tunbridge* (2) where he said (referring to a previous case*): 'It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage' [then LORD HEWART says:] The contrast is between a particular and definite private hiring and a public picking up of passengers."

The decision in *Allen v. Tunbridge* (2) was a decision of the Court of Common Pleas, but the same idea is, I think, behind the contemporary decisions in the Court of Queen's Bench and the Court of Exchequer. Thus in *Case v. Storey* (4) ((1869), L.R. 4 Exch. 319), KELLY, C.B., in referring to the words "plying for hire" under a different Act†, said (*ibid.*, at p. 323):

"Those words must mean that the carriage is to be at the disposal of any one of the public who may think fit to hire it."

In *Clarke v. Stanford* (5) ((1871), L.R. 6 Q.B. 357), COCKBURN, C.J., said (*ibid.*, at p. 359):

"But where a person has a carriage ready for the conveyance of passengers, in a place frequented by the public, he is plying for hire, although the place is private property."

MELLOR, J., said (*ibid.*, at p. 360):

"But what is the carriage there for? Though the driver makes no sign,

* *Clarke v. Stanford* (5) ((1871), L.R. 6 Q.B. 357).

† The London Hackney Carriage Act, 1831.

A he is there to be hired by persons who arrive by train, and there is no restriction as to the persons who, arriving by train, shall hire the carriage; it is therefore plying for hire, within the meaning of the statute."

LUSH, J., said (*ibid.*):

B "This carriage was awaiting the arrival of a train, in order to be hired by any person who might come by the train. That is a plying for hire, within the meaning of this statute."

C In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: before you hire my vehicle, you must take a ticket at the office; aiter, if he said: you cannot have my vehicle but if you go to the office you will be able to get a vehicle, not necessarily mine.

D There are, however, some cases which point to a different conclusion. For my part, however, I find it unnecessary to go into them and for this reason. In all the cases where it has been held that a carriage was plying for hire, it was in fact there and on view. Thus in *Gilbert v. McKay* (6) ([1946] 1 All E.R. 458), cars were held to be plying for hire even though, as I assume, a member of the public could not choose his vehicle, but, be that as it may, the vehicles were clearly on view, they were standing, like taxis might stand on a rank, outside offices bearing the sign "Cars for Hire". It is true that in that case it was suggested that there might be a plying for hire even if the cars were not on view*, and the same appears in *Carroll v. Amos* (7) (1900). 16 T.L.R. 156, where CHANNELL, J., in giving judgment, said (*ibid.*, at p. 157):

E "In ordinary cases, in order that there should be a plying for hire, the carriage itself should be exhibited. He thought, however, that a man might possibly ply for hire with a carriage without exhibiting it, by going about touting for customers."

F For myself I think that it is of the essence of plying for hire that the carriage should be exhibited. Here it is clear that the cars in question were not exhibited in this sense of the word. As I have said, the only cars that were on view were at one terminal, and to any ordinary member of the public they did not appear to be for hire; they appeared merely to be ordinary private cars with private chauffeurs.

G It is said, however, that the cases concerning stage carriages and in particular *Griffin v. Grey Coaches, Ltd.* (1) (45 T.L.R. 109), to which I have already referred, force one to a different conclusion. Indeed, I think that it was that case that chiefly influenced the magistrates. Thus, in setting out their reasons, they say this:

H "Indeed it is not necessary that at the time the agreement is reached by the hirer and the passenger for the passenger's conveyance that the actual driver or the vehicle to be used is known (*Griffin v. Grey Coaches, Ltd.* (1))."

A little later on they say:

I "We considered that the facts in *Griffin v. Grey Coaches, Ltd.* (1) and the cases before us had two substantial similarities: in both cases the existence of the service offered to the public was made known by advertisement and the vehicle used was not on view or allocated to the particular journey at the time the agreement for the journey was made."

In *Griffin's* case (1), which, as I have said, concerned a stage carriage, the company, *Grey Coaches, Ltd.*, were owners of motor charabanes, plying at regular hours between London and Brighton. The question was whether the vehicles

* See per Lord GODDARD, C.J., [1946] 1 All E.R. at p. 459, letters D-F.

were plying for hire at Brighton, in respect of which there was no licence. It appears that there were extensive advertisements exhibited at the office in Brighton advertising the times of departure of the charabanes, and tickets could be purchased at the office up to ten minutes before the advertised time, but not afterwards. At the time when the tickets were purchased, there was no charabane in the garage adjoining the office, and it was not until twenty minutes later that the charabane was driven up by one of the company's servants into the yard to take on the passengers. In the course of his judgment LORD HEWART, C.J., said (45 T.L.R. at p. 111):

"What is the real difference, apart from mere accidental difference, between that state of affairs and the state of affairs which exists where the driver of the coach, by gesture or by words, invites the members of the public to board, and to travel upon, a vehicle which they can see? It may be, as has been said, that the particular coach was not then appropriated to the particular journey. It was waiting to be appropriated; it was in a proper and convenient place for that very purpose."

For myself I do not think that this decision in regard to a stage carriage is compelling authority in this case. This court, of course, treats itself as bound by its own decisions. There is, however, at present no appeal, and, that being so, I do not think that the court should treat itself as bound by a previous decision unless there can be said to be no real distinction. It is true that "plying for hire" must have the same meaning whether applied to stage carriages or to hackney carriages. In the former case, however, it may well be far easier to find a plying for hire. Indeed, where a schedule of regular services is advertised and a vehicle or vehicles has been performing those services for some time in full view of the public, there is something to be said for the view that they are exhibited in the sense that I have indicated, even though a particular vehicle is not on view when the ticket is bought. I do not think that *Griffin's* case (1) compels me to come to a conclusion in regard to hackney carriages different from that indicated earlier in this judgment.

In my judgment the magistrates were wrong in treating this case as indistinguishable from *Griffin's* case (1). No conceivable blame attaches to them, and indeed the court is grateful for the clear reasoning set out in the Case on which their decision was based. I would allow this appeal.

DONOVAN, J.: The Lord Chief Justice has already quoted the definition of "hackney carriage" in s. 4 of the Metropolitan Public Carriage Act, 1869*, and I need not repeat it. Section 6 gives the Secretary of State power to license to ply for hire both stage carriages and hackney carriages within the territorial limits of the Act, namely, the Metropolitan Police District and the City of London. Section 9 gives him power to make regulations inter alia for fixing the stands of hackney carriages; s. 7 provides, as has already been stated, that if any unlicensed hackney carriage plies for hire or uses one of the fixed stands the owner is liable to a continuing penalty. The motor cars concerned in the present case are hackney carriages within the definition in s. 4, and London Airport is within the territorial limits of the Act. The sole issue is whether these cars, in the circumstances detailed in the case, and which the Lord Chief Justice has already narrated, "ply for hire" within the meaning of s. 7.

When that section was enacted hackney carriages were, I suppose, solely horse-drawn, and indeed one meaning of the word "hackney" is "an ambling horse". The purpose of the Act was clearly to exercise control over these vehicles so as to ensure a proper standard of safety and cleanliness, and of competency in their drivers, for the driver has to be licensed, too, under s. 8. The motor car has now displaced the horse carriage and in addition a very large business has grown up of private hire of motor cars. These new conditions do not mean that plain words in the statute are now to be given something other

* See p. 315, letter E, ante.

A than a plain meaning. They do, however, in my view involve that when the court is asked to apply the language of 1869 to the vastly different circumstances of 1959, then a very close scrutiny of the words is called for.

B The expression "plying for hire" is not defined in the statute, and I would respectfully concur in the justices' finding that no comprehensive definition is to be found in the decided cases; but the term does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired. One can perhaps best explain the reason by taking an example. It is a fairly common sight today to see in smaller towns and villages a notice in the window of a private house "Car for Hire". If the car in question is locked up in the owner's garage adjacent to the house, it could not in my view reasonably be said that at that moment the car was "plying for hire". If a customer wishes to hire it, he comes and makes his terms with the owner. On the return journey the owner might exhibit a sign on its windscreen, as some of them do, "Taxi" and then clearly he would be plying for hire. Similarly, if he left the car outside his house, the same notice on the car would involve, I think, that the car was then plying for hire, and the notice in the window might also then have the same effect. The essential difference in the circumstances that I have compared is that in the one the car is not exhibited at all, whereas in the other it is, coupled with the notification that it may be hired. I am fortified in suggesting a test of exhibition by several considerations. The first is that there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers. In *Gilbert v. McKay* (6) ([1946] 1 All E.R. 458) the cars were just outside the premises of the car hire firm which bore advertisements that cars were for hire.

E Secondly, in s. 7, the words are: "If any unlicensed carriage plies for hire" thus indicating that one is to look and see what the vehicle itself is doing, albeit under human agency. I find it very difficult to say that a vehicle which is not exhibited in some way is a vehicle plying for hire. Like my Lord, I do not regard the decision in *Griffin v. Grey Coaches, Ltd.* (1) ([1928], 45 T.L.R. 109) as antagonistic to this view. There it is true that the charabanc was not on view at the time that the passenger booked his seat. But the court was there dealing with a regular service at regular times along a regular route. One can, I think, exhibit a vehicle such as an omnibus or a charabanc just as effectively for the purpose of hire in this way as by any other. By these means it will come to the notice of prospective customers, which after all is the object of exhibition.

G The court is dealing in this case with two particular vehicles, one engaged from the Central Terminal and one from the North Terminal. The case finds that at the Central Terminal the cars stood while waiting to be hired on a roadway to which the public had no access. There is no such precise finding as to the situation of the standing at the North Terminal, but there is certainly no evidence that at either standing there was any notice that the cars, or any of them, were for hire. This no doubt explains the contention put in the forefront of the appellants' case, namely, that the two cars were not exhibited to intended passengers, or at all. This is not met by any opposing contention on the part of the respondents. The justices appear to deal with the case on the footing that the cars were not on view, for they say in effect that, despite this, the decision in *Griffin v. Grey Coaches, Ltd.* (1) compelled them to the conclusion that this circumstance was inconclusive. I have already stated why in my view the charabancs concerned in that case were in fact on view. If, then, the two cars with which this case is concerned were not exhibited to the public as being available for hire, I think that it is wrong to say of these vehicles that they were then hackney carriages "plying for hire".

I The respondents' main contention begins in this way: plying for hire really means carrying out the business of carrying passengers for hire or reward. With respect I think that this suggested definition is misleading. The business is carried on by the owners of the cars and s. 7 is not designed to regulate that

business as such. It deals with the vehicle itself, and enacts that the vehicle shall not, if unlicensed, ply for hire. Of course, the vehicle can do nothing except under human control, but the section is contemplating the function which the vehicle itself is fulfilling, albeit under human control, at a particular time.

I do not find it possible to say that a hackney carriage not on view to the public is, when not so on view, plying for hire, particularly when at the same time there is no indication in or around it that it ever does such work. I agree also with the judgment of the Lord Chief Justice, and accordingly I also would allow this appeal.

SALMON, J.: I also agree, for the reasons stated by my Lord, although not without some doubt, that this appeal should be allowed. Such doubt as I feel springs not from the words of the statute, which appear to me to be reasonably plain, but from the multifarious decisions on it. If the matter were *res integra*, I should have thought that it was obvious that the words "plying for hire" have a meaning different from and narrower than "letting for hire" or "carrying on a private hire business". But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which is accepted by the member of the public stepping into the vehicle.

In the case of a bus or charabanc it would matter not that he buys the ticket before he goes into the bus or after he enters the bus. In cases such as those, the member of the public knows nothing about and has no time for making any inquiry about the vehicle or the standing or indeed the identity of the owner, and it is not surprising that in cases such as those Parliament should make arrangements so that the vehicles which so ply for hire shall be of a certain standard of safety and comfort on which the member of the public can rely.

From time to time in the past people owning vehicles which were plying for hire have exercised their ingenuity for circumventing the provisions of the Metropolitan Public Carriage Act, 1869, and on a large number of occasions this court has had to consider those attempts. During the course of the case, observations have been made which deal with the particular circumstances of the case, but which have been followed and expanded in other cases, and so we have come to a position where, on the authorities, it is possible, as has been pointed out by counsel for the Minister of Transport and Civil Aviation, to make a powerful argument, as counsel for the respondents had done, for holding that this Act means something quite different from what any ordinary man would think that it meant on reading it. Indeed this court, to my mind, is driven to the very brink of saying that whenever a private hire firm has a fleet of motor cars in its garage and advertises for customers, those motor cars are plying for hire. That seems to me to be quite wrong, and it was never within the contemplation of the Act that the job-master, who was the counterpart in 1869 of the car hire service of 1959, should be within the Act, as was pointed out by MONTAGUE SMITH, J., in *Allen v. Tunbridge* (2) ((1871), L.R. 6 C.P. 481 at p. 485), as long ago as 1871. I do not feel that we are constrained by authority to cross the brink, although authority I think prevents us finding that the making of a present open offer is a necessary part of plying for hire. I do not feel compelled by any authority to find that a vehicle plies for hire unless it is exhibited. In this case the vehicles were not, as my Lords have pointed out, exhibited, and for that reason I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Coward, Chance & Co.* (for the appellants); *Alexander Charles* (for the respondents); *Treasury Solicitor* (for the Minister of Transport and Civil Aviation).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

**FAWCETT PROPERTIES, LTD. v. BUCKINGHAM
COUNTY COUNCIL.**

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), March 16, 17, 18, 19, April 27, 1959.]

B *Town and Country Planning Development Permission for development—Condition—Permission to build cottages on condition that occupants employed in agriculture, etc.—Validity—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 14 (1), s. 36.*

C A local planning authority gave permission for the erection of a pair of farm workers' cottages subject to the condition that the "occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." The reason for imposing that condition was stated as follows: "because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agricultural or similar purposes". At the date of the permission no development plan relating to the land was in operation, but its inclusion in a green belt area was envisaged. On the question whether the condition was void as being ultra vires or for uncertainty or as being spent,

D **Held:** the condition was valid for the following reasons—

E (i) the company had not shown that the condition was unrelated to or inconsistent with the policy underlying the planning proposals, or that the council had taken into consideration matters which (having regard to s. 36 of the Town and Country Planning Act, 1947) were irrelevant or had disregarded relevant considerations in imposing the condition, which accordingly was not ultra vires.

F Observations of LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.* ([1947] 2 All E.R. at p. 682) applied.

Dictum of LORD DENNING in *Pye Granite Co., Ltd. v. Ministry of Housing and Local Government* ([1958] 1 All E.R. at p. 633) applied.

G (ii) though the wording of the condition was open to considerable criticism, yet, having regard to the facts that it was based on language used in the housing legislation (but in a different context) which seemed not to have led to dispute and that the condition must be regarded in relation to the subject-matter, viz., the pair of cottages, the condition was not obscure to the point of voidness for uncertainty.

H (iii) the power, under s. 14 of the Act of 1947, to impose conditions on granting planning permission was not limited to conditions expressed with reference to the use of property as distinct from the personality of the occupier.

(iv) the condition was permanent and continuing, and had not become spent after the first tenant had gone into occupation in accordance with it.

I Per LORD EVERSLED, M.R.: if a condition such as that in the present case was to be held invalid, it must be shown that its terms, on the face of them, were demonstrably unrelated to the development plan (see p. 326, letter D, post).

Decision of ROXBURGH, J. ([1958] 3 All E.R. 521) reversed.

[**Editorial Note.** Though the validity of the condition was upheld, the form of the condition is not one which should be followed; see per ROMER, L.J., p. 333, letter A, post.

For the Town and Country Planning Act, 1947, s. 14 (1), and s. 36, see 25 HALSBURY'S STATUTES (2nd Edn.) 511, 544.]

Cases referred to:

- (1) *Pyg Granite Co., Ltd. v. Ministry of Housing and Local Government*, [1958] 1 All E.R. 625; [1958] 1 Q.B. 554; 122 J.P. 182.
- (2) *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 2nd Digest Supp.
- (3) *Theatre de Luce (Halifax), Ltd. v. Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; sub nom. *Halifax Theatre de Luce, Ltd. v. Gledhill*, 84 L.J.K.B. 649; 42 Digest 920, 160.
- (4) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 13 Digest (Repl.) 239, 639.
- (5) *Crisp from the Fens v. Rutland County Council*, (1950), 1 P. & C.R. 48; 114 J.P. 105; 2nd Digest Supp.
- (6) *Scott v. Pilliner*, [1904] 2 K.B. 855; 73 L.J.K.B. 998; 91 L.T. 658; 68 J.P. 518; 25 Digest 436, 333.
- (7) *Prescott v. Birmingham Corpn.*, [1954] 3 All E.R. 698; [1955] Ch. 210; 119 J.P. 48; 3rd Digest Supp.
- (8) *Pilling v. Abercrombie Urban District Council*, [1950] 1 All E.R. 76; [1950] 1 K.B. 636; 114 J.P. 69; 2nd Digest Supp.

Appeal.

This was an appeal by the defendants, Buckingham County Council, from an order of ROXBURGH, J., on Oct. 29, 1958, reported [1958] 3 All E.R. 521. ROXBURGH, J., held that the condition imposed on a permission for development was ultra vires and void, because it did not fairly and reasonably relate to any local planning consideration.

J. P. Widgery, Q.C., and *Alan Fletcher* for the defendants, Buckingham County Council.

R. E. Megarry, Q.C., and *C. F. Fletcher-Cooke, Q.C.*, for the plaintiffs, Fawcett Properties, Ltd.

Cur. adv. vult.

Apr. 27. The following judgments were read.

LORD EVERSHERD, M.R.: In this case the validity is impugned by Fawcett Properties, Ltd. (respondents in this court) of a condition imposed by the appellants, Buckingham County Council, as the relevant planning authority under the Town and Country Planning Act, 1947, on the grant of permission to one Clark, the company's predecessor in title, to build two farm workers' cottages at Chalfont St. Giles. Mr. Clark first applied for such permission in May, 1952, and it was granted, on condition, in the following July. Owing to certain difficulties in siting the cottages, Mr. Clark's proposal and the permission given for it had to be abandoned, and a slightly different planning proposal was made by him in November, 1952. Permission to erect the farm workers' cottages according to this second proposal was granted, on condition, on Dec. 5, 1952, by the clerk to the Amersham Rural District Council for and on behalf of the county council. We are only concerned with the terms of the document recording this permission on Dec. 5, 1952. In certain (though immaterial) respects it differed from the earlier document of July; but the condition with which we are concerned appeared in fact in both documents in identical language, and I will read it. It is as follows:

"The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by s. 119 (1) of the Town and Country Planning Act, 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid."

A In accordance with an order* promulgated by the Ministry of Town and Country Planning, the document granting the permission of Dec. 5, 1952, also contained a statement of "the reasons for imposing" the condition which was as follows:

"because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agricultural or similar purposes."

B Mr. Clark proceeded to erect the two cottages and no question arose in regard to them or in regard to the terms or efficacy of the condition between Mr. Clark and the council. But the company, having succeeded to the interest of Mr. Clark, have contended and now contend that the condition is wholly ineffective on the grounds that it was, according to its terms, beyond the competence of the council to impose in accordance with the provisions of the Town and Country Planning Act, 1947, or that it is void for uncertainty, or that, on its proper interpretation, its force is now exhausted.

C As is well known, the effect of the Town and Country Planning Act, 1947, was to place all land in England under planning control so that (so far as is relevant to this case) no vacant land could be "developed" by being built on save with the permission of the local planning authority (in this case the council), which permission might be granted either unconditionally or subject to conditions. Thus it is that s. 14 (1) of the Act provided so far as material:

"...where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

E There was in this case at the relevant date no operative "development plan" for the area in question. It follows, therefore, that the obligation of the council under the section was to have regard "to any other material consideration", and it is not in doubt that the effect in the present case of these five words which I have quoted was to introduce and make obligatory for the council's consideration (there having been no direction by the Minister) the matters indicated by the final words of s. 36 of the Act, viz.:

"...the provisions which in their opinion will be required to be so included [in the development plan when operative] for securing the proper planning of the said area."

G At the relevant date there had been published by the council what is called an "Outline Development Plan for Buckinghamshire". The most relevant paragraph of this document is set out in the judgment of ROMER, L.J., which I have had the advantage of seeing; and I do not repeat it. It is sufficient for the purpose of my judgment (for there is no dispute on the matter between counsel) to say that the area of Chalfont St. Giles, which includes the land in question, was and is intended to form part of what is generally known as London's green belt, and as such to be dedicated to rural use and excluded accordingly from any form of urban development. The "reason" given in the planning document of Dec. 5, 1952, is conceded to reflect by its language that purpose; and it is also conceded, as I have already indicated, and as I later repeat, that by the joint effect of s. 14 and s. 36 of the Act it was the council's duty in considering Mr. Clark's application for planning permission to have regard to the provision which would in their opinion be required for achieving that purpose.

I I take first the more broad and general attack by counsel for the company on the validity of the condition, viz., that in spite of the generality of the language of s. 14 (1) of the Act, "...such conditions as they think fit", it is not open to

* See the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 5 (9) (a).

the local planning authority to impose a condition in reference to a proposed structure related not to the manner in which the building may be used (e.g., as a residence, or as a shop, etc.) but to the class of persons who may use or occupy it. On this point I am content to adopt the conclusion and reasoning of ROXBURGH, J., who stated that acceptance of such an argument would involve reading some gloss or qualification into the language chosen by Parliament and that he could find no sufficient justification for doing so. The learned judge observed (and I respectfully agree with him) that the examples given in s. 14 (2) are expressed to be without prejudice to the generality of the preceding subsection, and cannot, therefore, properly be invoked for the very purpose of limiting that generality. I add that, in my judgment, the fact that the terms of s. 12 of the Act in general provide that a material change in the user of premises will constitute development lends support to the interpretation of the general language of s. 14 (1) according to its natural sense.

Though I am taking the point out of its order, I can also deal here, and briefly, with the last submission of counsel for the company, viz., that on its true construction the condition only purported to apply by way of restriction to the first occupation of the cottages, so that its force must now be taken as spent. Counsel did not develop the argument at any length, and he will, therefore, I hope, forgive me if I reject it somewhat summarily. It is sufficient, in my view, to say that I do not think the language of the condition can fairly be so construed, and that no planning authority could sensibly in a case of this kind be supposed to be discharging its statutory duty by imposing a condition so restricted.

To my mind the most difficult question is whether, when regard is had, on the one hand, to the planning scheme and proposals of the council, and the reasons given by the council for the imposition of the condition in December, 1952, and, on the other hand, to the scope and effect of the condition itself according to a fair interpretation of the language, the latter ought to be treated as having been beyond the council's powers, not being fairly and reasonably related to the former. In formulating the question, I have, as a matter of language, substituted (by reference) the words "the planning scheme and proposals of the council" for the words used by ROXBURGH, J., "the local planning requirements". Both forms of words depart somewhat from the language of LORD DENNING in *Pyg Granite Co., Ltd. v. Ministry of Housing and Local Government* (1) ([1958] 1 All E.R. 625), where he spoke (*ibid.*, at p. 633) of the requirement that the conditions should "fairly and reasonably relate to the permitted development". The test proper to be applied, however it be expressed, is derived from the last four lines of s. 14 (1) of the Act as they are qualified in the present case by the terms of s. 36 of the Act. The joint effect of these provisions being (so far as relevant to the present case) that in dealing with Mr. Clark's application to build the two "farm workers' cottages" the council were bound to have regard to the provisions which, in their opinion, would be required to be included in the then contemplated development plan in respect of this area for securing its proper planning. It seemed at one time that a question might be raised whether it was the duty of the council to assume the burden of proving positively what were the matters to which in fact they had had regard. But counsel for the company has in this respect eased our burden, for he has conceded that (*prima facie*, at any rate) it is not necessary that the council should prove these matters affirmatively. He concedes that they should be assumed to have had regard to the proper factors unless the objector to the condition can produce evidence to the contrary (as has not been done in this case) or unless the facts of the case, and particularly the terms of the condition itself, lead as a matter of necessary or proper inference to a contrary result.

So far there is no conflict (in principle at any rate) between counsel, but what is said by counsel for the company (and what was, I think, found by the learned judge) was to this effect—that since the contemplated development plan for

A the relevant area involved its use and preservation as a rural (i.e., an agricultural) area, then the provisions which would have to be included in such a plan and to which, therefore, the council must have regard, must be provisions designed to achieve that end; and that the terms of the condition, fairly construed, were in truth inconsistent with such provisions or requirements. Without, therefore, contending (as I understood him) that the court ought necessarily
 B here to infer failure on the part of the council to have regard to the proper requirements of the intended plan, counsel submitted, in reliance on LORD DENNING's language that the terms of the condition bore no fair or reasonable relation to the intended plan, and, therefore, that the condition must be treated, according to LORD DENNING, as "invalid". Put another way counsel said that if it be shown that the terms of the condition bear no fair or reasonable
 C relation to the intended plan, then, whatever the council did or intended to do or even thought that they did, they have or must be taken to have lost sight in framing their condition of the matters which were relevant for their consideration; and the result is, therefore, the same as if they had not properly ever considered such matters at all.

D On the other side, counsel for the council while not seeking to qualify the true effect of LORD DENNING's language, invoked also the terms of LORD GREENE, M.R.'s judgment in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, (2) ([1947] 2 All E.R. 680) as showing that in such circumstances as the present if the local authority has not misdirected itself by paying regard to the wrong matters, then the matter of reasonableness is, *prima facie*, at any rate,
 E one for the local authority's discretion; and that, in regard to such discretion, the court will not act in an appellate capacity substituting its own opinion for that of the local authority.

Since it is at this point that the arguments of counsel part company, I hope that I shall be forgiven for substantial citations from LORD GREENE, M.R. He said in the *Wednesbury* case (2) (*ibid.*, at p. 682):

F "What, then, is the power of the courts? The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it, a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers, and the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered
 G that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.

H "What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty—those, of course,
 I

stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration."

Again, in reference to the judgment of ATKIN, J., in *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (3) ([1915] 2 K.B. 49), LORD GREENE, M.R., said ([1947] 2 All E.R. at p. 684):

"... I think that ATKIN, J., was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language might not be read in rather a different sense from that which I think he must have intended. I do not find in any of the language that he used any justification for thinking that it is for the court to decide the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether the condition imposed by the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose."

In my judgment it follows from the citations which I have made that if the condition in the present case is to be held "invalid" (i.e., beyond the competence of the council to impose) it must be shown that its terms, on the face of them, are demonstrably unrelated to the proposed plan. So that the result is the same as if the council had never had the proposed plan and its requirements really or properly in its mind at all. In other words, it is not, in my judgment, enough that the terms are not such as, in the opinion of the court, are best designed to subserve or promote the intended plan; or that, while capable of subserving or promoting the plan, they do so inefficiently and are or may be also capable, in practice, of creating anomalous situations and permitting occupation of the cottages by persons who have no concern with the intended agricultural use of the adjoining property.

The main criticism of the condition has been in two directions: first, that there is no limitation (as regards either the permitted occupants or as to the agricultural or industrial enterprises covered by the terms of the condition) to the adjoining district; and, secondly, that the phrase "any industry mainly dependent on agriculture" covers a type of enterprise not only vague and extremely wide in its scope, but also unrelated to the (supposed) rural requirements of the neighbourhood.

These objections are formidable. But after much consideration and, indeed, some vacillation of opinion, I have come to the conclusion that in the light of LORD GREENE, M.R.'s exposition they are not sufficient to "invalidate" the condition. It is to be remembered (i) that the subject-matter to which the condition relates is two small "farm workers' cottages" in a rural area, and (ii) that the condition is intended to persist for an indefinite period of time. In these circumstances it seems to me as a practical matter that in the foreseeable future and, at any rate, in at least nine cases out of ten, the effect of the condition is to limit the use of the cottages to the occupancy of persons who have a direct interest as workers in the agricultural requirements of the area, and that, although the language of the condition would allow to qualify for occupation other persons who would have no such concern, e.g. (to cite extreme instances used in the course of the argument) an ex-employee of a sheep farm in New South Wales or the servant of a canning factory in a neighbouring county, the result is only to show that the council have not limited the class of occupancy in the most strict or efficient way or in the way they might have done had they had the advantage before drafting the condition of hearing the arguments in this court. In other words, I have in the end come to the conclusion both (a) that the terms of the condition do not suffice to show that the council failed, or must be deemed to have failed, to have regard to the matters which, by the

A terms of the statute, they should have regarded, and (affirmatively) (b) that the terms of the condition are fairly and also reasonably (in the sense of intelligibly and sensibly, if not most economically and efficiently) related to the council's planning scheme and proposals.

B It will be seen that I have used, throughout, the phrase "planning scheme and proposals" as being, in my view, most appropriate to the circumstances; but I do not intend any difference from ROXBURGH, J.'s phrase "local planning requirements", and I also agree with ROXBURGH, J., in thinking that LORD DENNING had no different intent by his words "the permitted development" which could in strict use of language mean, in the present case, only the two cottages themselves. But LORD DENNING was not intending to lay down a precise and governing formula for all cases of this kind, nor had he in mind or under consideration the problem which is raised in this case. I also disclaim, for my part, an intention to lay down some precise and governing formula; but I have ventured, in the light of LORD GREENE, M.R.'s judgment in the *Widnesbury* case (2), to interpret LORD DENNING's words "fairly and reasonably" as meaning "intelligibly and sensibly", and not as indicating that the court must approve the conditions as being a "fair and reasonable" exercise of the planning authority's discretion, judging, that is, of the fairness and reasonableness and so inevitably to some degree at least acting in an appellate capacity in regard to the authority's discretion.

C It was the view of ROXBURGH, J., that since by the terms of the condition no preference was given to local agricultural workers over, say, employees of more distant canning factories, therefore the condition failed "fairly and reasonably" to relate to the proposed local plan; in other words, that the condition, to attain the required standard, should have provided that the class of permitted occupants other than purely local farm workers should only be entitled to live in the cottages if there were no strictly local applicants. Again, it was the view of the learned judge that the inclusion of industries mainly dependent on agriculture could not (possibly) be relevant to the intended local plan; and in considering the implication of the word "fair" he was of opinion that the local authority must be "fair" to all classes of the community which they represent. These matters are beyond question weighty criticisms of the efficiency of the condition in its relation to the proposed plan, though, as regards the last point, I feel some doubt of the way in which the condition may be said to have failed (relevantly) in fairness to the general community. But for reasons which I have already tried to state, I have in the end come to the conclusion that these criticisms, being qualitative in character, do not suffice to disable the condition altogether, though I share my brethren's hope that its future use will be at the least carefully considered. Thus, if it is legitimate, e.g., to consider whether the condition should have given priority to purely local farm workers, there seems to me to be logically no stopping short of reviewing the local authority's discretion in all its aspects, and rejecting the condition altogether if, in the end, it fell short of what the court would itself acting fairly and reasonably in relation to the plan have contrived.

E There remains the attack of counsel for the company on the condition on the ground that its language is void for uncertainty. What, asked counsel, is the significance and effect of the word "occupation"? Is it intended to refer to occupation as of some right, i.e., as tenant or licensee? Or does it extend to any person who for any reason and at any time happens to reside in the houses? Again, who are intended to be covered by the term "dependants"? Is financial dependence intended? And, if so, must such persons be in fact financially dependent and how at any given moment of time can such facts be ascertained? More difficult still, what is the scope and effect of the phrase "industry mainly dependent upon agriculture", and is it relevant in what capacity the "occupier" is employed by such an industry? Finally, counsel observed that, *prima facie*, the condition might be broken as a result of some fact (e.g., change in the nature

of the employment) occurring after the "occupation" had been first entered into. A
 It is undeniable that these criticisms have much force. But on the whole I con-
 clude that on this point also (on which it was, in the circumstances, unnecessary
 for the learned judge to reach a decision) the company should not succeed. It is
 not difficult in the case of any general formula to suggest or imagine instances in
 which a difficulty might arise in saying whether the instance would or would not B
 be within the formula; but it does not follow as a consequence that the formula
 should in vacuo, as it were, and in advance be held void. It has to be remembered
 that the present condition is related to two small farm workers' cottages. In
 that context I cannot think that any real difficulty arises, or would be likely
 to arise, in saying whether any "occupation" was within the condition or (as
 indeed ROXBURGH, J., thought) in saying what was meant by "dependants".
 It is no doubt true that a subsequent change of employment might take an C
 "occupancy" outside the permission allowed by the condition, though within
 it at the occupancy's commencement; but these considerations are pertinent,
 as I think, rather to the argument on ultra vires than to that on construction. The
 expression "industry mainly dependent upon agriculture" is indeed very vague
 and wide. But the real question is whether, if any question arose in the future,
 was a proposed occupant or was he not employed in such an industry, the D
 parties or the court would be unable to give a certain answer. I am not persuaded
 that they could not. The learned judge took the view that the inclusion of this
 phrase would presently or in the future involve an "extensive and expensive
 inquiry" to find out what industries were comprehended. With all respect
 to him, I do not think that this is so. In no circumstances and at no time
 would it, so far as I can see, be necessary to discover and make, as it were, E
 a list of all the industries included by the phrase.

It was contended that since this condition was promulgated by a local authority
 in exercise of its statutory power, it was fairly analogous to a bye-law, more
 particularly since penal consequences might ensue from its breach. It is true
 that the courts have on more than one occasion expressed the view that bye-
 laws should be clear and certain in effect (see 24 HALSBURY'S LAWS OF ENGLAND F
 (3rd Edn.), p. 517, para. 951 and cases there cited), though there is also authority
 for the view that the courts will not be astute to hold bye-laws void and of no
 effect on the ground of obscurity (see *Kruse v. Johnson* (4), [1898] 2 Q.B. 91, per
 LORD RUSSELL OF KILLOWEN, C.J., at p. 99). In my judgment, however, the
 analogy between the present condition and a bye-law is not a true one. A bye-law
 is a local, but within the locality, a general regulation; this condition was an G
 expression of the terms on which the council informed Mr. Clark that they were
 prepared to grant to him permission to build his cottages, and the terms were
 at least satisfactory to him, for he built the cottages and no difficulty arose during
 his ownership in giving effect to the condition. Further, though penal conse-
 quences may follow on a breach of the condition, they do so, as it were, at a
 remove. The first step which the local authority must take if they allege a H
 breach of the condition is to serve an enforcement notice; and that notice may
 be challenged by the landowner or the tenant (as the case may be) before
 the local justices. It is only after the service of the notice and (if it has been
 challenged) the failure of the challenge that the local authority may invoke the
 penal provisions of the Act. These provisions seem to me to provide reasonable
 protection, at any rate, to the landowner in a case in which, because of difficulty
 or obscurity in the language of the condition, there is doubt whether the acts I
 complained of constitute a breach.

There is another consideration which has appreciably affected my mind on
 this matter. The language of the condition has been taken, so far as relevant,
ipsis verbis, from the definition of the phrase "agricultural population" in
 s. 34 (2) of the Housing Act, 1930, now s. 115 (2) of the Housing Act, 1936.

* See also s. 114 (5) of the Housing Act, 1957, where the same definition is repeated.

- A It is no doubt true that we are asked to construe a condition in the permit issued by the council in December, 1952, and not a section of the Housing Act. It may also be true that a collection of words can be reasonably clear in one context and obscure to the point of voidness in another; and it may further be that the administrative difficulties capable of arising from the formula in the Housing Acts (which are, so far as relevant, concerned with the grant of
- B an annual subsidy in respect of premises occupied by a member of the "agricultural population", as above defined) are less than those which may emerge from a user of the formula in a condition imposed under the Town and Country Planning Act, 1947. Nevertheless, it seems to be inescapable that, if the arguments of counsel for the company that the language in the condition to which I have referred is void for uncertainty in the context of the condition, it is no less void
- C for uncertainty in the context of the Housing Acts. I do not, of course, say that forms of words occurring in an Act of Parliament are, because they so occur, sacrosanct against being held void for obscurity and uncertainty; but the court will, in my opinion, be slow to come to such a conclusion on words which have been on the statute book for more than a quarter of a century and have, during that time, doubtless been many times acted on. For the reasons which I have
- D tried to state, I come therefore to the conclusion that we ought not to hold the condition in the present case void for uncertainty.

It follows, in my opinion, that all the challenges made on the efficacy and validity of the condition should be rejected and that the appeal should be allowed accordingly.

- E **ROMER, L.J.:** The ground on which the learned judge based his declaration that the condition subject to which the council gave their approval under the Town and Country Planning Act, 1947, for the erection of the two cottages with which these proceedings are concerned was *ultra vires* and of no effect was, in substance, that the condition did not effectuate any proper planning purpose. The validity of the condition was impeached in the court below, as
- F it was before us, on other grounds as well, but I will consider first the one which I have already mentioned.

- At the date when the council gave their permission for the building of the cottages, viz., Dec. 5, 1952, no development plan had become operative with respect to the Chalfont St. Giles area of the council. An Outline Development Plan for Buckinghamshire had, however, been drafted in February, 1950, and a copy of it was put in evidence. It is stated on p. 1 of this document that the
- G Outline must be regarded as a draft only, but that it did "enunciate the fundamental matters which must be considered in forming the framework of the statutory plan". On p. 12 and p. 13 of the Outline there appears the following reference to the Metropolitan green belt:

- H "Although much of the land included in the Metropolitan green belt ring of the Greater London Plan is not necessarily of great scenic beauty or highly productive from the agricultural point of view it is essential that it should be preserved against building development so as to form a barrier against the further outward spread of London . . . The communities in Bucks within the green belt are . . . Chalfont St. Giles . . . It is proposed that further development of these communities should be restricted to infilling and rounding off of existing development."

- I The policy which emerges from this statement was still current in December, 1952, and, as no relevant directions had been given by the Minister, the council had, in granting development permission in the Chalfont St. Giles area, to have regard to the Outline Development Plan (s. 36 of the Act) and to "any other material considerations" (s. 14). There can be no doubt but that the policy which I have quoted from the Outline Development Plan constituted a proper planning purpose or that conditions calculated to further that purpose could properly be attached to permission to develop in the area in question. Before

considering the effect of the condition which the council did in fact attach, and which has resulted in this litigation, it is necessary to note the reason which the council gave for imposing it:

"Because the council would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes."

The meaning of this reason would appear to be that the council would only allow houses to be built on the site provided that their use, when erected, would be connected with the agricultural use of the adjoining land. The reason, so interpreted, is in conformity with the policy stated in the Outline Development Plan and would seem to show that the council, in framing it, were aware of the obligation imposed on them by s. 36 of the Act. The company contend, however, that the same cannot be said of the condition itself which, in their submission, did not implement either the planning policy as adumbrated in the Outline Development Plan, or any other proper planning policy, and was in any event at variance with the reason given for imposing it. I will not repeat the terms of the condition for they have already been stated in the judgment of LORD EVERSHERD, M.R. They are clearly open to criticism in more than one important respect. But a preliminary question which, as it seems to me, has to be considered is whether a condition which is attached to a permission to build enjoys the same degree of protection from review by the courts as is enjoyed by planning policies. That protection or immunity has been recognised in several decisions and the principle underlying it has never, perhaps, been more clearly stated than in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (2) ([1947] 2 All E.R. 680), which has been fully discussed and analysed by LORD EVERSHERD, M.R. The effect of that and other decisions is that if there were any doubt as to the validity of the policy which I have extracted from the Outline Development Plan (which in my judgment there is not) the courts would only intervene if satisfied that the council must have taken irrelevant matters into consideration or failed to pay regard to matters which were relevant. Now, conditions attached to development permission do not strictly constitute planning policy; they are rather means of effectuating a policy already pre-determined. I think nevertheless that they are entitled, equally with the policy which they are designed to implement, to the shelter of what I might call the *Wednesbury* umbrella (2). The reasons for giving that shelter to decisions on policy are, in my opinion, equally applicable to the machinery which is essential for rendering those decisions effectual. Accordingly, conditions such as that now in question will not be invalidated on grounds of ultra vires, in my judgment, except on the contingencies indicated in the *Wednesbury* line (2) of authority.

The company's principal contention, in brief, is that the terms of the condition, whether taken by themselves or in conjunction with their probable or reasonably possible consequences, show that the council must have paid regard to irrelevant considerations or failed to take relevant elements into account. They rely on the discrepancy between the condition and the planning policy as outlined in the Outline Development Plan and also on the disparity between the condition itself and the reason which the council gave for its imposition. Taking these two objections in order, the company's first attack is based on the scope of the condition which, says counsel on their behalf, is unrelated to the Outline policy, or to any other sensible planning policy. Subject to his other submission on ultra vires, counsel for the company concedes that parts of the condition, if isolated from the rest, would constitute a perfectly proper condition to be attached by the council when permitting the erection of the cottages. Thus if the condition had been that

"the occupation of the houses shall be limited to persons whose employment is employment in agriculture as defined by s. 119 (1) "

- A** of the Act of 1947 counsel admits that the objection now under consideration could not be advanced. The condition is, however, not so limited and the company submit that the excess is destructive of the whole. A small excess, they say, if trifling enough to attract the maxim de minimis, would be innocuous, but the condition as framed lets in so many people as authorised occupants of the cottages who might have no connexion with agriculture at all as to show
- B** that the council demonstrably lost sight of their obligations as the planning authority when they drafted it. In this connexion the company rely in part on the phrases "or was employment in agriculture" and "including also the dependants of such persons as aforesaid", but their main attack is on the reference to "an industry mainly dependent on agriculture". Apart from the uncertainty as to what this expression means the company suggest that the
- C** owners of the cottages could let them to industrial workers whose job was some miles away in preference to local agricultural labourers who needed a home which was close to their work. Many other illustrations were also given in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages would bear no relation to any sensible planning policy and certainly not to the policy outlined in the Outline Development Plan.
- D** Counsel for the council frankly admitted that curious and anomalous positions might arise under the terms of the condition and that certain persons whose connexion with agriculture was non-existent or remote might qualify as tenants whilst other persons, who might ordinarily be expected to qualify, would find themselves excluded. But he contended that the condition makes a broad division between persons whose employment is such that they may have to live in a
- E** rural area and persons whose employment is such that they need not, i.e., a distinction is in effect drawn between the agricultural population and others; that the effect of the condition is to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore makes a sensible contribution to the retention of the rural character of that part of the county; and that it accordingly is in substantial and reasonable conformity
- F** with the policy contained in the Outline Development Plan, and none the less because of the admitted possible anomalies. The condition, said counsel for the council, is right in principle and imperfection of detail affords no sufficient ground for invalidating it or indeed, on the authorities, for its review by the court at all. I think on the whole, that the council's contention should be accepted. Although the condition is most unfortunately worded and absurd results could
- G** follow having regard to its terms, it does seem to me that broadly speaking it is in line with the Outline Development Plan. It is not possible to say that the condition *could* not implement the policy outlined in that document; on the contrary it seems to me that it almost certainly will implement it, notwithstanding that it is dissociated from the policy in certain of its aspects. Assuming, as I do, that the condition is entitled to the same limited immunity from criticism and review as the council's planning policy itself, the company have not
- H** satisfied me that the council must, in imposing it, have regarded the irrelevant or disregarded the relevant and thus laid themselves open to challenge.

The company further contend, as already mentioned, that the condition in no way reflects the reason which the council gave for imposing it. The point and force of the criticism is that by the "reason" the council evinced an intention that the use of the cottages should be connected with the stated use of the adjoining land whereas the condition itself imposes no topographical limitation on the class or work of permitted occupiers. That this disparity between the condition and the reason exists cannot be denied. On the footing, however, which I accept, that the condition is broadly in line with the council's general planning policy it cannot, in my judgment, be invalidated because of some inconsistency with a reason which, as I have earlier indicated, is also in line with the policy. Moreover as a matter of practical common sense it is probable in the highest degree that, if the condition is sustained, these two "farm workers"

cottages " will in fact be tenanted by agricultural workers who are employed on the adjoining land. A

Turning now to counsel for the company's main submission on the ultra vires issue, this is clearly stated in the company's notice on this appeal in the following terms:

" It was not within the powers of a planning authority to prescribe conditions limiting the occupation of a new building with reference to the personality of the occupier, but only with reference to the nature of the user thereof." B

The submission is that a planning authority cannot specify the persons who may live in a house, but only the purposes for which it is to be used. This appears to put a limitation on the power of the local authority which does not appear in s. 14 of the Act of 1947 or in any other of its provisions to which our attention was called. It is not a very easy point to follow. The argument apparently concedes that the council in the present case could have made it a condition that the two cottages should only be used for the purpose of housing agricultural workers and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. However that may be, counsel for the company was constrained to admit that this fetter which he sought to place on a planning authority's power to impose conditions might be removed in certain cases. For example, I understood him to concede that a condition limiting occupation to workers on a neighbouring farm would be valid. It seems to me that such a condition would clearly be intra vires of the authority; as also would be a condition limiting the occupation of proposed new dwellings near a colliery to persons employed in it. Exceptions such as these (and many more were suggested in argument) afford, as it seems to me, compelling reasons for rejecting a restriction for which, in my judgment, no sufficient warrant is to be found in the Act itself. C D E

It remains to consider whether the condition imposed by the council is void for uncertainty and this question has caused me considerable doubt. All the members of this court in *Crisp from the Fens v. Rutland County Council* (5) (1950), 1 P. & C.R. 48) stressed the importance of conditions such as those under consideration being clearly expressed, and indeed they were clearly right in doing so. A man's right to do what he likes with his own property has, of course, long since been abrogated in what the state conceives to be the interests of the community as a whole. If, however, a man is subjected to restrictions on the use of property which is his, and for which he has paid, it is at least reasonable that he should know with some precision what those restrictions are. If the condition which the council imposed on Mr. Clark had been (for some other purpose) enshrined in a bye-law, the breach of which would have involved him or anybody else in criminal proceedings, I should imagine it highly probable that the bye-law would have been held invalid on the ground of uncertainty (*Scott v. Pilliner* (6), [1904] 2 K.B. 855). The main reason why I take that view is the difficulty, which might frequently arise, of knowing whether an industry is or is not mainly dependent on agriculture; or, in the case of an industry which is so dependent, whether and when it ceases to be so when it subsequently, and perhaps gradually, changes its activities. However, the condition is not a bye-law and an enforcement notice for its breach is not a criminal proceeding. Under s. 23 and s. 24 of the Act of 1947 the council could serve an enforcement notice on the owners and occupiers of the cottages if the condition were broken and if this were disregarded penal consequences might ensue for the occupiers, but not for the owners unless they were shown to have caused or permitted the continued non-observance of the condition. Nevertheless owners whose properties are subjected to such conditions as that imposed on Mr. Clark can have no clear idea what will be regarded as a breach of the condition. F G H I

A and what will not; and this would in many, and possibly most, cases lead to difficulties in selling or letting the property, with a consequential depreciation in its value, trouble between landlord and tenant and considerable inconvenience to both. It is, in my judgment, quite wrong that a condition couched in such vague and ambiguous terms should be imposed by any planning authority, and I can only hope that it will never be imposed again. I feel there are two difficulties, however, in holding that the condition is invalid for uncertainty. In the first place its language, so far as relevant, is statutory in the sense that it was used in the Housing Acts of 1930 and 1936. That fact in itself would not operate as a deterrent to invalidating the condition on the ground that no sensible meaning could be attributed to it in some of its aspects. What, however, weighs with me is that it was not suggested before us that any difficulty or disputes have arisen from the language used in the Acts of 1930 and 1936; from which it is a legitimate inference that the statutory provisions in question have not worked unsatisfactorily in practice. Counsel for the company pointed out that those provisions in the Housing Acts appear in a different context and for a different purpose from those of the condition now in question, for they were introduced in connexion with applications for subsidies. Counsel said that on such applications it is unnecessary to inquire in advance as to the exact limit of the permitted occupancies and that the contributing authority need only satisfy itself whether a particular person who is proposed for occupation is an agricultural worker or not. While not disregarding the force of this comment, I feel that it would be a strong thing to say that language which has been acted on (albeit for a different purpose) for years, and without apparent difficulty, is incapable of sensible meaning. Secondly, one cannot divorce the terms of the condition from the subject-matter of the permission. This was not a large private residence, of the kind which might be let for a term of years. The subject-matter was a pair of farm workers' cottages to be built in an agricultural area. I have earlier indicated the probability that these will be let to persons who work on the neighbouring land. It is a further probability that such persons would have weekly tenancies or quarterly tenancies at most. There would not be the same difficulty arising from the condition in relation to such tenancies as might well arise if a property were let for a term of years, e.g., trouble between landlord and tenant. This appears to me to be a legitimate element to take into account; and combined with the Housing Act ancestry of the language in question it is, I think, enough (though only just enough) to save the condition from destruction. With some reluctance, therefore, and more than a little doubt, I am of opinion that this point too should be decided in the council's favour.

If, then, the condition is neither ultra vires of the council nor void for uncertainty, the company can only succeed on this appeal if they can establish that the force of the condition is now spent. For this point they rely in their statement of claim on the fact (admitted by the council) that after the cottages had been erected by Mr. Clark they "were first occupied for a substantial period by persons whose employment was covered by the terms of the aforesaid condition". Counsel for the company submitted the point for our consideration, but did not pretend that it was his best one. It is quite clear to my mind from the terms of the condition and of the reason, that the former was intended to have permanent, and not merely temporary, force and effect. The question needs no development or elaboration, so I will merely say that, in my opinion, it must be decided adversely to the company.

For the above reasons, and those stated by LORD EVERSHED, M.R., I agree that the appeal should be allowed.

PEARCE, L.J.: The council are, by the terms of s. 14 of the Town and Country Planning Act, 1947, entitled to grant permission "subject to such conditions as they think fit". *Associated Provincial Picture Houses, Ltd. v.*

Wednesbury Corpn. (2) ([1947] 2 All E.R. 680) makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, i.e., that they disregarded something which they should have taken into account or regarded something which they should not have taken into account. The onus of showing this is on the person seeking to upset the condition imposed by the authority. That onus may be discharged either by showing from the terms of the condition itself that the authority cannot have taken into account the right considerations or by extrinsic evidence to that effect. The principle has not been affected or altered by *Prescott v. Birmingham Corpn.* (7) ([1954] 3 All E.R. 698). That case was decided on the ground that the corporation owed a fiduciary duty to the ratepayers and had misapprehended the nature and scope of the discretion vested in them. Here there is no such element. When no reasons are given and decisions of the authority present what LORD SUMNER called in another context "the inscrutable face of a sphinx",* it is hard to discharge such an onus. However, in the case of conditions imposed under s. 14 it has been provided (by a statutory order†) that reasons must be given. No doubt the purpose of that is to help and to inform the persons on whom conditions are imposed. Moreover, by the last four lines of s. 14 (1), and by s. 36 of the Act of 1947, indication has been given of the matters which the authority must take into account: but the general principle remains that the condition cannot be upset by this court unless it be shown that the authority have not taken into account the right matters.

Counsel for the company argues that the court can criticise and interfere with the condition itself even if the right matters have been taken into account. With all respect to his argument, I do not think that that is the right approach; but it is perhaps rather a question of words than a matter of substance. He is quite right to my mind in suggesting that the court will interfere if a condition is ridiculous. The reason for its interference is that the court will conclude from the folly of the condition that, however good the reasons which the authority say they took into account, they cannot in fact have taken into account the right considerations. For one essential matter which the authority must take into account is the imposing of an intelligible condition which can have some effect in achieving the other matters which they have properly taken into account. Thus, although he and counsel for the council travel by a different route in their arguments, they arrive at results which are not very far apart.

The court will, of course, hold a condition *ultra vires* if it does not "fairly and reasonably relate to the permitted development" (see LORD DENNING'S judgment in *Pyr Granite Co., Ltd. v. Ministry of Housing and Local Government* (1), [1958] 1 All E.R. at p. 633), but in this case it does so relate. Here there is no extrinsic evidence that the authority did not take the right matter into account. In my view, therefore, the question in the case before us is this. The authority having on the face of the expressed reasons taken the proper matters into account, can one infer merely from the possible absurdity or the inefficiency or uncertainty of the condition that they did not in fact do so? If the condition is absurd, or if it is sufficiently uncertain or inefficient, or sufficiently combines these qualities, I should have no hesitation in so inferring. So viewed, the question of uncertainty is not a separate point but merely one of the points whose cumulative effect may prove that the council cannot have taken the right things into account. There is no doubt that the condition is cumbrous and unsatisfactory and *unui* in extreme instances produce ridiculous results. There could be circumstances in which the cottages could be occupied by rich retired earners from overseas

* In relation to proceedings for certiorari to quash proceedings; see *R. v. Nat Bell Liquors, Ltd* ([1922] 2 A.C. 128 at bottom of p. 159), and cf. e.g., *R. v. Northampton and Compensat on Appeal Tribunal, Ex p. Shaw* ([1952] 1 All E.R. 122 at p. 126, *locus cit*).

† See the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3 (9) (a).

A or various other unsuitable persons who, like wraiths, have glided in and out of the arguments during the hearing of this case. But there are many legal principles which on their border-lines in some unlikely set of circumstances produce injustice or even absurdity. And in the case of a condition seeking to affect the character of the local population in the complexities of modern life, there may be difficulty in ensuring that application of that condition cannot

B at times produce ridiculous results.

To my mind, therefore, the possibility of absurdities is not in itself the true test. The test is: Are the absurdities and anomalies and uncertainties not merely theoretically possible but also so probable that they neutralise any beneficial results that the condition could have from a town planning point of view? And, therefore, is the net effect of the condition, looked at broadly,

C that it cannot be said to advance the town planning objects which are its ostensible justification? If a reasonable person could hold that it would so advance the town planning objects, then the court should not interfere. In framing the condition the authority have taken the wide, loose definition of "agricultural population" (to which in general terms they wished to limit the occupation of the cottages) from the Housing Act, 1936, s. 115 (2), together with the

D extended definition of "agriculture" contained in s. 119 (1) of the Town and Country Planning Act, 1947. But it is no answer, as counsel for the company rightly says, to an accusation of uncertainty that the condition contains words used in an Act of Parliament in another context. Had the clause ended at the words "or in forestry", most of the possible absurdities and uncertainties would have been avoided. The remaining words were unfortunately added, presumably

E with an intention of liberality, to increase the field of the possible occupants, and it would be unfortunate if words added to give a more liberal scope should destroy the whole condition. From a practical point of view I do not feel that the uncertainty is likely to produce expense or injustice. If a would-be tenant is on the border-line, he would probably not be accepted; and, if he was accepted, the justices would in any enforcement proceedings feel both bound and inclined

F to give the tenant the benefit of any doubt that there could be. The condition is far from satisfactory. The authority ought not to impose a permanent fetter on a house without a careful consideration of its nature and careful consideration of how and when it should be removed or altered if changed circumstances make its removal or alteration just. It is only after some doubt that I have arrived at the view that the condition itself is not so unsatisfactory that it can

G be said to fulfil no town planning purpose and thereby to supply evidence that the authority did not take the proper matters into account. I think that this condition, looked at broadly, could on the whole be said to contribute to the maintenance of a green belt in the area. The cottages are small and in rural surroundings. The exclusion of many urban classes of population will tend in general towards limiting their occupation to rural persons who make them a

H permanent and not a week-end home. The persons who make their homes there are more likely to be people who are working than people who have retired, since in general the former exceed the latter in number. People who are working are more likely to be working locally since the occupants will tend to be persons of small means. In the main this condition does make the cottages available to people who may need to live in the country and does exclude many of the

I community who do not have to live in the country.

Counsel for the company further argues that the Act confers no power to impose conditions restricting the persons, or classes of persons, who may use the property, but only a power to impose conditions restricting the purpose for which it is used. In my view, that argument certainly cannot be accepted in terms so broad. The Act itself contains no express words limiting the scope of the conditions; and I think that the legislature must be taken to envisage some restriction on the persons occupying premises, since that itself is often the only means of restricting the purpose, e.g., a farm cottage restricted to the

farm hand or the bailiff, a building near a hospital restricted to the housing of nurses. Where then, can one draw the line? It might be arguable that a restriction to a class of person fulfilling some office in relation to the adjoining land is the only permissible restriction; but that is a tenuous distinction, and I see no justification for inferring it. I think that restriction of persons is permissible if that restriction is of persons in relation to town planning, i.e., if the restriction is genuinely directed to securing for a given locality a certain class of occupant from a town planning point of view. It is clear that such restrictions should be closely watched. For, if they are imposed from some housing or public health or social consideration other than town planning, the authority would be taking a wrong matter into account and the restriction would on that ground be invalid (see *Pilling v. Abergele Urban District Council* (8), [1950] 1 All E.R. 76). But in the case before us the restriction does not offend in that respect.

I cannot accept the further argument that the condition has spent its force after the first tenant has gone into occupation in accordance with it. The natural meaning of the words plainly restricts all future tenancies. There is no room for any implication that only the first tenancy is affected by them and no ground on which such an implication could be justified.

I have come to the conclusion, not without some reluctance, that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Solicitor and Clerk to Buckingham County Council* (for the defendants); *A. L. Philips & Co.* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BEECHAM FOODS, LTD. v. NORTH SUPPLIES (EDMONTON), LTD.

[CHANCERY DIVISION (Vaisey, J.), April 23, 24, May 1, 1959.]

Restrictive Trade Practices—Condition for price maintenance—Injunction against sale by retailer below fixed price—Retail price of soft drink listed as "2s. 6d. plus 3d." charge, refundable, on bottle—Property in bottle not intended to pass to customer—Correct retail price of drink in bottle, 2s. 6d., and 3d. charge for hire of bottle—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 25 (1).

The plaintiffs were the manufacturers and suppliers of a glucose drink sold under the trade mark "Lucozade". Every bottle of "Lucozade" was supplied subject to a condition as to the price at which it might be re-sold, the condition being the observance of the fixed retail price as published in the current price list issued by the plaintiffs' distributors. In the distributors' retail price list for 1957, the retail price of "Lucozade" was stated to be "2s. 6d. plus 3d." for a twenty-six ounce unit, and, under the heading "Bottle and container charges," it was stated that "Lucozade" bottles were "charged at 3s. per dozen, refundable". The defendants, who carried on business as grocers, received a copy of the 1957 retail price list from the distributors with a covering letter dated Sept. 10, 1957. On Oct. 30, 1957, and again on Nov. 1, 1957, the defendants retailed a bottle of "Lucozade" for 2s. 7d. Moulded in the glass of the bottle was the word "Lucozade", and there was a label on the bottle with "2s. 6d." in large type, followed by the words "plus 3d deposit returnable on bottle with stopper", in smaller type. In an action for an injunction to restrain the defendants from re-selling "Lucozade" at a price less than the fixed retail

A price, contrary to s. 25 (1)* of the Restrictive Trade Practices Act, 1956, the plaintiffs contended that the fixed retail price published in the 1957 price list was 2s. 9d. for a twenty-six ounce bottle.

Held: (i) the bottles in which the "Lucozade" was sold were not sold to customers, but merely hired to them, as the property in the bottles was not intended to pass to customers.

B (ii) the correct retail price of the drink in a twenty-six ounce bottle of "Lucozade" was 2s. 6d., and not 2s. 9d., the extra 3d. being for the hire of the bottle, and, on each occasion when the defendants received 2s. 7d. for a bottle of "Lucozade", the customer paid the correct retail price of 2s. 6d. for the drink, and 1d., instead of 3d., for the hire of the bottle.

C (iii) s. 25 (1) of the Restrictive Trade Practices Act, 1956, applied only to sales, and not to hiring agreements, and, therefore, the defendants were not in breach of the subsection in not charging the stipulated price for the hire of the bottles.

[For the Restrictive Trade Practices Act, 1956, s. 25, see 36 HALSBURY'S STATUTES (2nd Edn.) 958.]

D Cases referred to:

(1) *County Laboratories, Ltd. v. J. Mindel, Ltd.*, [1957] 1 All E.R. 806; [1957] 1 All E.R. 861 n.; [1957] Ch. 295; 3rd Digest Supp.

(2) *Goodyear Tyre & Rubber Co. (Great Britain), Ltd. v. Lancashire Batteries, Ltd.*, [1958] 3 All E.R. 7.

Action.

E The plaintiffs were the manufacturers and suppliers of a glucose drink, sold under the trade mark "Lucozade", and supplied to retailers subject to the observance of the fixed retail prices published in the current price list issued by Harold F. Ritchie, Ltd., the plaintiffs' distributors to the grocery trade. The defendants, who carried on the business of grocers, received a copy of the distributors' retail price list, dated February, 1957, with a covering letter, dated Sept. 10, 1957, from the distributors. In the price list the "retail price per unit" of the twenty-six ounce size "Lucozade" was stated to be "2s. 6d. plus 3d." On the back of the price list, under the heading "Bottle and container charges", it was stated that Lucozade bottles were "charged at 3s. per dozen, refundable". On Oct. 30 and Nov. 1, 1957, the defendants retailed two bottles of "Lucozade" to persons who were, in fact, representatives of the plaintiffs. The amount paid to the defendants, on each of these occasions, was 2s. 7d., whereas the plaintiffs claimed that the correct retail price was 2s. 9d. The plaintiffs brought an action against the defendants claiming (i) an injunction under the Restrictive Trade Practices Act, 1956, s. 25 (4), to restrain the defendants from re-selling "Lucozade" or any other product of the plaintiffs, supplied by the plaintiffs subject to a condition that it might be re-sold only in observance of the fixed retail prices published in the current price list of Harold F. Ritchie, Ltd., at prices less than the said retail prices, contrary to s. 25 (1) of the Act; and (ii) an inquiry as to damages and payment of the amount found due. The defendants, by their defence, denied that the plaintiffs had suffered any damage, and that they were entitled to any relief.

I *P. J. S. Bevan* for the plaintiffs.

W. R. Rees-Davies for the defendants.

Cur. adv. vult.

May 1. VAISEY, J., read the following judgment: The plaintiffs manufacture and supply a glucose drink which is sold under the trade mark and name "Lucozade". The defendants carry on business as grocers at Edmonton and may be described as cut-price grocers, without any offence in a free country.

* The relevant terms of s. 25 (1) are printed at p. 338, letter A, post.

The question in this action arises under s. 25 (1) of the Restrictive Trade Practices Act, 1956, which enacts:

"Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold . . . that condition may . . . be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

The plaintiffs say that every bottle of Lucozade supplied by them at all material times was supplied subject to a condition as to the price at which it might be re-sold, that is to say, subject to the observance of the fixed retail price as published in the current price list issued by Harold F. Ritchie, Ltd., the plaintiffs' distributors to the grocery trade. They also say that the fixed retail price published in the said current price list was 2s. 9d. per twenty-six ounce bottle. No such question arises here as arose in *County Laboratories, Ltd. v. J. Mindel, Ltd.* (1) ([1957] 1 All E.R. 806) and *Goodyear Tyre & Rubber Co. (Great Britain), Ltd. v. Lancashire Batteries, Ltd.* (2) ([1958] 3 All E.R. 7) for I do not doubt, and I find as a fact, that the defendants had the fullest notice of the said condition, and not merely of its existence but of its terms, and, in particular, that the relevant current price list, dated February, 1957, was in fact sent to the defendants under cover of a letter from the said distributors dated Sept. 10, 1957. But whether there was a current fixed price of 2s. 9d. per twenty-six ounce bottle seems to me much less certain, and the condition has, in my judgment, been so framed as to confuse rather than clarify the rights and obligations of the parties, as I will presently explain.

The said current price list contains a column which shows that the retail price of a twenty-six ounce bottle of "Lucozade" per unit is 2s. 6d. plus 3d., which the plaintiffs say (wrongly, as I think) is equivalent to a fixed retail price of 2s. 9d. per unit. I am by no means clear that that is so. If a customer goes into a grocer's or chemist's shop and asks for, and is given, a twenty-six ounce bottle of "Lucozade", he is presumably asked to pay 2s. 9d., which seems, no doubt, to suggest that he has bought the bottle and its contents for 2s. 9d. But when the transaction is analysed and considered, it seems to me to be far from being as simple as that. I look first at the label on the bottle which is marked in bold figures "2s. 6d.", followed by a statement in less bold characters "plus 3d. deposit returnable on bottle with stopper". I pause to observe that the label now in use does not say by whom the 3d. will be returned, although a label previously used states "plus a deposit of 3d. which will be returned when the bottle with stopper is returned to the retailer", from which I should infer it is only by taking the bottle back to the same shop which supplied it that the customer will get his 3d. back. It further seems that the property in the bottle was never intended to pass to the customer. This is the view taken by the distributors, as I will presently indicate. Moulded in the glass of the bottle in large letters is the word "Lucozade" which would preclude the use of the bottle for any other "soft-drink", because such user might easily give rise to a passing-off claim. I suppose that the bottle would be of use to contain other kinds of liquid, but I should have thought that to an ordinary customer it would, at 3d., be dear at the price.

In the present case each of the two ladies who effected a trap or test purchase from the defendants paid, on each occasion*, 2s. 7d., and, in my judgment, may fairly be said to have paid the full and correct price of 2s. 6d. for the liquid but only 1d. for or towards the hire of the bottle. In my judgment, however, the bottle, in each of these transactions, was never sold at all, but was merely lent or hired as a convenient receptacle for carrying the liquid home. The same

* Namely, on Oct. 30 and Nov. 1, 1957.

A result follows if 2s. 9d. is paid by a customer. In either case I interpret the transaction as a payment of 2s. 6d. in full as the price of the liquid and 3d. or 1d. for the hire of the bottle. The matter may be looked at in a variety of ways. For example, a customer may go into a shop, ask for a bottle of "Lucozade", fill up his own flask from the contents and hand back the bottle with its stopper across the counter to the shop man. What has he to pay? Surely 2s. 6d. The suggestion that he must pay 2s. 9d. and a minute or two later ask for 3d. back is reducing a very ordinary transaction to an absurdity. The moral is that, if people want to fix prices for retail sales, they must, in my view, do so in plain, simple and sensible and, above all, accurate language. Here the price of "Lucozade" is 2s. 6d., whether the bottle to carry it home is hired or not.

B The short answer to this action is that the bottles in which "Lucozade" is sold are never themselves sold at all. Section 25 (1) of the Act has nothing to do with hiring agreements. It applies only to sales, and these bottles in respect of which the 3d. is claimed, are, so far as I can see, never sold at all to a purchasing customer. It is interesting to observe that in the distributors' Retail Price List dated May, 1958, there is a statement on the back page that "Lucozade" (twenty-six ounce) bottles are "charged at 3s. per dozen, refundable",

D followed by a statement that

"Actual ownership of these . . . bottles does not pass to our customers although a charge for them is made."

E It is further stated that any charge in this respect is "in the nature of a deposit and will be refunded when the . . . bottles are returned". I think that the distributors' view is perfectly right, and that the goods which are sold in the present case are the contents of the bottles and not the bottles themselves. Indeed, it is this fact, and this fact only, which justifies the prominence given to the figures 2s. 6d. on the labels.

F It is, of course, impossible to regard a bottle as convertible currency, which it plainly is not, for it cannot be used to pay an omnibus fare or buy a postage stamp. The contract with the customer with regard to the bottles is entirely different from that which affects their contents; they are merely hired while the contents are sold out and out. This sort of dealing may raise some difficult questions, whether, for example, the customer could be compelled to return the bottles to the retailer or the distributor or the plaintiffs or anybody else, or whether he could be sued for conversion of the bottles in any, and what, circumstances. All such questions are beside the point of the present case if the truth be, as I think it is, that the bottles are never sold to a customer and so do not come within s. 25 (1) at all. The plaintiffs' claim is, in my judgment, misconceived, and I think that the action fails and must be dismissed with costs.

Judgment for the defendants.

Solicitors: McKenna & Co. (for the plaintiffs); S. Eversley & Co. (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re POOLE'S SETTLEMENTS' TRUSTS. POOLE AND ANOTHER v. POOLE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 7, 8, 1959.]

Variation of Settlement (Matrimonial Causes) — Power of appointment — Joint power and power to survivor of spouses — Settlement varied after divorce — Powers and interests of wife extinguished as if dead — Whether husband could exercise power during life of wife.

Trust and Trustee — Variation of trusts by the court — Protective trusts — No forfeiture suffered — Provision proposed for one member of discretionary class

Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (1).

By a post-nuptial settlement made in 1931, a trust fund was directed to be held on trust to pay the income to the husband and the wife during joint lives and to pay the income to the husband during his life if he survived the wife but in case the wife survived the husband then to pay one moiety of the income to her during her life and to divide the other moiety between the issue of the marriage equally. Income payable to any beneficiary under the provisions of the settlement was to be held on protective trusts for the benefit of the beneficiary and in accordance with s. 33 of the Trustee Act, 1925. The settlement provided that "After the death of the survivor of the husband and the wife . . . the trust fund shall be held in trust for all or such one or more exclusively of the others or other of the issue of the marriage of the husband and wife and of any subsequent marriage of the husband (whether children or remoter issue) at such time and . . . in such shares . . . as the husband and wife shall by deed . . . jointly appoint. And in default of and subject to any such appointment then as the survivor of them shall by deed . . . or by will . . . appoint". In 1932 a son, the only child of the marriage, was born. In 1947 the marriage was dissolved. On Mar. 17, 1952, the husband obtained an order of the Probate, Divorce and Admiralty Division that the settlement of 1931 "be varied and that all the rights, powers and interests of [the wife] in and under the [settlement] be extinguished absolutely as if she were now dead". The husband had re-married, but there was no issue of his second marriage. At a time when the former wife was alive the husband purported to make an appointment under the settlement of 1931 as the survivor of the spouses. The husband and his present wife applied for an order declaring the appointment valid.

The husband and his present wife also applied, if the appointment were valid, for approval of an arrangement pursuant to s. 1 of the Variation of Trusts Act, 1958, under which the protective trusts applicable to the appointed moiety of the trust fund might be varied so as to create absolute interests in the husband and his son, subject to the raising of sums for the benefit of the son's infant daughter on attaining twenty-one years of age or marrying under that age. The son married in 1953 and his daughter was the only child of the marriage.

Held: (i) the appointment was valid because, though the order of the court did not state that the settlement was to have effect as if the wife had died, yet the words "as if she were now dead" were not confined to the extinguishment of her interests but involved by necessary implication the proposition that the husband was to be treated as the survivor of the spouses, notwithstanding that both were living.

Dictum of JENNE, P., in *Whitton v. Whitton* ([1901] P. 348) applied.

(ii) the proposed arrangement would not be sanctioned unless it were varied to make provision under which funds would be retained for the benefit of future children of the son born in the husband's lifetime at twenty-one or, if female, on marriage under that age, but, after having been so varied by the parties, was approved.

A [As to the variation of settlements on divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 457, para. 1025.

As to the effect of dissolution of marriage on joint powers of appointment, see 25 HALSBURY'S LAWS (2nd Edn.) 594, para. 1048.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

B Cases referred to:

(1) *Re Allsopp's Marriage Settlement Trusts. Public Trustee v. Cherry*, [1958] 2 All E.R. 393; [1959] 1 Ch. 81.

(2) *Whitton v. Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, 6063.

Adjourned Summons.

C The plaintiffs, the life tenant under post-nuptial settlements, made in regard to his first marriage and dated respectively Apr. 8, 1931, and Dec. 22, 1937, and his present wife (by his second marriage), applied to the court by originating summons for the following relief: (i) that it might be declared whether on the true construction of the said settlements as varied by an order of the Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice made on Mar. 17, 1952, and having regard to the fact that the former wife of the life tenant was alive when the appointment dated May 2, 1952, was executed, the appointment (a) took effect as a valid appointment or (b) was ineffective; (ii) that if it was declared that the appointment took effect as a valid appointment, an order might be made pursuant to the Variation of Trusts Act, 1958, s. 1, for the approval of a scheme of family arrangement varying the trusts affecting that half of the trust funds which was appointed by the appointment.

E The second settlement previously referred to, viz., that dated Dec. 22, 1937, was in all material respects similar to the settlement of Apr. 8, 1931, the material provision of which is set out infra and at p. 342, letters A and B, post. There was one child of the first marriage, which was solemnised on Aug. 7, 1929, a son, Michael, the first defendant, who was born on Nov. 9, 1932. The first marriage was dissolved on June 16, 1947. The second marriage took place on Jan. 16, 1948, and there was no issue of that marriage. By the appointment dated May 2, 1952, which the court held valid, the plaintiff, the life tenant, irrevocably appointed a moiety of the trust funds under both settlements to his son, the first defendant, to be vested in him on attaining the age of twenty-one years but if he should attain a vested interest in the lifetime of the appointor then payment of his moiety was directed to be postponed until the appointor's death and in any case until he should attain the age of twenty-five years. The son was married on July 8, 1953, and had one child, Sarah, who was born on Jan. 14, 1956, and was the second defendant. The third defendants were the trustees of the settlements. The application under s. 1 of the Variation of Trusts Act, 1958, is reported at pp. 343, 344, post.

H *J. A. Ploorman, Q.C.*, and *W. S. Wigglesworth* for the plaintiffs, the life tenant and appointor and his second wife.

F. B. Marsh for the first defendant, the only son of the first marriage, and the appointee.

F. B. Alcock for the second defendant, the infant daughter of the first defendant.

I *G. C. D. S. Dunbar* for the third defendants, the present trustees.

ROXBURGH, J.: By a post-nuptial settlement dated Apr. 8, 1931, a trust fund was settled on trust to pay the annual income to the husband, Geoffrey Sainsford Poole, and his wife, Mab Poole, jointly during their joint lives and then to pay the entirety thereof to the husband for his life if he survived the wife and (so far as relevant)

After the death of the survivor of the husband and the wife the capital and income of the trust fund shall be held in trust for all or such one or

more exclusively of the others or other of the issue of the marriage of the husband and wife and of any subsequent marriage of the husband (whether children or remoter issue) at such time and if more than one in such shares and with such gifts over and such provisions for maintenance advancement and otherwise at the discretion of any named persons and generally in such manner for the benefit of such issue or some or one of them as the husband and wife shall by deed revocable or irrevocable from time to time or at any time jointly appoint. And in default of and subject to any such appointment then as the survivor of them shall by deed revocable or irrevocable or by will or codicil appoint."

On June 16, 1947, the marriage between the husband and the wife was dissolved. Some years afterwards, on Mar. 17, 1952, the former husband obtained this order in the Probate, Divorce and Admiralty Division of this court:

"It is ordered that the said report [the registrar's report] be confirmed, that the said post-nuptial settlements dated respectively Apr. 8, 1931, and Dec. 22, 1937, be varied and that all the rights, powers and interests of the respondent [the wife] in and under the said settlements be extinguished absolutely as if she were now dead."

Consequent on the order of Mar. 17, 1952, the entirety of the annual income was paid to the former husband, and the former husband purported to make an appointment dated May 2, 1952, as the survivor under the principal settlement, though, of course, his former wife was in fact still alive. The question is whether he had power to do that. It is impossible, in my view, to consider that question without at the same time considering the question whether he was entitled to the entirety of the annual income after that order on the variation of the principal settlement.

It is to be noted that that form of order, which is certainly not uncommon, does not say that the settlement is thenceforth to take effect as if the former wife were dead, a comment which VAISEY, J., made in a case which does not otherwise resemble the present, viz., *Re Allsopp's Marriage Settlement Trusts. Public Trustee v. Cherry* (1) ([1958] 2 All E.R. 393). If it had done there would have been no question; but the argument is that the phrase "as if she were now dead" is to be confined to the extinguishment of the former wife's rights, powers and interests, and has no bearing on the question of the former husband's surviving the former wife: in other words, that he has to fulfil a condition which is to be judged by the normal conditions of affairs and not on the artificial hypothesis of the former wife being dead when she is still alive. Indeed, it is curious that after so many years this form of order should have been common and its validity should never have been tested except in so far as it was tested in *Whitton v. Whitton* (2) ([1901] P. 348). The very point arose there, but the respondent appeared in person and plainly it was not argued. JEUKE, P., treated the matter quite shortly by saying (*ibid.*, at p. 353):

"Therefore I am prepared to treat the husband's interests as abolished, as if he were dead, which will enable the wife to make the appointment I have mentioned."

The wife could only make the appointment if she was the survivor, and therefore there is no doubt that the President proceeded on the footing that the words "as if she were now dead" were not to be limited in their operation to the extinguishment of, in that case, the husband's interests but would have an effect in considering whether the wife was the survivor. Although the matter comes for decision after serious argument for the first time today, I see no reason for differing from the President in the case to which I have just referred, in which there was no argument at all, though I have had the benefit of a very full investigation of the problem, and he had no such benefit.

A I do not think that the two trusts and power, i.e., the trusts for the annual income and the power of appointment, can be considered in isolation. I start with the question what is the purpose of a variation of a marriage settlement by the Divorce Court? Surely to readjust so far as possible the matrimonial balance for the benefit of the parties to the marriage and their children. It is not the function of the court to punish a wife for being unfaithful, except in
B so far as the innocent party and the children are thereby benefited.

On that basis I look at this trust of the income. It is to pay the entirety thereof to the husband for his life if he survives the wife. If the word "survives" is to have its natural signification and it is to be unaffected by the order of the Divorce Court, obviously it could not be said whether in the natural order of things the husband would survive or not, so that presumably there would be
C a resulting trust of the income during that period, the wife's interest having been extinguished by the order, and that could not be for the benefit of the husband or the children. I find it easy to avoid that difficulty, because the order does not merely extinguish the wife's interest, but it extinguishes it as if she were at the date of the order dead, and that by necessary implication involves the artificial proposition that the husband has survived the wife, and
D that seems to me to be the true basis on which the former husband was entitled to the entirety of the income as from the date of the order of variation. It is not, in my view, a case of acceleration, because the problem is to say whether the husband survived at a time when his wife was still alive, and that problem can only be solved by the necessary implication which I have suggested; otherwise, as I have said, there would be a resulting trust.

E I apply precisely the same reasoning when I approach the power of appointment, which is the subject-matter of today's case. It is not merely that the wife's powers are extinguished; they are extinguished as if she were dead at the date of the order; and that involves by necessary implication the proposition that the husband is to be treated as the survivor of them as from that date. Accordingly, in my judgment, the former husband had the power to make the
F appointment.

Declaration accordingly.

Apr. 8. HIS LORDSHIP heard argument on the second question raised by the originating summons, by which the approval of the court was sought on behalf of an infant and unborn persons interested by virtue of the Trustee Act, 1925, s. 33, for an arrangement under the Variation of Trusts Act, 1958, s. 1.
G

The settlement of 1931 provided (in addition to the provisions previously mentioned) that income payable to any beneficiary under the provisions of the settlement should be held on protective trusts for the benefit of such beneficiary and otherwise as mentioned in s. 33 of the Act of 1925. The life tenant (the husband) had suffered no forfeiture. The husband had appointed by deed that
H (so far as relevant) one half of the trust fund should be held on trust for his son Michael after the husband's death. The arrangement proposed was that one half of the appointed one half share should be held on trust (a) to raise £500 and hold that sum and the investments representing it on trust for Sarah Poole, the infant child of Michael, if and when she should attain the age of twenty-one years or previously marry, and subject thereto on trust for Michael, and (b) subject to raising and paying a premium on a single premium insurance policy assuring the payment to the trustees of a sum on the husband's death within five years, any policy moneys to be held on trust for Michael, and, in effect to pay, or to hold the residue on trust, for the benefit of the husband. The remaining moiety (of the one half appointed share) was to be held, subject to a similar provision of £500 for Sarah Poole, for Michael absolutely. In the result, therefore, the only member of the class of issue of Michael interested under s. 33 for whom any provision was made by the arrangement was Sarah Poole, who was the only member of that class in existence.
I

J. A. Plowman, Q.C.: I refer to s. 1 (1) of the Variation of Trusts Act, 1958. A
which, so far as material, reads:

"Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any . . . settlement or other disposition, the court may if it thinks fit by order approve on behalf of . . . (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, any arrangement . . . varying or revoking all or any of the trusts . . . Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

So where, as here, the court is concerned with the objects of a discretionary trust, the court is not bound to be satisfied that the variation is for the benefit of members of the discretionary class. In schemes dealt with before the Act of 1958 came into force any provision required to be made for unborn persons, objects of discretionary trusts, was small and often barely more than nominal.

ROXBURGH, J.: I do not see why, if Sarah is to have something, a future brother or sister of Sarah should get nothing. It will be quite easy so to frame the arrangement that Sarah will get what is available if she has no brother or sister. Equity requires the same sort of provision to be made for future brothers and sisters as it requires for a first child. It is not my duty under this Act to formulate, or to assist in the formulation of, a scheme, but merely to sanction or not to sanction one. If I am not satisfied, the scheme will not be sanctioned, but without prejudice to an amended scheme being brought before me.

J. A. Plowman, Q.C. (after counsel had conferred): We are agreed, subject to your Lordship's approval, that the provision to be made for Sarah and the other objects of the discretionary trusts should be this—a sum of £1,250 to be held on trust for such of the children of Michael, born in his father's lifetime, as attain the age of twenty-one years or, if daughters, attain that age or marry under twenty-one, and, if more than one, in equal shares. Thus where the figure £500 appears twice in the scheme of arrangement put forward, a sum of £625 will be substituted in each case.

ROXBURGH, J.: I approve the scheme, amended in that manner. In this particular case the proper order will be "This court doth think fit, pursuant to the above-mentioned Act, to approve and doth hereby approve the arrangement" set out in the schedule to the order.

Order accordingly.

Solicitors: *Charles Russell & Co.*, agents for *Smallpeice & Merriman*, Guildford (for the plaintiffs); *Simmons & Simmons* (for the first defendant); *Middleton, Lewis & Co.* (for the second defendant); *Slaughter & May* (for the third defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MATTHEWS v. KUWAIT BECHTEL CORPORATION.

[COURT OF APPEAL (Sellers and Willmer, L.J.J.), April 7, 8, 1959.]

Practice—Service—Service out of jurisdiction—Master and servant—Contract made in jurisdiction—Personal injuries to employee sustained abroad—Action framed in contract—Whether only remedy in tort—R.S.C., Ord. 11, r. 1 (e).

Contract—Implied term—Contract of service—Contract embodying the whole arrangements between the parties—Employer resident abroad—Services to be rendered abroad—Personal injuries sustained by employee—Whether implied term imposing duty to take care on employer.

A contract of service made between an employer resident abroad and an English employee, expressed to be construed in accordance with English law, provided for services to be rendered abroad by the employee. It contained no express reference to the employer's duties as to standard of care in respect of the premises where the employee was to work, the plant to be used, or the system of work, and a clause provided that "this agreement embodies the whole arrangements between the parties . . ." The employee suffered personal injuries in the course of his employment and brought an action for damages against the employer. He alleged a breach of contract, by reason of a breach of an implied duty to take care, and he obtained leave to serve the writ on the employer out of the jurisdiction under R.S.C., Ord. 11, r. 1 (e)*, which enabled service of a writ to be effected out of the jurisdiction in an action for damages for breach of a contract which was to be governed by English law. On an application by the employer to set aside the service,

Held: the employee was entitled to leave to serve the writ out of the jurisdiction under R.S.C., Ord. 11, r. 1 (e)*, since the action was maintainable at the option of the employee either as an action in tort, or as an action in contract within that rule, there being an implied term of the contract imposing a duty to take care on the employer.

Dicta of VISCOUNT SIMONDS in *Davie v. New Merton Board Mills, Ltd.* ([1959] 1 All E.R. at p. 350), of LORD RADCLIFFE and LORD TUCKER in *Lister v. Romford Ice & Cold Storage Co., Ltd.* ([1957] 1 All E.R. at pp. 139, 142) and of LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd. v. English* ([1937] 3 All E.R. at p. 642) followed.

Riley v. Baxendale ((1861), 6 H. & N. 445) overruled.

Appeal dismissed.

[As to the distinction between actions sounding in contract and in tort, see 1 HALSBURY'S LAWS (3rd Edn.) 36, paras. 73, 74.]

As to grounds for granting leave to serve a writ out of the jurisdiction, see 26 HALSBURY'S LAWS (2nd Edn.) 31, para. 44; and for cases on the subject, see DIGEST (Practice) 343, 344, 605-609.

As to implied terms of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124, paras. 212-215; and for cases on the subject, see 12 DIGEST (Repl.) 681-688, 5251-5285].

Cases referred to:

- (1) *Tassell v. Hallen*, [1892] 1 Q.B. 321; 61 L.J.Q.B. 159; 66 L.T. 196; 56 J.P. 520; 31 Digest (Repl.) 370, 5016.
- (2) *Davie v. New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346.
- (3) *Lister v. Romford Ice & Cold Storage Co., Ltd.*, [1957] 1 All E.R. 125; [1957] A.C. 555; 121 J.P. 98; 3rd Digest Supp.
- (4) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

* The rule and terms of R.S.C., Ord. 11, r. 1 (e), are printed at p. 347, letter D, post.

- (5) *Wilson v. Merry*, (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675; 34 Digest 211, 1747. A
- (6) *Riley v. Baxendale*, (1861), 6 H. & N. 445; 30 L.J.Ex. 87; 25 J.P. 407; 158 E.R. 183; 34 Digest 195, 1593.

Appeal.

The defendants (originally the first defendants) appealed against an order of McNAIR, J., made on Feb. 26, 1959, dismissing an appeal against an order of Master DIAMOND made on Jan. 19, 1959, refusing to set aside the service of a writ by the plaintiff on the defendants out of the jurisdiction. The defendants contended that the plaintiff's action, which was an action for damages for personal injuries arising out of a contract of service, was an action in tort and not in contract and was therefore not covered by the provision for service out of the jurisdiction contained in R.S.C., Ord. 11, r. 1 (e). B
C

J. D. Stocker for the defendants.

R. E. G. Howe for the plaintiff.

SELLERS, L.J.: The plaintiff in this action obtained leave to serve out of the jurisdiction the writ which he had taken out and it has been served on the defendants to the proceedings in Panama. At the outset there was a second defendant who was resident in this country and the appropriate procedure in those circumstances was adopted, but that was the effect of what took place. The defendants, who are now the appellants, applied for the service of the writ to be set aside, as they were entitled to under the rules. The master refused to set it aside, and McNAIR, J., on appeal upheld the master's refusal. The defendants have appealed to this court alleging that the decision not to set aside the service out of the jurisdiction in the circumstances of this case is wrong. D
E

The defendants allege that the claim does not fall under R.S.C., Ord. 11, r. 1 (e), as it was held to have done by the master who gave leave to serve out of the jurisdiction. They say that it is a claim simply in respect of a tort committed in Kuwait, if committed at all, and that there is no jurisdiction to order service out of the jurisdiction. As originally framed, the writ does appear to have been a claim in tort, but it was amended. So that no technical point could be taken about the state of the writ when the order was made, learned counsel for the defendants said that he accepted the amendment and would take no point about it and, if it was so desired, he was prepared to permit any further amendment of the writ without any objection if his submission before this court at the present stage was not sustained, that the service out of the jurisdiction was not justified. F
G

On Apr. 30, 1957, the plaintiff entered into a written contract with the defendants (another preliminary contract was entered into concurrently, to which no further reference need be made). In substance the agreement was for the plaintiff to go into the service of the defendants as a foreman millwright H

"in Kuwait or such other location in the Near or Middle East (hereinafter referred to as 'the zone of operations') as the company may desire."

The agreement was to begin on Apr. 30, 1957. The plaintiff appears to have gone out to Kuwait at some time between then and May 28, less than a month after the date of the agreement, to carry on his duties under the contract, when, unfortunately, on May 28, he met with an accident by falling into a trench when engaged in work on the construction of a pump. He seems to have fallen into the trench because he stepped back into it and he stepped back into it because he was trying to avoid a load swinging from a crane which was coming towards him. Those facts are derived from an affidavit which the plaintiff put in at one stage in these proceedings. I

In that affidavit the plaintiff sets out the duty which he alleges that the defendants have infringed. It is said:

A "It was the duty of one or other or both of the defendants under and by
virtue of one or other or both of the aforesaid agreements to take all reason-
able care by themselves, their servants or agents, to provide and maintain
safe premises, plant and equipment at any place or places at which I was
to carry out my duties thereunder and to institute, operate and maintain
a safe system of work and not to expose me to any unnecessary risk of injury
B at any such place or places."

The second defendants have now been struck out and we are not concerned
with them. Counsel for the defendants has conceded that duties of that
character did arise and the only point is whether they arose under this contract.
The contention is that such duties arise in tort and not under contract. The
importance of that in this case is apparent when one turns to the circum-
stances in which a writ can be served out of the jurisdiction. At the time in
1958 when he sought to bring these proceedings the plaintiff had returned to
England. The accident happened out in Kuwait. The defendants are resident
in Panama and that is where the writ was in fact served. Seeking in those
circumstances to bring his action in these courts and to serve out of the juris-
diction, the plaintiff relies on R.S.C., Ord. 11, r. 1 (e), which provides:

D "Except in the case of a writ to which r. 1A of this order applies, service
out of the jurisdiction of a writ of summons or notice of a writ of summons
may be allowed by the court or a judge whenever . . . (e) The action is one
brought against a defendant not domiciled or ordinarily resident in Scotland
to enforce, rescind, dissolve, annul or otherwise affect a contract or to
E recover damages or other relief for or in respect of the breach of a contract
—(i) made within the jurisdiction, or (ii) made by or through an agent
trading or residing within the jurisdiction on behalf of a principal trading
or residing out of the jurisdiction, or (iii) by its terms or by implication to
be governed by English law . . ."

The rules under R.S.C., Ord. 11, are to be read disjunctively and each sub-section
is complete in itself and independent of the others (*Tassell v. Hallen* (1),
[1892] 1 Q.B. 321). The question that has arisen in this case is whether
the plaintiff can properly present his case as a case for damages for breach of
contract. The writ as amended is in these terms:

G "The plaintiff's claim is for damages for personal injuries and loss
sustained by the plaintiff as a result of an accident which occurred on or
about May 28, 1957, in the course of his employment with the defendants
in the Sheikdom of Kuwait, the said accident having been caused by breaches
by the defendants, their servants or agents of contracts of employment
entered into between them and the plaintiff on or about Apr. 30, 1957."

The contract, which is a long, printed document signed by the parties, contains
no express reference to the duties placed on the employers in respect of their
H standard of care with regard to the premises in which they were engaging the
plaintiff to work or to the provision of plant which he was to use or to the
system of work in which he had to co-operate. Clause 11 deals with the working
conditions, but it imposes obligations only on the employee and makes no
reference to the obligations in respect thereof on the part of the employers.
Clause 12, which was relied on, in my view does not help the defendants' argument
I that the contract does not permit of any implied term as to taking reasonable
care for the plaintiff's safety in the course of the work. The clause provides,
and admittedly it prevails in this respect, that the agreement

"shall be construed and have effect in all respects in accordance with the
law of England."

It seems to me that the law of England does permit terms in these matters to
be implied into the contract. So far it is against the contention that the agree-
ment can have no such implication. The other part of cl. 12 is as follows:

"This agreement embodies the whole arrangements between the parties with reference to the employment agreement hereby constituted, and all previous correspondence and negotiations, whether oral or written, shall be excluded."

I think that none of those terms is anything like adequate to exclude or, indeed, was ever intended to exclude any term which would normally be implied into the contract if in fact there are such terms. That is the agreement.

The plaintiff's right to invoke the procedure under R.S.C., Ord. 11, depends on whether this is an action in respect of a breach of contract and turns on whether the matter of which he complains is the subject of a contract, or whether, as the defendants allege, it is only a matter of liability in tort.

From such experience as I have had in this branch of the law, quite apart from recent high authority, I should have held the view that the plaintiff's claim could be made either in tort or in contract. It has surely been frequently so pleaded without exception being taken. Counsel for the defendants has referred, however, to many authorities and has argued with persistence that this type of claim can arise only in tort and cannot be framed in contract.

The matter was considered recently in the House of Lords in *Davie v. New Merton Board Mills, Ltd.* (2) ([1959] 1 All E.R. 346). The question was whether the employers were liable for defects in a tool which they had bought in the open market for the use of their workman who was injured by reason of such a defect. VISCOUNT SIMONDS said (*ibid.*, at p. 350):

"The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment but it can only lead to confusion, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms."

The difference between a claim in tort and a claim in contract, at any rate in its more conventional form, without alleging any special implied term or any special obligation, rarely calls for consideration, and in most cases does not matter, and perhaps on that account the majority of the cases have not dealt with it in the way one might have expected. The distinction matters in two cases—there may be others—one, where there is a desire to serve out of the jurisdiction, which is the very case we have now under consideration; another in the county court jurisdiction where the basis of costs may be different according to whether the action was framed in contract or in tort. But the solution of this case is not much assisted because costs in the county court are higher in respect of a claim in tort than in the case of contract and the action would certainly be more normally framed in tort rather than in contract. The position is also somewhat different when costs come to be considered in the county court at the end of the case, since it will be known whether the action has been contested in contract or in tort.

The issue now is whether this action can be framed in contract for the purposes of this rule. In *Davie v. New Merton Board Mills, Ltd.* (2), LORD REID made some observations which are more helpful to the defendants than those of LORD SIMONDS, *ante*. He says (*ibid.*, at p. 365):

"A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as part of the law of tort. Vicarious liability is well recognised, and I see no difficulty in principle in extending vicarious liability beyond liability for those who are, strictly speaking, servants, but it would, I think, be going far beyond anything reasonable to extend it to cover a case where there was no relationship whatever between the master and the negligent person or his employer at the time when the negligence occurred. Then I take the other possible way of regarding the master's duty. It was common at one time to regard it as depending on the contract of employment, and, indeed, it was this view which was largely

A responsible for the invention of the rule of common employment. No doubt this view leaves the court much scope, but I think that it has always been recognised that an implied term must at least be reasonable."

He went on to consider the proposed implied term in the case, so that he cannot be said to have come down without qualification on the side of the claim being founded only in tort and not on the basis of contract or an implied term.

B Indeed, the balance of opinion in the cases from 1861 onwards would seem to have been that the action may be framed within limits on either basis. The House of Lords considered the matter in *Lister v. Romford Ice & Cold Storage Co., Ltd.* (3) ([1957] 1 All E.R. 125). The House was there looking at the obligations imposed by the contract of service on the workman, but, notwithstanding the contention of counsel for the defendants to the contrary, I think that the reasons which establish that terms can be implied which place an obligation of care under the contract on a workman apply equally and even more obviously to the obligation of an employer. On this topic VISCOUNT SIMONDS said (*ibid.*, at p. 130):

D "I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the respondents' cause of action lay in tort or breach of contract. But, in deference to DENNING, L.J., I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this, the negligence of a servant in performance of his duty is a clear example."

E LORD RADCLIFFE reveals (*ibid.*, at p. 139) that the same sort of argument which has been advanced here arose in the House of Lords:

F "It was much canvassed in argument before your Lordships whether, if there was some such duty on the appellant, it was anything more than the general duty he owed the world to avoid the tort of negligence. On one view of the case this would, indeed, be a question of some importance in respect of costs. Since I take a different view as to the proper result of the case anyway, I do not need to dwell on this part of it. It is, perhaps, sufficient if I say that, in my view, this question is a somewhat artificial one. G The existence of the duty arising out of the relationship between employer and employed was recognised by the law without the institution of an analytical inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, H express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. I It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other."

LORD TUCKER stated his view (*ibid.*, at p. 142):

"... that a servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable care in the driving and management of the vehicle, that for breach of this duty an action founded on contract can be brought by the master against the servant, and that damages which have been awarded against the master by reason of the servant's negligence or breach of this duty are not too remote to be recoverable in the master's action against his servant..."

The noble Lord said ([1957] 1 All E.R. at p. 143):

"Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, e.g., Sale of Goods Act, 1893, Bills of Exchange Act, 1882, etc., derive in the main from the common law by which they have become attached in the course of time to certain classes of contractual relationships, e.g., landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these, there are those in which, from their particular circumstances, it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the 'official bystander' type of case, to use the well-known words of *MACKINNON, L.J.** I do not think the present case really comes in that category; it seems to me to fall rather within the first class referred to above."

Then he set out some of the recognised implied terms that the contract imposed on the servant in his contract of service with the employer. The argument of learned counsel for the defendants was that the common law had imposed certain duties on employers in regard to the safety of the workman in the course of his work but the obligation so imposed, it was said, was entirely in tort. That the duties arose from the common law I think is established. That was the view of the law taken in *Wilsons & Clyde Coal Co., Ltd. v. English* (4) ([1937] 3 All E.R. 628). The admitted obligations which are imposed on the employer were re-stated in that case by LORD WRIGHT (*ibid.*, at p. 642), who cited from the speech of LORD CAIRNS, L.C., in *Wilson v. Merry* (5) (1868), L.R. 1 Sc. & Div. 326).

The question is whether those duties are contractual duties. The authorities to which I have referred show that they may be implied terms of the contract, attached to or incorporated in the contract to apply LORD TUCKER's view. It is at the election of the workman in circumstances such as these whether, relying on the recognised common law duties as established by LORD CAIRNS' speech in *Wilson v. Merry* (5), and following decisions, he will sue in contract or sue in tort. In this case, if it suits his purpose, he may sue in contract. It may be that that will have a somewhat limiting effect on his rights against the employer as compared with his more extensive right at common law if he sues in tort but I make no further comment on that. These authorities seem to me to establish that, on the facts of this case, an action does lie in contract and on the basis of these implied terms which the plaintiff seeks to invoke. If he establishes a breach of those terms, then he would appear to have a cause of action entitling him to damages.

I do not wish to prolong this judgment on an interlocutory matter by referring to cases quoted by learned counsel for the defendants with regard to costs in the county court. I think that they approach the matter from a different point of view, dependent on how the action was in fact contested before the court, and do not help in any way his argument that an action does not lie for breach of contract.

* In *Sherlaw v. Southern Foundries (1926), Ltd.* ([1939] 2 All E.R. 113 at p. 124).

A Learned counsel for the defendants did rely on passages in SALMOND ON TORTS (12th Edn.), p. 131, where an extract was incorporated in the text from a work by MUNKMAN (pp. 60 and 61), to the effect that, although the relationship of master and servant is based on contract, this obligation is imposed by the law of tort and is not to be regarded as an implied term in the contract of service. Those passages do require consideration in the light of the authorities that

B I have quoted. Also learned counsel referred to a passage in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.), pp. 362, 363, and from that he derived an authority in 1861 of *Riley v. Barendale* (6) ((1861), 6 H. & N. 445), in which the court (POLLOCK, C.B., and MARTIN and WILDE, BB.) expressed the view that such an action as was contemplated here could not be framed in contract. There the declaration alleged that

C "J.R. was the servant of the defendants, on the terms that the defendants should take due and ordinary care not to expose the said J.R. to extraordinary danger and risk in the course of his said employment . . .",

and it was held that those terms could not be made the subject of a claim in contract. It was put in this way by MARTIN, B. (*ibid.*, at p. 447):

D "There has been a series of cases in which the duty of the master has been improperly declared upon as a contract. This imposes a difficulty on the defendant by making it impossible for him to demur, and all that he can do is to deny the contract. I am of opinion that on the hiring of a servant no such contract as this is to be implied; there is a mere contract of service."

E

The other judgments are to the same effect. Counsel for the plaintiff sought to say that the decision turned on procedure. I am inclined to think that that case expresses a view of the law contrary to that which has been expressed in the House of Lords and which I have been expressing here. I think that the best way to deal with that case is to say that it goes into the limbo of lost causes.

F In my view, this appeal fails and the view taken by the master and the learned judge in this matter was the correct view with which there should not be interference. Therefore, the appeal must be dismissed.

WILLMER, L.J.: My Lord has covered the ground so fully that I find it unnecessary to say anything more than that I wholly agree with what has

G fallen from him.

Appeal dismissed.

Solicitors: *L. Bingham & Co.* (for the defendants); *Denton, Hall & Burgin* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HOPKINS v. REES & KIRBY, LTD.

[GLAMORGANSHIRE ASSIZE (Glyn-Jones, J.), July 8, 1958.]

Costs—County court scale—High Court action—Recovery of less than £300—Time at which to determine whether reasonable grounds existed for supposing that the amount recoverable would exceed £400—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 47 (1), as substituted by County Courts Act, 1955 (4 & 5 Eliz. 2 c. 8), s. 1 (2).

The test, under s. 47 (1)* of the County Courts Act, 1934, as substituted, whether a plaintiff had reasonable ground for supposing the amount recoverable by him for damages for personal injuries to be in excess of the county court jurisdiction (£400) is whether it would have been clear to a reasonable man in the position of the plaintiff at the time of the issue of the writ that no judge would award more than £400 damages: if that were not then clear, High Court costs are recoverable by the plaintiff, although less than £300 damages has been awarded, and s. 47 of the County Courts Act, 1934, as amended, is excluded.

[**Editorial Note.** The decision in the present case should be considered with that of LYNSEY, J., in *Parkes v. Knowles* ([1957] 3 All E.R. at p. 602) as to the effect of the acceptance of money paid into court, and with that of DEVLIN, J., on s. 47 (3) (a) of the County Courts Act, 1934, in *Finch v. Telegraph Construction and Maintenance Co., Ltd.* ([1949] 1 All E.R. at p. 455).

As to the costs of actions in contract or tort which might have been begun in the county court and are brought in the High Court, see 9 HALSBURY'S LAWS (3rd Edn.) 312, para. 761; and for cases on the subject, see DIGEST (Practice) 868, 4105, 4106.]

Action.

In this action the plaintiff claimed against his employers, the defendant company, damages for negligence causing personal injuries. The defendants alleged that the plaintiff's own negligence caused or contributed to causing the accident. The plaintiff was a steel erector. The accident happened on Nov. 20, 1955, when the plaintiff, who was employed in painting the inside of the defendants' factory and was at a height of some twenty feet above the ground, slipped and fell. The writ was issued on May 6, 1957. On Nov. 25, 1957, the action was ordered to be tried at Glamorgan. In March, 1958, the defendants paid into court £250, and the plaintiff subsequently gave notice within the prescribed time that he accepted that sum in satisfaction of his claim. The action was brought before the court so that the plaintiff might apply for an order for his costs of the action to be taxed on the High Court scale.

* Section 47 (1) of the County Courts Act, 1934, as substituted by s. 1 (2) of the County Courts Act, 1955, is, so far as relevant, as follows:—"Where an action founded on contract or tort is commenced in the High Court which could have been commenced in the county court . . . then subject to sub-ss. (3) and (4) of this section the plaintiff—(a) if he recovers a sum less than £300, shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the county court . . . so, however, that this section shall not affect any question as to costs if it appears to the High Court or a judge thereof . . . that there was reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court."

"For the purposes of para. (a) . . . of this subsection, a plaintiff shall be treated as recovering the full amount recoverable in respect of his claim without regard to any deduction made in respect of contributory negligence on his part or otherwise in respect of matters not falling to be taken into account in determining whether the action could have been commenced in the county court."

A *P. J. M. Thomas* for the plaintiff.

A. T. Davies for the defendants.

The following judgment was delivered at Swansea during the Glamorganshire Summer Assize.

B GLYN-JONES, J., briefly referred to the question before the court and the facts, and continued: I do not know whether the plaintiff accepted the sum paid into court because he thought that it would adequately compensate him for the injury that he had suffered, or because he thought that there was some chance of the plea of contributory negligence on his part succeeding. He gave notice that he accepted the amount. The defendants claim that the plaintiff's costs should be taxed on the county court scale pursuant to s. 47 of the County Courts Act, 1934, as amended by s. 1 (2) of the County Courts Act, 1955. Section 47 (1), as so substituted, provides that where an action founded on tort is commenced in the High Court, but could have been commenced in the county court, the plaintiff, if he recovers less than £300, will not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the county court. Section 47 (1) then continues:

E "... so, however, that this section shall not affect any question as to costs if it appears to the High Court or a judge thereof... that there was reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court."

I take that to mean reasonable ground for supposing that the amount awarded as damages to the plaintiff, in the event of his succeeding, may exceed the sum of £400. The subsection further provides that:

F "... a plaintiff shall be treated as recovering the full amount recoverable in respect of his claim without regard to any deduction made in respect of contributory negligence on his part or otherwise in respect of matters not falling to be taken into account in determining whether the action could have been commenced in the county court."

G I read that as requiring me to consider this case in the following way. Looking at the materials available to the plaintiff and his solicitors at the time when the writ was issued, was there ground on which the plaintiff might reasonably contemplate that the damages recoverable would exceed £400? Counsel for the defendants submits that in answering that question regard should be had to all the matters that were in dispute in the action, including medical evidence and the circumstances in which the accident happened. I think that that is wrong. The only question for me is this—putting myself, as far as I can, in the position of the plaintiff at the time when he issued the writ, am I satisfied that it was then obvious that this was a county court action, or was it an action which, when tried by one judge rather than another, might have resulted in an award exceeding £400 excluding any reduction on the ground of contributory negligence? I find in the medical report on the plaintiff, submitted to his solicitors for the purpose of this action, a statement that his ankle has a tendency to go over, that it is now a chronic sprain which will cause some permanent disability and that if this ankle continues to be liable to go over he might be a danger to his workmates and run the risk of injury to himself if he continued working at heights as a steel erector. Looking at that, and no more, I am unable to say that it was quite clear, or should have been quite clear, to the plaintiff as a reasonable man that no judge would award more than £400 for that injury.

For that reason I think that High Court costs are recoverable in this case, and I make the order that the plaintiff is entitled to have his costs taxed on the High Court scale.

Order accordingly.

Solicitors: W. H. Thompson (for the plaintiff); Kenneth Brown, Baker, Baker, agents for Gee & Edwards, Swansea (for the defendants).

[Reported by D. M. HUGHES, Esq., Barrister-at-Law.]

THE IMPETUS. OWNERS OF THE MOTOR VESSEL BLENHEIM v. OWNERS OF THE MOTOR TUG IMPETUS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J., assisted by Captain D. Dunn, Trinity Master), April 7, 8, 16, 1959.]

Shipping—Towage—Collision between tug and hirer's vessel—Negligent navigation of tug—At time of collision, tug in position to receive orders from hirer's vessel to pick up ropes or lines, but not in position to carry out such orders—Whether collision occurred "whilst towing"—United Kingdom Standard Towage Conditions, condition 1.

On June 15, 1956, a collision occurred in the River Tyne between the motor ship Blenheim and the motor tug Impetus, which had been engaged to attend the Blenheim on the terms of the United Kingdom Standard Towage Conditions, condition 1 of which reads: "For the purpose of these conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines . . ." Condition 3 of the conditions excluded the tugowners from liability for damage done by the tug "whilst towing". Shortly before the collision the Blenheim sounded a signal to show that she was ready for the tug. The tug then let go her moorings, moved towards the Blenheim at some speed, and, while attempting to turn to starboard to come on a parallel course with the Blenheim in order to throw the heaving line to her, struck her and caused considerable damage to her. The collision was due entirely to the negligence of the tug. At the time of the collision the tug was in a position to receive the order to throw a heaving line to the Blenheim but was not in a position until after the collision to carry out such an order. No such order had, in fact, been given by the Blenheim, because the tug had attended the Blenheim on several previous occasions and the crews of both vessels knew exactly what to do. At the moment of collision those on board the tug were prepared to heave a line (although not in a position to do so), and those on board the Blenheim were ready to receive the heaving line from the tug. In an action by the owners of the Blenheim against the tugowners,

Held: the collision occurred during the period defined as "whilst towing" by condition 1* of the United Kingdom Standard Conditions of Towage, because the Blenheim was ready to give, and the Impetus was in position to receive, orders to pick up ropes and lines, notwithstanding that temporarily the position of the Impetus was such that it was impossible for her to carry out any such orders that she might have received; therefore the tugowners (on whom the burden of proof lay in this respect) had established that they were protected from liability by condition 3.

The Uranienborg ([1935] All E.R. Rep. 70) distinguished.

DICTA of SCOTT, L.J., and BUCKNILL, L.J., in *W. J. Gull & Son v. Glen Line, Ltd.* ([1948] 1 All E.R. at pp. 247, 248) applied.

* This condition is printed at p. 356, letter H, post.

A [As to special conditions relieving tugs from liability, see 30 HALSBURY'S LAWS (2nd Edn.) 660, para. 841; and for cases on the subject, see 41 DIGEST 683-685, 5125-5138.]

Cases referred to:

(1) *The Uranienborg*, [1935] All E.R. Rep. 70; [1936] P. 21; 105 L.J.P. 10; 154 L.T. 664; Digest Supp.

(2) *Guy (W. J.) & Son v. Glen Line, Ltd.*, [1948] 1 All E.R. 245; sub nom. *Glen Line, Ltd. v. Guy (W. J.) & Sons, The Glenaffric*, [1948] P. 159; [1948] L.J.R. 1128; 2nd Digest Supp.

Action.

This was an action arising out of a collision in the River Tyne on June 15, 1956, between the motor ship *Blenheim* and the motor tug *Impetus*. As a result of the collision the *Blenheim* was considerably damaged. The plaintiffs, the owners of the *Blenheim*, claimed damages for negligence against the defendants, the owners of the *Impetus*, on the ground that the collision was caused solely by the negligent navigation of the *Impetus* by the defendants. The defendants, by their amended defence, admitted that the collision was caused solely by the negligent navigation of the *Impetus*, but alleged that they were protected from liability by condition 2 or condition 3 of the United Kingdom Standard Towage Conditions because the *Impetus* was engaged to attend the *Blenheim* on the terms of the conditions and the collision occurred "whilst towing", within the meaning of condition 1 of the conditions. By their reply, the plaintiffs admitted that the *Impetus* was engaged to tow the *Blenheim* under the terms of the United Kingdom Standard Towage Conditions but denied that the conditions had attached at the time of the collision. The facts relating to the collision are stated in the judgment.

J. V. Naisby, Q.C., and *R. F. Stone* for the plaintiffs.

W. W. Porges, Q.C., and *H. V. Brandon* for the defendants.

Cur. adv. vult.

Apr. 16. KARMINSKI, J., read the following judgment: Shortly before 5 a.m. on June 15, 1956, a collision occurred in the River Tyne between the plaintiffs' motor ship *Blenheim* and the defendants' motor tug *Impetus*. The place of collision was to the northward of mid-channel slightly above the Fish Quay buoys. The *Blenheim* is a steel screw motor ship of 4,766 tons gross, 374 feet in length, 53 feet in beam, fitted with eight cylinder oil engines of 4,600 horse power. At the time of the collision she was inward bound for Newcastle from Oslo with a general cargo and passengers. The *Blenheim* was manned by a crew of seventy-seven; her draught was approximately 14 feet 8 inches forward and 18 feet 6 inches aft. At the time of the collision it was daylight, the weather was fine and clear, and the tide was flood of the force of not more than one knot.

The *Blenheim* was a regular visitor to the Tyne, coming from Oslo three times a fortnight. The plaintiffs have had a towage contract with the defendants for many years, and, in fact, the *Impetus* had towed the *Blenheim* on many occasions before the collision. On the night before the collision the *Blenheim*, in accordance with her usual practice, had made a signal by radio to her Tyne agents reporting her expected time of arrival. This signal was made for the purpose of securing the attendance of two of the defendants' tugs on the *Blenheim's* arrival on the Tyne. Shortly before the collision the *Blenheim*, with a pilot on board, had passed the Tyne Piers and, having reduced her speed from slow to dead slow ahead, proceeded on her normal up-river course on the north side of mid-channel at a speed through the water of about five or six knots. Two of the defendants' tugs were waiting at the Fish Quay buoys for the *Blenheim*. The *Wonder* was heading upriver, the *Impetus* was heading downriver. The *Blenheim* sounded a signal of one long blast followed by two short blasts in accordance with local practice to show that she was ready for tugs. The *Impetus* let go her moorings

and moved at some speed towards the Blenheim, passing between her and the shore. The Impetus attempted to turn hard to starboard and to come on a parallel course close to the Blenheim for the purpose of the heaving of a line; the Impetus, however, failed to complete her turn and struck the starboard side of the Blenheim halfway between her stem and amidships at an angle which the Blenheim says was about ninety degrees and the Impetus says was about forty-five degrees, doing considerable damage to the Blenheim.

The plaintiffs allege that the collision was wholly caused by the negligence of the Impetus. The defence, as originally pleaded, denied negligence and alleged that the collision was caused by the negligence of the plaintiffs: but by an amendment dated Mar. 25, 1959, the defendants abandoned their charge of negligence against the plaintiffs and expressly admitted that the collision was solely caused by the negligent navigation of the Impetus. There is, therefore, no need for me to make a careful examination of the facts, since not only is negligence expressly admitted by the defendants but the facts, as proved, make it abundantly clear that the Impetus was solely to blame for the collision, which resulted from a manoeuvre which was ill conceived and badly executed. No criticism was made of the navigation of the Blenheim in any way. One fact only remained in dispute—namely, the angle of collision. As sometimes happens in cases of this kind, views and recollections varied widely not only between witnesses on both sides, but also on this occasion between the master and the chief officer of the Blenheim. In estimating the angle it must be borne in mind that the Impetus after striking the Blenheim drew away and then struck her again. Substantial damage was done to the Blenheim and the stem of the Impetus was set back. I have consulted the Elder Brother* as to what, if any, inference can be drawn from these matters, and he has advised me that they indicate an angle very considerably broader than forty-five degrees. I have accepted his advice on this point, and I find the angle of collision to have been approximately seventy-five degrees.

The defendants, however, raised another matter of substance. Relying on the terms of the United Kingdom Standard Towage Conditions, they alleged that at the time of the collision the Impetus was ready to throw a heaving line to the Blenheim and that the Blenheim was ready to receive the said line aboard and to bend it on to one of the Blenheim's wires to be used as a towing hawser. It is contended that the collision occurred, within the meaning of the conditions, whilst the Impetus was towing the Blenheim or during the employment of the Impetus as a tug, and that, therefore, notwithstanding the negligence of the Impetus, the defendants are protected by cl. 2 or cl. 3 of the towage conditions.

The material parts of the United Kingdom Standard Towage Conditions which have to be considered in this case are as follows:

" 1. For the purpose of these conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, or when the towrope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the hirer's vessel to cast off ropes or lines have been carried out, or the towrope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connexion with holding, pushing, pulling or moving the ship.

" 2. On the employment of a tug the master and crew thereof become the servants of and identified with the hirer and are under the control of the hirer or his servants or agents, and anyone on board the hirer's vessel who may be employed and/or paid by the tugowner shall be considered the servant of the hirer.

* Capt. D. Dunn, an Elder Brother of Trinity House.

A "3. The tugowner shall not, whilst towing, bear or be liable for damage
of any description done by or to the tug, or done by or to the hirer's vessel,
or for loss of or damage to anything on board the hirer's vessel, or for loss of
the tug or the hirer's vessel, or for any personal injury or loss of life, arising
B from any cause, including negligence at any time of the tugowner's servants
or agents, unseaworthiness, unfitness or breakdown of tug, its machinery,
boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed
or otherwise, and the hirer shall pay for all loss or damage, and personal injury
or loss of life, and shall also indemnify the tugowner against all consequences
thereof . . ."

C By their reply the plaintiffs admitted that the Impetus was engaged to tow
the Blenheim under the terms of the towage conditions set out above, but
specifically denied that at the time of the collision such conditions had attached.
Indeed, it was conceded by counsel for the plaintiffs, in opening his case, that
the sole point for decision was whether or not at the time of the collision the
towage conditions had attached. It is not suggested by the defendants that the
D towrope had been passed to or by the tug at the time of the collision. Counsel
for the defendants submitted that the words of cl. 1 construing the term "whilst
towing" refer to receiving orders to pick up ropes or lines and not to receiving
the ropes or lines themselves. It is common ground in this case that no orders
were in fact given by those on board the Blenheim to the Impetus, since the
crews of both ships knew from long usage precisely what to do. At the moment
of collision those on board the Impetus were prepared to heave a line, and those
E on board the Blenheim were ready to receive the heaving line from the Impetus
and to secure it to their own wire. With this proposition counsel for the plain-
tiffs was in partial agreement, but argued that the true test was whether or not
the Impetus was at the time of the collision ready to receive and to carry out
the order to heave her line if such order had been given. In his submission the
Impetus was at the time of the collision in no position either to heave her own
line or to receive the Blenheim's wire, since she was approaching the Blenheim
F at an angle of nearly ninety degrees. In cross-examination the mate of the
Impetus agreed that both before and at the time of collision he was not in a
position to heave a line to the Blenheim. In fact he heaved his line quite shortly
after the collision.

G I have no difficulty in accepting the contention of counsel for the plaintiffs
that the burden in this case is on the defendants to establish that they have
brought themselves within the protection of cl. 1 to cl. 3 of the towage conditions.
Clause 1 has, as it seems to me, extended the ordinary meaning of the words
"whilst towing" to cover a state of affairs in which towing is contemplated but
not being carried out. It is clear on the evidence that at the time of the collision
the Impetus was in a position to receive the order to heave the line, but was not
H in a position until after the collision to carry out such an order. The fact that
the Blenheim on this, as on very many earlier occasions, gave no order is in a
sense irrelevant. The question is whether at the time of the collision the Impetus
was in a position to receive orders from the Blenheim to pick up ropes or lines,
had such orders been given.

I The United Kingdom Standard Towage Conditions in their present form have
been in use, as I was told by counsel, for over thirty years. During that period
they have been judicially considered on several occasions, but I find it necessary
to consider only two decisions. In *The Uranienborg* (1) ([1935] All E.R. Rep. 70)
the tug was engaged to help a ship from a wharf. The tug arrived early and
before the ship had finished discharging and while she was still waiting for a
pilot and boatmen. The tug collided with the ship at a moment when the ship
was not ready to give orders to pick up ropes or lines and when the tug was
neither thinking about nor expecting such an order. It was argued on behalf
of the tug that she came within the definition of "whilst towing" because there

was a contract of towage, and because she was within hailing distance of the ship at the time of collision. This argument was rejected by SIR BOYD MERRIMAN, P., as being too wide. Discussing the meaning of the word "position", he said ([1935] All E.R. Rep. at p. 73):

"I doubt myself whether the word 'position' is only used in the sense of local situation. I think it involves also the conception of the tug being herself in a condition to receive and act upon the orders. But, however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or lines—not orders generally, but those specific orders—and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive such orders."

Pointing out that in that case at the time of the collision those on board the tug were not thinking about, and had not begun to expect, an order to pick up ropes or lines, the President concluded his judgment in these terms (*ibid.*, at p. 74):

"I think that the least that is involved in arriving at the moment when the period commences is that the tug herself, at any rate, should be able to show that she was in a position to receive and, having received, to comply with these orders in connexion with ropes or lines at the material time. I am satisfied that that period had not come in the case of this tug *Kenia*, but I think also that this phrase has got to be read as if there were two parties involved in the matter and that until the reasonable moment has come at which orders may be expected to be given from the ship the tug cannot be said to be in a position to receive orders from the ship; but whichever way you look at it—even if you look at it, as I say from the point of view of the tug alone—I am satisfied that on the facts of this case she was not in a position to receive orders and that the towing had not begun."

From this counsel for the plaintiffs argued that SIR BOYD MERRIMAN, P., was laying down a general principle that, to bring herself within the conditions, the tug must prove three things: (i) that the ship was ready to give the order to pick up ropes or lines; (ii) that the tug must be ready to receive such orders; and (iii) be able and ready to act on them. For my part, I do not think that the President intended to lay down any general proposition of that kind. I think that he was limiting his observations to the facts of that particular case, and I am fortified in that view by the observations of the Court of Appeal in *W. J. Guy & Son v. Glen Line, Ltd.* (2) ([1948] 1 All E.R. 245). In that case also the meaning of the words "whilst towing" had to be construed, though in the light of facts quite different from those in *The Uranienborg* (1). In *W. H. Guy & Son v. Glen Line, Ltd.* (2) the tug approached the ship three times, being ready to receive lines and to tow the ship. On each occasion the tug was told to keep clear or to wait. Finally the ship dismissed the tug with a message to the dockmaster, saying that the ship would not dock on that tide. Dropping astern on that order, the tug struck the ship and sustained damage. The Court of Appeal refused to read into what SCOTT, L.J., described as the plain meaning of the words of cl. 1 of the towage conditions any words modifying them. SCOTT, L.J., used the following words ([1948] 1 All E.R. at p. 247):

"It is clear on the evidence, as the judge held, that the tug was in that position. The mate was standing by ready to heave the line and so pick up a rope from the ship, and I reject the argument of counsel for the shipowners because, to make it good, he has to read into the clause, after the words 'when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines', the further words 'and the ship is ready to give orders', which are not there. Had that been the intention of the parties to the contract or those who framed the 'United Kingdom Standard Towage Conditions', some such words would have been inserted in the clause. They

A were omitted, and I think it is clear why they were omitted. After the tug has arrived at the ship at a proper time, namely, the normal time in accordance with ordinary practice, to take the ship in tow, she is from then in attendance on the ship and necessarily then begins to incur the risk of damage to herself by contact with the ship. After that, obviously, as it seems to me, there can be no justification for implying the suggested words.

B Such an additional condition protecting the shipowner could easily have been expressed, and I can see no possible ground for implication according to the ordinary rule of construction that nothing can be implied, unless it is necessary to give business efficacy to the bargain that the two parties must have intended when they made the contract. Counsel did not actually submit that those words ought to be implied, but, unless they are,

C his argument must fail."

BUCKNILL, L.J., agreed with the judgment of SCOTT, L.J., adding these observations ([1948] 1 All E.R. at p. 248):

D "The other point I should like to say a word about is this. I fully appreciate, speaking for myself, the point counsel for the shipowners made that this must be to some extent treated as a bi-lateral arrangement, and if the master or the pilot had made it clear to the tug before she got into the position to receive orders that he was not ready to give orders, then the tug could not, by putting herself in a position to receive orders, have brought herself within cl. 1. That does not, however, cover the case where, as

E SOMERVELL, L.J., suggested in argument, a ship leads the tug to believe that she is ready to give or take a towrope. I think in this case the facts led the tugmaster to believe that the ship would be ready to give a rope, and, therefore, that argument does not apply here."

SOMERVELL, L.J., also agreed and pointed out that the tug reasonably expected to receive orders from the ship in relation to towage, and that cl. 1 therefore applied.

F In spite of the interesting argument of counsel for the plaintiffs to the contrary, I have come to the conclusion that cl. 1 means what it says and that the conditions attach when the tug is in a position to receive orders to pick up ropes or lines. This pre-supposes that the ship is ready to give such orders, if such orders are required. I cannot, however, accept counsel's submission that a tug can thereafter put herself outside the conditions by getting into a position which may

G for a short period make it impossible for her to carry out such orders. To import such a condition when the tug is already in attendance on the ship, and, therefore, in danger of incurring damage, would, as SCOTT, L.J., pointed out in *W. J. Guy & Son v. Glen Line, Ltd.* (2), be without justification. I find that here the collision occurred whilst towing and there must be judgment for the defendants accordingly.

H

Judgment for the defendants.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the plaintiffs); *Bentleys, Stokes & Lowless*, agents for *Bramwell, Clayton & Clayton*, Newcastle-upon-Tyne (for the defendants).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

PENDER AND OTHERS *v.* SMITH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.,
April 30, 1959.)

Licensing—Offences—“Take from” licensed premises any intoxicating liquor outside permitted hours—Whether offence incomplete until liquor is outside the licensed premises—Licensing Act, 1953 (1 & 2 Eliz. 2 c. 46), s. 100 (1) (b).

A person does not “take from [licensed] premises any intoxicating liquor” outside permitted hours, contrary to s. 100 (1) (b) of the Licensing Act, 1953*, unless and until he takes the liquor outside the licensed premises.

Appeals allowed.

[As to taking liquor from licensed premises outside permitted hours, see 22 HALSBURY'S LAWS (3rd Edn.) 653, para. 1374.

For the Licensing Act, 1953, s. 100 (1), see 33 HALSBURY'S STATUTES (2nd Edn.) 231.]

Case Stated.

The appellants appealed from the decision of His Honour JUDGE LASKI at Liverpool Crown Court on Oct. 7, 1958, dismissing their appeals against their convictions by the Liverpool Magistrates' Court on Sept. 5, 1958, of offences against s. 100 (1) of the Licensing Act, 1953. The facts are stated in the judgment of LORD PARKER, C.J.

Andrew Rankin for the appellants.

G. W. Guthrie Jones for the respondent, the prosecutor.

LORD PARKER, C.J.: These are appeals, by way of Case Stated, from the judge of the Crown Court at Liverpool sitting as recorder of that city, before whom the appellants appealed against their convictions by the stipendiary magistrate of Liverpool of offences against s. 100 (1) of the Licensing Act, 1953. The recorder dismissed the appeals, holding that the offences were proved. Section 100 (1) provides, so far as it is material here, that

“... no person shall, except during the permitted hours ... (b) ... take from, any [licensed] premises any intoxicating liquor.”

The short facts were these. The four appellants had apparently bought a crate of beer from the off-licence portion of the Bow and Arrow Hotel, Mab Lane, Liverpool. They did not remove it at once but they took it into the smoke room of the hotel where they were going to continue drinking on the premises. They were minded ultimately to take the crate away and continue drinking somewhere else. At 10.23 p.m., licensing hours having ended at 10 p.m., they began to remove the crate, and they were in the process of taking it out of the smoke room and into the entrance hall when two police officers entered. The very short question in this case is whether in those circumstances those four men can be said to have taken the crate from any such premises, namely, the hotel.

I do not propose to look at any dictionary or even to consider the various examples of the use of the words “take from”, whether it be larceny from the person or taking a book out of a room or any matters of that sort. It seems to me perfectly clear here from the words used that no offence has been committed until the intoxicating liquor is taken from and gets outside the licensed premises. Accordingly, in my judgment, the police struck too soon and no substantive offence under the section was committed.

I should add that the recorder stated in the Case that if he were wrong he was satisfied, as indeed is clear, that there had been an attempt to commit the statutory offence and that he would be prepared to find them guilty of that

* The relevant part of s. 100 (1) (b) is printed at letter F, *supra*.

A offence. In this court that alternative has not been pursued, if only for the reason that before the stipendiary magistrate these appellants were charged with the substantive offence and not with an attempt to commit an offence. There being no jurisdiction in the magistrate to convict of an alternative offence, namely, of an attempt, even if that were possible, the matter cannot arise here.

In my judgment these appeals must be allowed.

B

DONOVAN, J.: I agree. Counsel for the respondent whose task, if I may say so, excites my sympathy, has had to ask us to read "takes from" in s. 100 of the Licensing Act, 1953, as being equivalent to "found in the process of taking from". One cannot read a penal section in that way. The ordinary and natural meaning of s. 100 in this respect is of a completed act being referred to and nothing else.

C

SALMON, J.: I agree and have nothing to add.

Appeals allowed.

Solicitors: *John Hands & Son*, agents for *John O. Couper*, Liverpool (for the appellants); *Cree, Godfrey & Wood*, agents for *Town clerk*, Liverpool (for the respondent).

D

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

E

PRACTICE DIRECTION

TATE *v.* TATE.

F

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), April 27, 1959.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years—Evidence—Status of hospital—Continuity of care and treatment—Affidavit—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (d)—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 Eliz. 2 c. 54), s. 1 (1) (a), s. 1 (3).

G

During the hearing of a divorce suit on the ground of insanity, the following direction was given:

LORD MERRIMAN, P.: The status under s. 1 (1) (a) of the Divorce (Insanity and Desertion) Act, 1958, of the hospital or other institution in which the patient is received should be established in some way, e.g., by affidavit of the medical superintendent of the hospital or institution concerned. Likewise under s. 1 (3) evidence should be given, if it be the fact, that the care and treatment of the patient has been continuous, save for the permitted interruptions.

H

[*Reported by* N. P. METCALFE, Esq., *Barrister-at-Law.*]

ADAMS AND OTHERS *v.* NATIONAL BANK OF GREECE
AND ATHENS, S.A.

PRUDENTIAL ASSURANCE CO., LTD. AND OTHERS *v.*
NATIONAL BANK OF GREECE AND ATHENS, S.A.

[COURT OF APPEAL (Lord Jenkins, Morris and Ormerod, L.J.J.), March 11, 12, 13, 16, April 29, 1959.]

Conflict of Laws Foreign law—Recognition—Succession, by foreign law, of newly created foreign company to liability of company then dissolved—Subsequent foreign decree altering law of succession so as to exclude retrospectively succession to obligations of dissolved company under English guarantees—Whether decree effective to discharge liability of foreign company on the guarantees.

The plaintiffs were the holders of sterling mortgage bonds issued by a Greek company in 1927, payment of the principal moneys and interest as they became due being guaranteed by the National Bank of Greece, S.A. (referred to hereinafter as "the guarantor bank"). The proper law of the contracts was English. In 1953, by a Greek decree made pursuant to a Greek Act (Statute 2292), the guarantor bank and another Greek company were amalgamated to form a new company, the National Bank of Greece and Athens, S.A. (referred to hereinafter as "the defendant bank"), and the amalgamated companies then ceased to exist. By Statute 2292, the defendant bank became the universal successor to the rights and obligations in general of the amalgamated companies which had been dissolved; but by Decree 3504, which came into force on July 16, 1956, and had retrospective effect, Statute 2292 and the decree of 1953 were amended so as to exclude from the obligations to which the defendant bank had succeeded the obligations of the guarantor bank as guarantors of bonds relating to loans in foreign currency. The plaintiffs presented for payment coupons for interest due on dates subsequent to July 16, 1956, and having received no payment from the issuing company, sought to recover payment from the defendant bank in London.

Held: the plaintiffs were not entitled to recover payment from the defendant bank for the following reasons—

(i) to recognise the retroactive effect of Decree 3504 did not involve any retroactive variation of the original contract of guarantee, whose proper law was English, but only a retroactive variation of the defendant bank's succession by Greek law to obligations of the guarantor bank.

(ii) as it was necessary for the plaintiffs to invoke Greek law in order to establish the defendant bank's succession to obligations of the guarantor bank, so also regard must be had to variation of that Greek law by Decree 3504, which was not penal or confiscatory in nature and was a foreign law which the English court would recognise.

(iii) by Greek law (which before the English court was a question of fact) the effect of Decree 3504 was that the defendant bank had never succeeded to the obligations of the guarantor bank in relation to the sums now claimed, viz., principal sums and interest due on coupons presented after July 16, 1956.

Decision of DIPLOCK, J. ([1958] 2 All E.R. 3) reversed.

[As to the recognition of the dissolution of foreign corporations, see 7 HALLS-BURY'S LAWS (3rd Edn.) 13, para. 22; as to the discharge of contracts, see *ibid.*, p. 82, para. 151; and as to when recognition of foreign law is withheld, see *ibid.*, p. 8, para. 10.]

Cases referred to:

(1) *National Bank of Greece and Athens, S.A. v. Melliss*, [1957] 3 All E.R. 608; [1958] A.C. 509; 3rd Digest Supp.

- A (2) *Lynch v. Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest (Repl.) 394, 513.

Appeals.

B These were appeals by the defendant bank, National Bank of Greece and Athens, S.A., from a decision of DIPLOCK, J., dated Mar. 13, 1958, and reported [1958] 2 All E.R. 3, whereby it was held that the plaintiffs, in three actions which were heard together, were entitled to recover from the defendant bank arrears of interest due to the plaintiffs on sterling mortgage bonds issued in 1927 by the National Mortgage Bank of Greece.

C The law of the contract relating to the bonds was English, and payment of the principal moneys and interest, as they became due, was guaranteed by the National Bank of Greece, S.A. By a Royal Decree* promulgated in February, 1953, under a Greek Statute, Statute 2292* of 1953, the National Bank of Greece, S.A., and the National Bank of Athens, S.A., were amalgamated to form a new company, namely, the defendant bank, and the amalgamated companies ceased to exist. Under art. 4 of Statute 2292, the defendant bank became "the universal successor to the rights and obligations in general of the amalgamated companies, without any other formality or act whatsoever". The defendant bank carried on business in England, having duly registered with the Registrar of Companies the prescribed particulars under the Companies Act, 1948, s. 410. D By Decree No. 3504†, passed by the Greek government on July 16, 1956, amendments having retrospective effect were made to Statute 2292 and the decree of 1953. E As a result of these amendments, the obligation of the National Bank of Greece, S.A., as guarantor of the sterling mortgage bonds was excepted from the obligations of that bank to which the defendant bank had become the successor.

F Coupons for payment of interest which had become due after July 16, 1956, were duly presented by the plaintiffs to the paying agents of the National Mortgage Bank of Greece, and notice thereof was given to the defendant bank. As the plaintiffs failed to receive any payment, they brought these actions against the defendant bank. It was contended by the defendant bank that by virtue of Decree 3504 the bank was not liable as guarantor of the interest payable on the mortgage bonds. DIPLOCK, J., having given judgment for the plaintiffs, the defendant bank appealed to the Court of Appeal.

G *T. G. Roche, Q.C.*, and *N. H. Lever* for the defendant bank.
J. G. Foster, Q.C., *Mark Littman* and *L. J. Blom-Cooper* for the plaintiffs.

Cur. adv. vult.

Apr. 29. LORD JENKINS‡: The judgment about to be read by MORRIS, L.J., is the judgment of the court in these appeals.

H MORRIS, L.J., read the following judgment of the court: The question which is raised in these appeals is whether the defendant bank is liable for the amounts of certain interest payments and principal sums which in the first instance became due from the National Mortgage Bank of Greece as principal debtors on dates subsequent to July 16, 1956. The amounts were due in respect of sterling mortgage bonds issued by that bank in 1927. Interest payments, I on coupons duly presented, became due to various holders on dates between July 28, 1956, and Aug. 22, 1956. One of the actions now under appeal relates to these amounts. That action was commenced by writ dated Sept. 17, 1956. Another of the actions relates to interest payments which became due on dates

* The relevant terms of the decree and of Statute 2292 are printed in full in [1958] 2 All E.R. at p. 4.

† The terms of Decree No. 3504 are printed at p. 364, letters E to I, post.

‡ LORD JENKINS was appointed Lord of Appeal in Ordinary on Apr. 6, 1959.

subsequent to Aug. 9, 1956. That action was commenced by writ dated June 4, 1957. A third action relates to the amounts of certain principal sums which became due on Dec. 1, 1957, and to certain arrears of interest. That action was commenced by writ dated Jan. 17, 1958. In each case the claims indorsed on the writs were expressed to be against the defendant bank "as guarantors". Certain matters which were raised at the hearing of the third action have not been debated in this court and the issues relating to the liability of the defendant bank are common to the three appeals.

The payment of the principal moneys and interest as they became due from the National Mortgage Bank of Greece had been guaranteed by the National Bank of Greece. The last named bank no longer exists. The facts relating to the bonds and the circumstances in which the last named bank came to be extinguished and the defendant bank came into existence are authoritatively recorded in the speech of VISCOUNT SIMONDS in *National Bank of Greece and Athens, S.A. v. Melliss* (1) ([1957] 3 All E.R. 608 at pp. 609, 610). The National Mortgage Bank of Greece, the principal debtor, remains in existence, but apparently does not flourish to an extent that has enabled it to pay the sums due. The significance of the date, July 16, 1956, is that Greek law was then changed as a result of the passing of Legislative Decree No. 3504. That decree was not in issue in *National Bank of Greece and Athens, S.A. v. Melliss* (1).

Decree No. 3504 amended the provisions of para. 2 of art. 4 of Statute 2292 of 1953 and the amendment was to have retrospective effect. Decree No. 3504 further provided for the abolition of para. 5 of the Royal Decree of Feb. 26/27, 1953. The provisions of Decree No. 3504 were as follows:

"Article 1. Paragraph 2 of art. 4 of Statute 2292/53 'on the amalgamation of limited liability banking companies' is replaced as from the time it came into force with the following: 'The company which has absorbed another company by amalgamation or the new company created by amalgamation becomes the universal successor to the rights and obligations of the companies amalgamated without the necessity of any other formality or action, with the exception of the obligations of these companies as principal debtors, guarantors or for any other cause deriving from bonds, securities in general or contracts or any other cause and relating to loans in gold or foreign currency by bonds or otherwise payable to the bearer issued by the limited liability companies, juridical persons of public law, municipalities and communes, etc. The company which has absorbed another company or is newly created by amalgamation does not acquire nor is it considered as having acquired by virtue of this present or other statute or decree or articles of association published in pursuance of this present law or in any other manner the above obligations deriving from loans in gold or foreign currency until a law is passed providing the extent and the manner in which they will become subject to these obligations.

"Article 2. Paragraph 5 of article sole of the Royal Decree dated Feb. 26/27, 1953, 'on the amalgamation of the National Bank of Greece and the Bank of Athens by the creation of a new limited liability banking company' is abolished as from the time of its publication. The rights and obligations of the new limited liability banking company created by the said decree under the name of 'National Bank of Greece and Athens S.A.' are governed as from the time the company was created by the relative provisions of Statute 2292/1953 as amended by the present law.

"Article 3. The present comes into force as from its publication in the Government Gazette."

The effect of Legislative Decree No. 3504 was, therefore, that the rights and obligations of the defendant bank (which was created by the Royal Decree dated Feb. 26/27, 1953, promulgated under the provisions of Statute No. 2292/

A were governed, as from the time that the defendant bank was created, by the relative provisions of Statute 2292 as amended by Legislative Decree No. 3504. The result was that by legislation having retrospective effect there was no succession to the obligations of the National Bank of Greece as guarantors of the bonds with which this litigation is concerned.

B The evidence showed that under Greek law, if the moratorium statutes* were left out of account, the defendant bank would have been held liable as successors to the guarantors in respect of interest coupons presented before the passing of Decree No. 3504 in actions heard before the passing of such decree, but would not have been, nor would be, held liable in respect of coupons presented after such decree. Under Greek law, therefore, if the present claims had been put forward against the defendant bank in the Greek courts they would have failed, even had there been no moratorium statutes in existence. Herein lies a difference between the claims now made and the claim made by Mr. Metliss which, had there been no moratorium statutes, could have been upheld in the Greek courts.

C On what basis, then, are the present claims advanced in this country against the defendant bank? The answer to this must be sought by referring to the statements of claim. For convenience we refer to the statement of claim in the action commenced in 1956. Paragraphs 1-4 set out that the plaintiffs were the bearers of certain bonds, set out the terms and the modified terms of such bonds, and record that the National Bank of Greece had unconditionally guaranteed the due payment of the principal moneys and interest. Paragraph 6 and para. 7 allege that the mortgage bank were in arrears with interest payments after coupons had been duly presented for payment and allege that notices had been given to the defendant bank which had not paid the amounts of the interest payments. The facts alleged in those paragraphs were all either proved or admitted. The basis of the claim against the defendant bank was put forward in para. 5 of the statement of claim as follows:

F "The [defendant bank is] a corporation constituted under the laws of Greece and carrying on business (inter alia) at 6, Old Jewry, E.C.2 in the County of London. By a Greek Decree dated Feb. 26, 1953, and/or art. 4 of a Greek Act No. 2292 the entire assets and liabilities of the National Bank of Greece (including their liability under the said guarantee) was transferred to the [defendant bank] as the universal successor of the National Bank of Greece."

G It was, however, proved in evidence that when the plaintiffs brought their action the defendant bank was not, by Greek law, liable to the plaintiffs. How then can the plaintiffs succeed? To advance on the road to success they must place dependence on Greek law. This is shown by the speeches of their Lordships in *National Bank of Greece and Athens, S.A. v. Metliss* (1). What the plaintiffs have done in the present actions is, in the first place, to assert and to rely on Greek law, but to set up Greek law in the form in which it was enacted in February, 1953, and which was to their advantage, and to claim to be entitled to ignore the amendments to the Greek law made in July, 1956, which are to their disadvantage. The question raised in the appeals is whether so singular a process of selectiveness can be justified.

H It seems to us that those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognise that Greek law can disendow. If they aver that Greek law can create, they must

I *The effect of the moratorium statutes was stated by Viscount SIMONDS in *National Bank of Greece and Athens, S.A. v. Metliss* (1) ([1957] 3 All E.R. at p. 613).

accept that Greek law can change. If they need to have the foundation of Greek law on which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is. A

Though the proper law of the bondholders' contracts was English law, and though, therefore, no foreign sovereign authority could vary the terms of the contracts, the bondholders must always have recognised that the existence of the Greek guaranteeing bank could be terminated by Greek law. If that happened, the contract, as such, would not be altered though the guarantor would disappear. That was always a risk that the bondholders ran. The guaranteeing bank was extinguished by Greek law. A new Greek bank, the defendant bank, was created by Greek law. By Greek law it was given certain attributes and certain duties. One duty was to pay certain sums which the defunct bank, as guarantor, would have been liable to pay. The question raised in the *Melliss* case (1) was whether in a suit in England this obligation under Greek law could found a claim. VISCOUNT SIMONDS referred in his speech to the importance and novelty of the question raised, and he proceeded ([1957] 3 All E.R. at p. 609): B

"... I am not aware of any case, nor has the industry of learned counsel discovered one, in which, in the courts of this country, a plaintiff has, without a plea of novation or statutory assignment, recovered a sum due under a contract from one who was not a party to that contract." C

Then LORD SIMONDS said (*ibid.*, at p. 612): D

"But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognise the fact that the new company exists by the law of its being but to recognise also what it is by the same law. It is conceded that its status must be recognised. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognising its existence, if we do not also recognise the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognise the new company as a juristic entity, neither the Greek government, the creator, nor the new company, its creature, can complain that we, too, clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done." E

LORD TUCKER, in his speech, said (*ibid.*, at p. 615): F

"The identity of the old bank has become merged in the amalgam by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognise the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognise that part of the decree which has extinguished the old bank but to refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellants and, accordingly, governed by the law of its domicile." G

Now, however, by reason of the passing of Decree No. 3504, the position is different. How, then, are the claims supported? The learned judge was of the opinion ([1958] 2 All E.R. at p. 8) that the rights which the plaintiffs are H

A seeking to enforce are contractual rights, and are none the less so because the legal person against whom they seek to enforce them

B "... was not originally a party to the contract, but has been substituted as a party by operation of a law (albeit passed by the Greek government) which the English courts recognise as effective to bring about the substitution."

C But, in our judgment, the defendant bank has not been substituted as a party to the contract. In his speech in the *Melliss* case (1) LORD SIMONDS pointed out that there was no plea of novation or statutory assignment and that novation could not be alleged. The relevant paragraph in the statement of claim in that action was as follows:

D "7. The defendants are a corporation constituted under the laws of Greece and carrying on business inter alia at 6, Old Jewry, E.C.2, in the County of London. By a Greek decree dated Feb. 26, 1953, the entire assets and liabilities of the National Bank of Greece (including their liability under the said guarantee) were assigned and transferred to the defendants."

E The contract of guarantee which was entered into by the National Bank of Greece was a contract to be governed by English law. The Greek legislature could not alter the terms of that contract. The Greek legislature could, however, terminate the existence of the guaranteeing bank. When it did so, it created the defendant bank and charged it with the responsibilities of the defunct bank. That was fortunate for the bondholders for they could assert that, though the defendant bank was a stranger so far as their contractual rights were concerned, yet by reason of the comity between states they could invite the English courts to recognise the status and the attributes of the new entity. Now it is said that Decree No. 3504 may be ignored because it is a foreign law which purports to discharge contractual liabilities. But there were no contractual liabilities as between the defendant bank and bondholders.

F It was further held by the learned judge that after the defendant bank came into existence the bondholders acquired vested rights in English law as against the defendant bank and that the English courts ought not to give effect to any foreign legislation which purported to annul such vested rights. An examination of that conclusion need not depend on considering the precise applicability of the word "vested". The position was that on various dates after July 16, 1956, the plaintiffs became contractually entitled to receive sums of money, in the first place from the National Mortgage Bank of Greece, and, in the event of failure by that bank to pay, from the National Bank of Greece: if they had owned their bonds in the period between Feb. 27, 1953, and July 16, 1956 (which they may or may not have done), they would have known that their rights as against the National Bank of Greece (if recourse to that bank as guarantors became necessary) would be unavailing for the reason that that bank had ceased to exist: they would, however, in that period, in the event of default by the National Mortgage Bank of Greece, have been able to sue the defendant bank in England for amounts becoming due in that period. But the basis of their potential claims against the defendant bank was that which is laid down in the *Melliss* case (1). In the period before July 16, 1956, bondholders would, in respect of amounts to become due in the future (assuming that they knew the law), have looked forward to the expectation of being able, if need be, to claim in the future against the defendant bank. But that would be on the assumption that Greek law remained as it was.

It seems to us that, if it is alleged that a foreign company has the status of a successor to another foreign company so as to make it liable to pay a particular debt which would have been payable by the old company under a contract, it becomes a question of fact whether the foreign law did at the material time bestow such a status. When Greek law was changed by Decree 3504, the effect so far as bondholders were concerned, was to remove the prop of Greek law on which they could have hoped to have founded claims against the defendant bank. It does not seem to us that an English court could any more refuse to recognise the fact of a change in Greek law than it could refuse to pay attention to any other relevant fact. The fact that Decree 3504 was made retrospective is not of consequence in these appeals, which relate to amounts which became due after the passing of Decree 3504. It might be, though this possibility does not affect any question of liability, that some of the plaintiff bondholders only became owners of their bonds after the passing of the decree.

It is said that Decree 3504 is not a law of succession and that, as it was passed after the defendant bank came into existence, it should, in any event, not be recognised as a law of succession as regards the defendant bank. It is further said that it does not become a law of succession by being made retrospective. We do not derive assistance from the attempt to apply to Decree 3504 some label of precise description. Decree 3504 seems, at least so far as art. 1 is concerned, to be a general law which, modifying Statute 2292, was to be of general application to company amalgamations. But whether "law of succession" is or is not the appropriate description, the decree does, in our judgment, redefine and vary the status and the attributes applied by Greek law to the defendant bank. It is said that the decree should be regarded, not as a law of succession, but rather as a law of discharge, because it was passed after the defendant bank came into existence and because its effect was to exonerate the defendant bank from further liability: to this is added the submission that bondholders cannot by a foreign decree be deprived of their rights under a contract governed by English law. But these submissions do not take due account of the nature of the bondholders' present claims. The claims are not claims in contract against the defendant bank. Until Greek law was altered, the position was, as LORD KEITH OF AVONHOLM pointed out in his speech in the *Melliss* case (1) ([1957] 3 All E.R. at p. 617), that the defendant bank represented and stood in the shoes of the contractual guarantor, the National Bank of Greece. They have not done so since the passing of Decree 3504.

This does not mean that there was any purported interference with contracts governed by English law. As VISCOUNT SIMONDS said in his speech in the *Melliss* case (1) ([1957] 3 All E.R. at p. 613):

"Clearly the obligations in English law (the proper law of the contract) could not be affected by a Greek law which purported to vary its terms."

The contracts remain unaffected by any of the Greek legislation. There was, however, a period when the law of Greece directed the defendant bank to undertake certain liabilities: while that period lasted bondholders found a substitute for their contractual debtor: but it was just as competent for the Greek sovereign power to terminate the period as it was for such power to originate it. The effect of the new decree may be to deprive bondholders of a hope to which they had looked forward, but their hope had as its basis the further hope that Greek law would remain as it was. It was fully within the competence of the Greek sovereign power to pass Decree 3504. When the law was changed, there was, so far as bondholders were concerned, the withdrawal of what had resulted to their

A advantage: but that does not mean that Decree 3504 was either confiscatory or discriminatory in its scope or was of the nature of a penal or revenue law or that English public policy could demand that it be not recognised. All bondholders alike would be affected by the change in the law. Nor does it seem to us that the respondents can derive assistance from *Lynch v. Paraguay Provisional Government* (2) ((1871), L.R. 2 P. & D. 268). If English law lays it down B that the succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death, then any change in the law of the place of domicile after the death of the deceased becomes irrelevant and immaterial. LORD PENZANCE pointed out how inconvenient and unjust might be the consequences if English law adopted a different rule C under which it was necessary to give effect to retrospective changes that the legislative authority of the foreign country might later make in that law.

It is said that at the time of the Decree of February, 1953, though bondholders would appreciate that the assets of the National Bank of Greece were being taken over by the defendant bank, yet they (the bondholders) might refrain D from taking any steps open to them in England under the Companies Act, 1948, because of the knowledge that the defendant bank was being charged with the liabilities of the National Bank of Greece: it is said that, as the defendant bank did take over the assets of the defunct bank, and as such assets would no longer be assailable at the instance of bondholders, any enactment which relieves E the defendant bank of any obligation to bondholders should be regarded as being confiscatory in nature and one which on principles of natural justice should be disregarded. In our judgment, however, any bondholders who had looked ahead to an expectation of claiming, if necessary, against the defendant bank must have recognised that their recourse against the defendant bank would depend, not on any contractual rights, but on establishing that by Greek law the defendant bank was required to discharge certain obligations. That they cannot now do. F The reflection that in the past, and in reference to obligations accruing in the past, they could have done so may give rise to disappointment but does not establish any present liability in the defendant bank. In our judgment the bondholders fail to show that they can recover from the defendant bank and we allow the appeals.

Appeals allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Stibbard, Gibson & Co.* (for the defendant bank); *Herbert Smith & Co.* (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ACKROYD & SONS v. HASAN.

[QUEEN'S BENCH DIVISION (Winn, J.), April 23, 24, 1959.]

Estate Agent—Commission—Agreement to pay commission on introduction of a party prepared to enter into a contract to purchase on terms communicated to agent or on such other terms to which vendor might "assent"—Purchasers found who were prepared to enter into a binding contract to purchase on terms communicated to agent—Sale not completed because of additional terms put forward by vendor—Whether estate agent entitled to commission.

The defendant, who was the lessee of certain premises, instructed the plaintiffs, a firm of estate agents, to sell her interest in the premises, together with the goodwill of a catering business she carried on there, on the terms, among others, that the sale was to be subject to the grant of a tenancy of the second floor of the premises to the defendant's husband. In a letter to the defendant, confirming the terms of their instructions to sell her property, the plaintiffs wrote, "we should take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission". Subsequently, the plaintiffs introduced two prospective purchasers who were prepared to enter into a binding contract to purchase the defendant's property on the terms communicated by the defendant to the plaintiffs, including granting a tenancy of the second floor to the defendant's husband. However, before contracts were exchanged between the parties but after the purchasers had signed their part of the contract, the defendant instructed her solicitor that she now wanted her husband's tenancy to include part of the first floor of the premises, as well as the second floor. As a result of this matter, the negotiations (which were subject to contract) broke down and the sale was never completed. In an action by the plaintiffs for commission,

Held: the plaintiffs were not entitled to commission from the defendant because the phrase used by them to describe the event on which commission was payable, viz., the introduction of "a party prepared to enter into" a contract, must be construed as meaning a party "who does enter into" a contract to purchase, and the plaintiffs had failed to introduce such a person; further, the defendant did not "assent", within the meaning of the commission agreement, to the terms of the contract since she had never reached the stage of agreeing to be contractually bound by them.

John E. Trinder & Partners v. Haggis ([1951] W.N. 416) not followed.

[As to estate agents' commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198, para. 457; and for cases on the subject, see 1 DIGEST 458-528, 1011-1867.]

Cases referred to:

- (1) *Trinder (John E.) & Partners v. Haggis*, [1951] W.N. 416; 2nd Digest Supp.
- (2) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (3) *Peter Long & Partners v. Burns*, [1956] 3 All E.R. 207; *affg.*, [1956] 2 All E.R. 25; 3rd Digest Supp.

Action.

This was a claim by estate agents, Ackroyd & Sons, the plaintiffs, for commission amounting to £404 7s. 6d., which they alleged was due to them under the terms of an agreement made between the plaintiffs and Ida Hasan, the defendant. The defendant was the lessee of certain premises at 11 Wardour Street, London, W.1, where, together with her husband, she carried on a catering business known as the Stage Door Grill; the catering business was carried

A on in the basement and on the ground floor of the premises, while the first
floor was used as a store for food and drink and the second floor was used for
the purposes of a non-residential club which was primarily conducted by the
defendant's husband. On July 23, 1956, the husband, acting on the defendant's
B behalf, orally agreed to employ the plaintiffs to sell the defendant's leasehold
interest in the premises together with the catering business carried on there,
on the understanding that the prospective purchaser should grant the husband
a tenancy of the second floor so that he could continue to run the club.
Accordingly, by a letter dated July 24, 1956, addressed to the husband, the
plaintiffs wrote as follows:

C "re: 11, Wardour Street, W.1. Following our meeting of yesterday we
are pleased to confirm, with thanks, receipt of your instructions to offer for
sale your leasehold interest in the above property together with the business
of the Stage Door Grill on the ground floor and basement in the sum of
£12,000 s.a.v. [i.e., stock at value] it being agreed that you shall take a
D tenancy of the second floor at a rent of £500 per annum exclusive . . .
we should take this opportunity of confirming that in the event of our
introduction of a party prepared to enter into a contract to purchase on
the above terms or on such other terms to which you may assent you will
allow us commission."

The defendant accepted the services of the plaintiffs on the above terms except
that later she agreed to reduce the purchase price to £9,750. Acting under their
instructions, the plaintiffs introduced to the defendant two Chinese gentlemen
E (hereinafter referred to as "the purchasers") who were interested in purchasing
the premises and in carrying on a restaurant there, and negotiations for the
sale of the property were then begun between the respective solicitors acting
for the purchasers and the defendant, on the basis that the negotiations were
subject to contract. On Jan. 10, 1957, the purchasers' solicitors wrote to the
defendant's solicitor:

F "11, Wardour Street, W.1. . . . We now enclose herewith our clients'
part of the contract signed, together with draft underlease [of the premises
on the second floor] approved . . . Please let us have your client's part of
the contract in exchange as soon as possible."

G The defendant's solicitor acknowledged receipt of that letter, and on Jan. 14,
he wrote to the purchasers' solicitor saying that the contract had been for-
warded to his client (the defendant) for signature, on the basis that certain
further amendments to the draft underlease would be agreed; these amendments
were agreed by the purchasers' solicitor. In a letter dated Jan. 16, enclosing
a cheque for the balance of the deposit due from the purchasers, the purchasers'
H solicitor intimated to the defendant's solicitor that the purchasers did not want
to take over the stock of the catering business (an obligation which, it had been
made clear to the plaintiffs, was a condition of the transaction). Thereafter,
difficulties arose because the defendant insisted that a storeroom on the first
floor of the premises should now be included in the underlease to be granted
by the purchasers to her husband, and as a result, the negotiations for the sale
I broke down before contracts were exchanged between the purchasers and the
defendant (the vendor).

The plaintiffs now contended that on the true construction of the letter dated
July 24, 1956, they were entitled to be paid commission by the defendant.

Harold Lightman, Q.C., and E. A. Seeley for the plaintiffs.

D. P. Croom-Johnson, Q.C., and P. H. Ripman for the defendant.

WINN, J.: In this case, which is a claim for commission by a firm of estate
agents, I have received the very greatest help and assistance from learned
counsel who have appeared before me. There is a great body of authority on

this topic which, in a very tantalising way, almost touches the point which I have to decide; but, as has been repeatedly recognised, each of these cases in reality is a new case.

[His Lordship, having stated the facts and referred to the terms of the letter of July 24, containing the contract for payment of commission to the plaintiffs, went on to refer to the negotiations which took place between the purchasers' solicitor and the defendant's solicitor. His Lordship said that he could not find that the purchasers were not prepared to enter into a binding contract, since, in his opinion, the letter of Jan. 16 from the purchasers' solicitor merely indicated that the purchasers would prefer not to take over the stock and did not amount to a repudiation of their obligation to do so. His Lordship continued:] This is a case in which the contemplated transaction very nearly came off, but in fact did not come off, between the parties to it. Counsel for the plaintiffs told me quite frankly in his opening that he accepted the position that there was never any binding contract, that there was never any enforceable contract in law or equity between the defendant and the purchasers. On the other hand, it is quite plain that the estate agent had done all that he could possibly be expected to do in the circumstances, and probably rather more than he could have been called on to do, because he appears to have smoothed out certain hitches which arose and encouraged both parties to think they were getting a good bargain. There was nothing more for the solicitors to do either; they had negotiated between themselves all the legal points and phraseology which is necessary for solicitors to agree on behalf of their respective clients. In those circumstances one turns, as indeed counsel for the plaintiffs quite rightly invited me to turn, to consider whether the event stipulated in the commission contract, as that on which the right to commission would accrue, did or did not occur.

It seems to me to be perfectly plain, as a general proposition of the law of contract, and not as a special rule relating to estate agents' or commission contracts, that in the case of a contract for the provision of a reward one must always look to see what is the precise definition in the contract of the event on which that reward will be earned. By a contract for the provision of a reward I mean, not necessarily a contract whereby one party agrees to render services to the other, because estate agents do not agree to render services to the owners of property, but a contract whereby one party agrees that if services are rendered to him by the other, or if he gains an advantage as a result of having availed himself of some facility or knowledge of the other party, he will reward the other party. In this case, therefore, one comes back to the words of the letter of July 24:

"in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission."

After a careful survey of the relevant cases which has been made by learned counsel for my assistance, I have come to the conclusion that there is no case precisely in point. *John E. Trinder & Partners v. Haggis* (1) ([1951] W.N. 416) is so very near to the present case that I feel difficulty, but no logical difficulty, in taking a view of the present case which arrives at a result opposite to that arrived at by the majority of the Court of Appeal in that case*. In this type of contract one must look with very great precision at the definition of the event. I am of the opinion that, whatever may have been the position in which I should have found myself had I been deciding this case in the 1940's, shortly after the decision in *Laurer (Eastbourne), Ltd. v. Cooper* (2) ([1941] 1 All E.R. 33), I am

* In *Trinder v. Haggis* (1) the relevant words used were "In the event of [the estate agents] being successful in introducing a person willing to sign a contract to purchase, commission would be payable; in the present case, the words used by the estate agents were "in the event of our introduction of a party prepared to enter into a contract to purchase".

A new constrained by the philosophy implicit in the judgments in cases decided in 1950 and 1952*, rather than by any express direction from the Court of Appeal, to regard the introduction, into the definition of the operative event on which commission will be earned, of the phrase "prepared to enter into a contract" as a nullity. If that phrase is sought to be construed against the owner of the property, in my opinion it amounts to a nullity in law, so that one ignores the phrase and construes the document, as a matter of law, as though it did not contain the words "a party prepared to enter into a contract", but¹ contained in place of those words, "a party who enters into a contract".

I need not at this late stage in the line of authorities, and after they have been so carefully examined in this court, refer to the repeated observations, not only of LORD DENNING but of others, to the effect that it makes no difference whether one says: "Introduce a party who purchases", "Introduce a party who is ready to purchase", "Introduce a party who is prepared to purchase", or "Introduce a party ready and able and willing to purchase". In all those cases the meaning is equivalent to "Introduce a party who does purchase". It is a matter of following the philosophy and the reasoning rather than any express direction in any of the judgments. I hold as a matter of construction that this phrase "introduction of a party prepared to enter into a contract" means precisely the same as "introduction of a party who does enter into a contract to purchase".

Of the cases which have been cited to me the judgment of LORD GODDARD, C.J., in *Peter Long & Partners v. Burns* (3) ([1956] 2 All E.R. 25) gives me the greatest help. In that case the relevant words were "introducing a person ready, willing and able to enter into a binding contract to purchase". The purchaser was perfectly ready and able and willing to enter into a binding contract; he signed a contract which was not binding only *ex post facto*, because it was induced by an innocent misrepresentation on a town and country planning matter. I think that counsel for the defendant was convincing when he submitted that, for the sake of certainty and clarity, and because of the necessity of being able to say at what point if any the contract bites on the owner of the property in favour of the estate agent, it is necessary to have the one clear and undoubted criterion—Has there been a contract? In a case, such as this, where the parties had been negotiating subject to contract, all appreciating that until both parts of the contract had been exchanged there would be a *locus poenitentiae* for each party, that criterion means—have contracts been exchanged?

I find some help in arriving at that view when I look at the last paragraph of the letter of July 24 where I notice the disjunctive effect of the word "or". It seems to me that that is consistent with the general approach which the courts have urged that judges should make towards this type of contract. The meaning consequent on that word "or" must be this:—that the terms effectively contemplated and communicated to the agents were that they were to offer for sale the leasehold interest in the property together with the business of the grill for the sum of £12,000, with a regrant to the defendant's husband of a tenancy of the second floor at a rent of £500 per annum: commission was to be payable on the introduction of "a party prepared to enter into a contract to purchase on the above terms"—"or", by contrast, "on such other terms to which you may assent". Part of my reason for coming to the conclusion which I have formed, is that in that context the word "assent" means, I think, finally assent at the last moment of time at which the property owner will be contacted, when the negotiations have proceeded to that final stage, to say—

"these are the precise terms to which I give my concluded and considered assent". I do not think that it is permissible to construe in favour of the estate

* See e.g., *Bennett, Walden & Co. v. Wood*, [1950] 2 All E.R. 134, *Graham & Scott (Carthage), Ltd. v. Orford*, [1950] 1 All E.R. 856, and *Midgley Estates, Ltd. v. Hamd*, [1952] 1 All E.R. 1394, which were cited to the court.

agent and against the property owner in such a contract as this the word "assent" as meaning a half-considered assent given on the basis that the property owner will not finally be committed until the time comes for exchanging formal contracts.

[His LORDSHIP then made the following findings of fact. The defendant's solicitor had not at any time misunderstood his client's instructions or exceeded his authority on her behalf. It was only in January, 1957, that the defendant told him that she had overlooked that it was necessary for her husband to retain the use of the storeroom on the first floor of the premises, in connexion with his club on the second floor, and it was because of this matter that the negotiations for the sale of the premises broke down. His LORDSHIP continued:] I accept counsel for the defendant's submission in law that solicitors dealing, as these respective solicitors were dealing, with the preparation of the final contractual documents and the smoothing away of difficulties, have no authority from their clients to make any bargain or to negotiate any terms; they are simply the mouth-pieces to communicate what their respective clients tell them. It seems to me, therefore, that in so far as Mr. Blum* passed on to Mr. Webber† what he had been instructed to say by the defendant, or drew up in writing any provision consistent with any instructions he had received, the defendant was, through him, giving her assent; and I do not think that it would be right in this case to say that anything which Mr. Blum agreed with Mr. Webber, or put forward to Mr. Webber as being agreed, was assented to by him in the function of a solicitor acting within his ostensible authority. It is my construction of the word "assent" in this commission document that such assent as was given by the defendant through Mr. Blum, or through her husband, at any meeting was not an assent within the meaning of this contract, which relates only to an assent given with the intention of being contractually bound to the same extent as the assent.

I do not think that it is necessary for me to say any more. For the reasons which I have endeavoured to indicate, and without pretending that I have found this case anything but difficult as well as interesting, in my judgment this claim fails.

Judgment for the defendant.

Solicitors: *Pratt & Sidney Smith* (for the plaintiffs); *R. C. de M. Blum* (for the defendant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* The defendant's solicitor.

† The purchasers' solicitor.

NOTE

BRUEN v. BRUCE AND ANOTHER.

[COURT OF APPEAL (HODSON and MORRIS, L.J.J., and PILCHER, J.), April 28, 1959.]

County Court—Appeal—Note of judgment—Incomplete note—Counsel's note should be available on appeal after having been submitted to county court judge.

[As to supplying the judge's note on appeal from the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 328, para. 794; and for cases on the subject, see 13 DIGEST (Repl.) 481, 482, 1058-1072.]

For R.S.C., Ord. 58, r. 18 (5), see ANNUAL PRACTICE, 1959, p. 1703.]

Case referred to:

(1) *Hayman v. Rowlands*, [1957] 1 All E.R. 321; 3rd Digest Supp.

Appeal.

This was an appeal from the decision of His Honour Judge LAWSON CAMPBELL at Luton County Court on Nov. 21, 1958. The appeal was dismissed, the last judgment being delivered by HODSON, L.J., who after concurring in the dismissal of the appeal, made in conclusion, the following observations in relation to the note of the judgment of the county court judge.

Ian Percival and *D. H. Wild* for the appellant.

Michael Hoare for the respondent.

HODSON, L.J.: I desire to say a word on another matter which has arisen in this case. There was no note of the learned judge's reasons for his decision and, as is common practice, counsel's note was written out and agreed with the other side. Unfortunately it was not submitted to the learned judge before the appeal came on for hearing, so that he had no opportunity of checking it. I desire to draw attention to the terms of R.S.C., Ord. 58, r. 18 (5), which this court has previously done in *Hayman v. Rowlands* (1) ([1957] 1 All E.R. 321). It is, I think, convenient, where there are only notes of evidence and no notes of the learned judge's judgment, except a very brief note, that counsel's note should be available; but the correct practice is that counsel's note should be used only after it has been submitted to the learned judge. I will not re-read the terms of the rule, which was read by DENNING, L.J., in *Hayman v. Rowlands* (1). The learned judge not having had the note submitted to him for approval, this court had to decide what course should be taken, and we decided to hear the appeal. If, however, this court had been in favour of the appellant's argument we would not have given judgment in a final form, as we intimated at the outset, until the learned county court judge had had an opportunity of seeing the notes of his judgment which was being criticised in this court. The appeal having failed, no further question arises.

Appeal dismissed.

Solicitors: *T. D. Jones & Co.*, agents for *Tearle & Herbert Jones*, Luton (for the appellant); *Machin & Co.* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE

ROSS v. RIVENALL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.),
April 30, May 1, 1959.]

Road Traffic—Motor vehicle—Taking and driving away without owner's consent—Accused not the driver—Evidence that occupants of motor vehicle were acting in concert—Sufficiency of evidence—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 28.

Insurance—Motor insurance—Third-party risks—Using vehicle taken and driven away without owner's consent—Accused not the driver—Evidence that occupants of motor vehicle were acting in concert—Sufficiency of evidence—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 35.

[As to the offence of taking and driving away a motor vehicle without authority, see 31 HALSBURY'S LAWS (2nd Edn.) 676, para. 1002.]

As to compulsory insurance against third-party risks, see SUPPLEMENT to 31 HALSBURY'S LAWS (2nd Edn.), para. 1205.

For the Road Traffic Act, 1930, s. 28 and s. 35, see 24 HALSBURY'S STATUTES (2nd Edn.) 598, 602.]

Case Stated.

This was a Case Stated by the Recorder of West Ham on appeal to him by the appellant, Raymond Kenneth Ross, from two convictions by a magistrates' court sitting at West Ham on Sept. 8, 1958. The appellant had been charged by the respondent, John Rivenall, a detective constable of the Metropolitan Police with the following offences, that between Aug. 29 and 30, 1958, at Frederick Street, Stratford, E.15 (i) he unlawfully took and drove away a Ford Consul motor car without having either the owner's consent or other lawful authority, contrary to the Road Traffic Act, 1930, s. 28, and (ii) he unlawfully used a motor vehicle without there being in force in relation to the user of the vehicle a policy of insurance or such security in respect of third-party risks as complied with Part 2 of the Act of 1930, contrary to s. 35 of the Act of 1930. At the hearing of the appeals on Sept. 29, 1959, the following facts were found. Between 7.30 p.m. on Aug. 29, 1958, and 8.30 a.m. on Aug. 30, 1958, a Ford Consul motor car, the property of the Stratford Car Hire Co., was unlawfully taken and driven away from the company's premises at Frederick Street, Stratford, E.15, without the owner's consent or other lawful authority. The car had been left locked and closed (though one of its window catches was faulty) and with no key left in it. It had only enough petrol in it to run for a distance of about six miles. At 1.55 a.m., at the junction of Woolwich Road and Westcombe Hill, the car was seen being driven by a man called Richards. A man called Goodier was the front passenger, and a man called Waddington and the appellant were sitting in the back. When the car was seen by the police, Waddington and the appellant were sitting very low in the rear seat, with their feet outstretched and their heads back. When the police sergeant went up to question them, leaning through the door of the car, they stayed in the same position. Neither made any attempt to run away. The car apparently ran out of petrol at the junction, and Richards and Goodier started to push it back off the crown of the road on to its nearside kerb. Goodier also asked a nearby policeman where to get petrol. When all four men were told they would be arrested for being in unlawful possession of the car, none of them made any reply after caution. At the police station, when the appellant was asked how he came to be in the car, he said "A bloke stopped and asked me if I wanted a lift, so I got in". When all four men were seen in the car, the car's ignition

A and oil lights were both on but there was no ignition key in the lock. An examination of the wiring showed that one fuse had been removed and placed between the wires of the starter (thus enabling the car to run without ignition). There was no damage to the doors.

At the end of the case for the prosecution, it was contended by the respondent that no further evidence of association between the driver and the appellant was necessary by the prosecution to make out a *prima facie* case. The prosecution need only prove two facts in order to make out a *prima facie* case here, namely, that (i) the vehicle concerned had been unlawfully taken and driven away by somebody without the owner's consent or other lawful authority, and (ii) the appellant was a passenger in the circumstances of the case. It was for the appellant to give evidence to satisfy the court that he had, or reasonably thought he had, lawful authority for being where he was when arrested, and, until such time or such evidence was given by him or on his behalf, then a *prima facie* case against him remained. In any event, the prosecution had proved that the appellant was using the vehicle for which there was no insurance.

The recorder came to the conclusion that the prosecution had failed to make out a case on either charge for the appellant to answer. He was of opinion that the facts were reasonably consistent with the conclusion that the appellant might well have been an innocent passenger and that the prosecution had failed to prove to the contrary. He, therefore, allowed the appeal. The question for the opinion of the court was whether, on the above facts, he came to a correct determination and decision in point of law.

R. J. Trott for the appellant.

Paul Wrightson for the respondent, the prosecutor.

LORD PARKER, C.J., stated the facts, and continued: Where, as here, four men are found in a motor car out of petrol, at 1.55 a.m. six miles from where the car was taken, and, when arrested, say nothing, there clearly was, I think, a case to go to the jury, if there was a jury, that the four men were acting in concert. If that does not constitute evidence of acting in association together, it would be well nigh impossible in cases of this sort to prove a case against anyone except the driver of the car.

The learned recorder was clearly impressed by the fact that a police officer gave evidence that, when these men had been taken to the police station and the appellant was questioned, he said to the police officer "A bloke stopped and asked me if I wanted a lift, so I got in." The recorder seems to have thought that that was a possible reason for the appellant's being in the car, and that, accordingly, a *prima facie* case of acting in concert had not been made out. For my part, I cannot read that evidence as in any way destroying what appears to me to be the *prima facie* view that one would take, viz., that these four men were acting in concert. It was the excuse which a guilty man would make; and it was only what the police officer said that the appellant had said. It clearly called for the appellant to give evidence on oath to the effect of what the police officer had said, before it could be said that there was a reasonable excuse for the appellant's presence in the car.

I am quite satisfied on the facts of this case that a *prima facie* case of association between the appellant and the driver of the car was made out. I would allow the appeal and remit the case to the recorder.

DONOVAN, J.: In this case I thought initially, and it seems mistakenly, that counsel for the respondent was contending that mere presence in a car which had been taken and driven away without the owner's consent was evidence of complicity in the offence. I should find any such proposition unacceptable, but I understand the contention really to be that the presence of the appellant

in the circumstances of this case raises a *prima facie* case against him of acting in concert with the other occupants. Those circumstances were the time, 2 a.m., the fact that the car was stationary, having run out of petrol; the fact that the appellant, who said that he was an innocent passenger who had been offered a lift, was making no attempt to resume his journey independently but was sitting very low in the rear seat with his feet outstretched and his head back; and the fact that none of the others in the car at any time spoke up for him in support of his story, as it would be natural to expect that they would have done, if the story were true. I agree that these circumstances, when taken together, did call for an answer on the appellant's part. A B

There has been some discussion whether the learned recorder decided as a matter of law that no *prima facie* case was disclosed or whether he decided that, as a question of fact, it was too weak a case to justify conviction. I think that the first of these alternatives represents the position, and I agree that the Case should go back to him with the direction proposed. C

As regards the point raised this morning on the proviso to s. 28 of the Road Traffic Act, 1930, namely, that the recorder could be satisfied of the appellant's bona fides on the evidence given that the appellant alleged that he was an innocent passenger, the answer is that that is not what happened. The recorder treated this testimony as equivocal, and, accordingly, counsel for the appellant's argument on this matter is not, to my mind, of any weight. D

SALMON, J.: The only doubt which I have felt in this case is what the learned recorder really did decide. This doubt springs from the somewhat nebulous way in which he has stated the Case. If, at the end of the case for the prosecution, he found that there was in law some evidence against the appellant but that it was not in his view strong enough to call for an answer, I, for myself, have grave doubts whether this court could have interfered. The recorder's view might have been mistaken, but it would not have been a mistake in law and, accordingly, would not have been a mistake that could successfully be challenged in this court. I have come to the conclusion, however, that, on a fair reading of the Case, the recorder decided that in law there was no evidence to support the charges. This, in my judgment, was a wrong conclusion on a point of law, since it is always a question of law whether there is or is not evidence. I do not propose to refer to the evidence, which has been stated by my Lord, save to say this. Test the matter in this way:—had the appellant been convicted at quarter sessions, any appeal based on the ground that there was no evidence to support the conviction would have been hopeless. I want to make it quite plain that I am not saying that the recorder was bound to convict on this evidence, although it certainly would not have been surprising if he had done so. In my opinion, however, there was clearly evidence for him to consider, and he misdirected himself in law in holding that there was no evidence for him to consider. On that ground I would allow this appeal. E F G H

Appeal allowed; case remitted.

Solicitors: *Mitchells* (for the appellant); *Solicitor, Metropolitan Police.*

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

DIWELL v. FARNES.

[COURT OF APPEAL (Hodson, Ormerod and Willmer, L.J.J.), January 22, 23, April 27, 1959.]

Trust and Trustee—Resulting trust—Unmarried couple—Contributions by woman to joint home—House in name of man—Death of man intestate—Rights of woman—Joint venture—“Equity is equality”.

In 1945 the deceased and the defendant, who lived as man and wife but were not married to each other, began to reside with their child at No. 13, H. Road, of which the deceased was the tenant. On entering into possession, the deceased was required to pay £100 as “key money”. This was loaned to him by the defendant’s mother. Both the deceased and the defendant were in work at all material times, the deceased earning £10 a week and the defendant between £6 and £7 10s. a week. The deceased contributed between £2 10s. and £3 per week to the expenses of the establishment, and the defendant contributed the rest; in particular she paid the rent. In 1954 the deceased purchased No. 13, H. Road, which was a rent restricted dwelling, for a low price as a sitting tenant, and borrowed the whole purchase price on a mortgage repayable by instalments. The defendant made all the repayments of the mortgage debt until, in 1956, the deceased sold No. 13, H. Road, at a price which was high enough to enable the rest of the mortgage debt to be repaid and to provide the purchase money for No. 15, H. Road, which the deceased then bought. The deceased spent £200 on improvements at No. 15, H. Road, this and other money being secured by a mortgage which was discharged at his death out of the proceeds of an insurance policy that he kept up. The defendant paid the outgoings on No. 15, H. Road (except the mortgage instalments) and she installed a water heater there at her own expense. In March, 1957, the deceased died intestate, and his widow, as administratrix of his estate, claimed possession of No. 15, H. Road, contending that the defendant had no interest therein or at most a charge for any amount that she had repaid on the mortgage of No. 13.

Held: (i) the dispute must be treated as one between strangers and not (WILLMER, L.J., dissenting) by analogy to cases between husband and wife in relation to which the court would more easily resort to the maxim “Equity delighteth in equality” when it was difficult to assess the respective contributions of spouses to purchasing the matrimonial home; in the present case it was possible to quantify the contributions of the defendant towards purchasing No. 13 and she was not entitled, by invoking that maxim, to a one half beneficial share of the proceeds of sale of No. 15, H. Road (see p. 382, letter G, p. 383, letter C, p. 386, letters D and E, post; cf., p. 392, letters A to D, post).

(ii) (by HODSON and ORMEROD, L.J.J.) payments by the defendant for rent were not contributions towards the purchase price of No. 13, and did not entitle her to any beneficial interest therein (see p. 383, letters H and I, p. 385, letter B, post; cf., p. 389, letter G, post).

(iii) (by the court) the defendant became entitled to a beneficial share in No. 13, H. Road and not merely to be subrogated pro tanto to the mortgagee’s rights, since her payments towards the repayment of the mortgage debt were contributions towards the purchase price of the property; she was entitled to a like share in the proceeds of sale of No. 15, her share being (WILLMER, L.J., dissenting) the proportion that the aggregate of her contributions bore to the purchase price of No. 13 (see p. 383, letter F, p. 386, letter B, and p. 390, letter F, post).

Silver v. Silver ([1958] 1 All E.R. 523) applied.

DECISION OF ROMER, L.J., in *Rimmer v. Rimmer* ([1952] 2 All E.R. at p. 869) considered.

(iv) the defendant was also entitled to be paid the amount that she had expended and the amount of her liability in respect of the water heater (see p. 383, letter G, and p. 386, letter F, post).

Appeal allowed.

[**Editorial Note.** It is possible that payments for rent on the rent restricted property, No. 13, H. Road, might have been taken into account, if an intention to buy the property had been proved to exist at the date when the parties took possession (see per ORMEROD, L.J., at p. 385, letter B, post; WILLMER, L.J., considered that payment towards the rent could in any case be taken into account, see p. 389, letter G, post).

As to resulting trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 141, para. 239; and for cases on the subject, see 43 DIGEST 642, 643, 650, 651, 785-787, 844-861.]

Cases referred to:

- (1) *Balfour v. Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, 1604.
- (2) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.
- (3) *Newgrosh v. Newgrosh*, (June 28, 1950), unreported.
- (4) *Re Dickens, Dickens v. Hawksley*, [1935] Ch. 267; 104 L.J.Ch. 174; 152 L.T. 375; 13 Digest (Repl.) 88, 313.
- (5) *Silver v. Silver*, [1958] 1 All E.R. 523.
- (6) *The Venture*, [1908] P. 218; 77 L.J.P. 105; 99 L.T. 385; 43 Digest 655, 894.
- (7) *Gravesend Corpn. v. Kent County Council*, [1934] All E.R. Rep. 362; [1935] 1 K.B. 339; 104 L.J.K.B. 169; 152 L.T. 116; 99 J.P. 57; Digest Supp.
- (8) *Dyer v. Dyer*, (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest 511, 78.
- (9) *Bull v. Bull*, [1955] 1 All E.R. 253; [1955] 1 Q.B. 234; 3rd Digest Supp.
- (10) *Jones v. Maynard*, [1951] 1 All E.R. 802; [1951] Ch. 572; 27 Digest (Repl.) 152, 1112.

Appeal.

This was an appeal by the plaintiff from a judgment of His Honour DEPUTY JUDGE CONINGSBY, given at Ilford County Court on Feb. 27, 1958, whereby he dismissed the plaintiff's action for possession of No. 15, Havering Road, Romford, and declared on the defendant's counterclaim that the plaintiff held the legal estate in the said premises on trust for sale for the plaintiff and defendant in equal shares absolutely.

R. W. Goff, Q.C., and *H. Vester* for the plaintiff.

J. L. Arnold, Q.C., and *A. W. I. Edwards* for the defendant.

Cur. adv. vult.

Apr. 27. The following judgments were read.

HODSON, L.J.: This is an appeal from a judgment of deputy County Court Judge Coningsby given on Feb. 27, 1958, by which he held that a house, No. 15, Havering Road, Romford, is held by the plaintiff as administratrix of the estate of her husband, A. E. Diwell deceased, on trust for sale and is to be held as to a half share of the proceeds of such sale for the defendant.

The house stood in the sole name of the deceased, and the plaintiff says that it forms part of his estate and that the defendant was no more than a licensee of her late husband, such licence having been determined either by her husband's death or notice subsequently given. The judge having held that the plaintiff and defendant are equally entitled, the plaintiff contends that even if she cannot maintain that the defendant has no interest in the house the defendant's interest is limited to the extent of a charge on the house equivalent to the amount advanced by her for its purchase, or, if the defendant is entitled to an equitable interest in the proceeds, such interest is fractional and must be calculated by reference to the proportion which her contribution bears to the whole purchase

A The plaintiff complains that the learned judge wrongly applied the equitable maxim "Equity delighteth in equality" on the analogy of those cases decided between husband and wife often under the Married Women's Property Act, 1882, s. 17, although he had correctly directed himself that the husband and wife cases were not authorities directly in point.

B The facts are these. In 1940 the defendant was employed at the Rex Cinema, Romford, where she met the deceased, he then being the manager of the cinema. In about 1941 they decided to live together, and a child, Christine, was born to the defendant in June, 1942, as a result of their so living. In May, 1945, they went to live at No. 13, Havering Road, the house next door to the one in question. The deceased was the tenant and obtained, either as a gift or loan, the sum of £100, which was required as "key money". This money was obtained from the defendant's mother, a Mrs. Bevis, but was paid to the deceased, who became the tenant of the house. The deceased and the defendant were both working and saving and shared the expenses of the house. The former earned about £10 a week and the latter £6 a week, rising later to £7 and later still to £7 10s. a week. The deceased only contributed about £2 10s. or a little more per week towards the expenses of the establishment, never averaging more than £3 a week.

D In 1946 the defendant learned for the first time that the deceased was a married man, but she continued to live with him until 1948, when he obtained work in Birmingham, where he set up a similar establishment with another woman while leading the defendant to believe that he was living with his mother. Thenceforward he visited the defendant every two or three weeks and at holiday time. In 1954 the deceased obtained the opportunity of buying No. 13, Havering Road, and as sitting tenant was able to purchase the property for the low price of £900, all of which was obtained by him on a building society mortgage. The mortgage provided for monthly instalment repayments of £5 1s. 3d. Sixteen of these repayments were made, all of them by the defendant. In June, 1956, the neighbouring house, No. 15, Havering Road, which is the property now in dispute, was bought by the deceased for £1,250. No. 13 was sold for £2,300 and the mortgage was discharged out of the proceeds of sale, leaving after payment of legal expenses little if any balance when No. 15 had been paid for. The deceased raised a mortgage of £600 on the security of this house from the Guardian Building Society for the purpose of improving the property, but spent only £200 of this on this object and appears to have retained the balance. In December, 1956, the deceased took out a policy of life insurance with the Sun Life Assurance Society to ensure that on his death the mortgage would be discharged out of the sum assured. This was done on the death of the deceased, as appears from a receipt dated June 12, 1957.

H At the time of the purchase of No. 15, Havering Road and afterwards the deceased wrote to the defendant letters in which he referred to the property and the sale of No. 13, Havering Road, using the words "our sale", "our expenses", and like expressions, showing that he regarded the defendant as interested in the house with him. The deceased paid one of the instalments of the mortgage on No. 15, Havering Road, otherwise the defendant paid all outgoings necessary, apart from mortgage instalments, either out of her own money or out of the contributions which the deceased was continuing to make after his departure to Birmingham. The defendant herself bought a water heater for the house at a total price of £47 19s. 3d., and has paid a deposit and various quarterly instalments thereon.

I The legal position between the defendant and the deceased is that there was an enforceable legal liability on the latter to contribute towards the keep of the child, but no contract or joint enterprise between them can be spelled out of their relationship as man and mistress, and their financial arrangements cannot be looked at as if, while they were living together, their relationship was that of man and wife.

Husband and wife cases are in a class by themselves, for the reasons given by ATKIN, L.J., in *Balfour v. Balfour* (1) ([1919] 2 K.B. 571) where he pointed out that the ordinary incidents of commerce have no application to the ordinary relations between husband and wife. The courts have in the cases of disputes between husband and wife frequently found it impracticable if not impossible to distinguish between the respective rights of the parties or assess the amount of their respective contributions to some piece of property which they have acquired and enjoyed together. Such a case was *Rimmer v. Rimmer* (2) ([1952] 2 All E.R. 863), in which the jurisdiction of the courts was invoked under s. 17 of the Married Women's Property Act, 1882. SIR RAYMOND EVERSHED, M.R., read the relevant part of s. 17, which is as follows:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland . . . [who] may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit . . ."

He proceeded to take as his guide or test the observations of BUCKNILL, L.J., in the unreported case of *Newgrosh v. Newgrosh* (3) (June 28, 1950):

"That [s. 17] gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it enables him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as 'palm tree justice'. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case."

Applying that guide or test to the facts of the case the court held that the husband and wife should share equally in the proceeds of sale of a property. SIR RAYMOND EVERSHED, M.R., said in the course of his judgment ([1952] 2 All E.R. at p. 867):

"Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to ascertain some more precise calculation of their shares, I think that equality almost necessarily follows."

This is not, of course, to say that the maxim "Equity delights in equality" is to be used only in husband and wife cases. SIR RAYMOND EVERSHED, M.R., referred in this connexion to *Re Dickens, Dickens v. Hawksley* (4) ([1933] Ch. 267), where, in the absence of materials for apportioning a sum of money between the owners of the copyright and the owners of the manuscript of a work of Charles Dickens, the court apportioned that sum in equal shares.

It however remains true to say that the court in husband and wife cases resorts the more readily to the equitable maxim because of the very nature of the relationship of spouses and the absence in most cases of any attempt by either of them to regulate their business relations, if any, with one another in any formal manner. This aspect of the case was explained by ROMER, L.J., in the following passage ([1952] 2 All E.R. at p. 869):

"I think the judgment of the county court judge is open to criticism only in that he approached the problem before him in rather too strict a way, and applied legal principles which, although perfectly right and accurate in a dispute as between strangers, require modification at least when a husband and wife when the subject of dispute is the ownership of what was the matrimonial home."

A He said (*ibid.*, at p. 870):

B "It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application."

C This dispute is not concerned with a matrimonial home and is to be treated accordingly, in my opinion, as a dispute between strangers, the plaintiff's position being that she stands in the shoes of the deceased, who was a stranger in law to the defendant. This does not mean that the defendant can have no claim to share in the proceeds of sale, which are in the nature of a windfall from which someone is entitled to benefit. The question resolves itself into this: Can she establish her claim to a reasonably precise amount? If she can do this, I think she is not limited to a charge and is entitled to a share of the proceeds of sale of the house No. 15, Havering Road, for if she were entitled to a share in the proceeds of No. 13 it is conceded that the same applies to No. 15, Havering Road. ROMER, L.J., on the facts of the *Rimmer* case (2), took the view that as between strangers in like circumstances contributions to a building society mortgage result in subrogation *pro tanto* to the society's rights. Without in any way dissenting from the proposition as stated by the learned lord justice, each case must, I think, be considered in the light of its own special facts.

D In *Silver v. Silver* (5) ([1958] 1 All E.R. 523), LORD EVERSHED, M.R., regarded such contributions, on the facts of that case, as contributions towards the purchase of property rather than moneys advanced on loan so as to found a charge. In my opinion, the right view to take of the contributions made by the defendant in this case is that they were contributions towards the purchase of the house which was in effect being bought by a series of payments partly of capital and partly of interest, so that the defendant obtained an equitable interest in the proceeds limited to the proportion which her contributions bear to the purchase price of the house (*cf.*, *The Venture* (6), [1908] P. 218, and *Gravesend Corpn. v. Kent County Council* (7), [1934] All E.R. Rep. 362).

E This equitable interest can be calculated with reasonable certainty and should be enlarged by an appropriate figure representing the value of the water heater which the defendant installed in the house, but cannot, I think, be enlarged further. It has been contended that a relevant consideration tending to enlarge the proportion in favour of the defendant so as to make an even sharing a just result is the fact that the windfall here in question arose from the operation of the Rent Restrictions Acts which enabled the deceased, as sitting tenant with a protected tenancy, to make a substantial amount of money out of his landlord's property by selling it with vacant possession for two and a half times as much as he paid the landlord for it. Since the rent of the house No. 13, Havering Road, was paid very largely by the defendant, it is argued that this was the origin of the profit which enured to the deceased and now is claimed to form part of his estate. I cannot accept this submission and feel myself unable to say that because the defendant contributed towards the rent of the first house in which she lived with the deceased she can be taken to have contributed towards the purchase price, for the rent was not paid to acquire the property. The only payment made to acquire the leasehold was the £100 which the deceased had borrowed from the defendant's mother. On the other hand, when the freehold was acquired it was the deceased and the defendant, so far as her contribution went, who found the purchase price by the mortgage which was the equivalent of payment for the property. I think that material is here available which can enable the court to calculate with sufficient precision the contribution made by

the defendant to the purchase price of No. 13, Havering Road, and the learned judge was in error in taking the steps which might have been open to him in a husband and wife case of drawing inferences which can only appropriately be drawn when such a relationship exists so as to produce a situation where the only just solution is to treat the parties on an equal footing. A

I would allow the appeal and vary the order of the learned judge so as to give effect to my judgment. As to the form of the order, I would wish to hear counsel as to the aliquot proportions to which the parties are entitled on the basis that the defendant's share of the beneficial estate is in proportion to her contribution to the purchase of the house No. 13, Havering Road, together with such sums as she has paid or rendered herself liable to pay in respect of the water heater. B

ORMEROD, L.J.: The deputy county court judge has decided in this case that there is a trust in favour of the defendant in respect of one half share of the beneficial interest in the house No. 15, Havering Road, Romford. The basis of his judgment is expressed where he says: C

"I am satisfied that at all material times the parties contemplated and intended a joint transaction or, as counsel for the defendant put it, a joint venture." D

He considered that the history of the parties should be taken into account from the time when they first entered into possession of No. 13, Havering Road, and the case was a proper one for the application of the equitable maxim "Equality is equity". May I say at the outset that even if there was sufficient evidence from which a joint transaction or a joint venture might be inferred, and in my view there was not, such joint venture must depend on a contract express or implied between the parties which, being founded on an immoral consideration, would not be enforceable. E

The plaintiff says that the judge was in error in the first place in taking into account the £100 provided by the defendant's mother to enable the deceased and the defendant to go into possession of No. 13, Havering Road. She then contends that there is no sufficient evidence that the defendant made any payments on account of the mortgage. If it is held that she did make such payments, then, says the plaintiff, they should be treated as payments on account of the mortgage and not as payments of the purchase price. If, contrary to the plaintiff's contention, the payments should be treated as payments of the purchase price so as to give the defendant a share of the beneficial interest in the house, then she says that such share should be in the proportion which the payments bear to the purchase price of No. 13 and not an equal share with the plaintiff. F G

I propose to deal first of all with the question whether the loan of £100 should be taken into account. If the true position be that the defendant is entitled to a share in the beneficial interest, this question is clearly of the first importance. The uncontradicted evidence of the defendant was that the "money was loaned to Mr. Diwell" by her mother, Mrs. Bevis. Mrs. Bevis herself said: H

"About 1945 they came to me about renting No. 13, Havering Road.

It was a question of £100 for fittings. He (the deceased) said, 'How about it?' I said 'I'll lend it to you' to get them a place to live in."

Later she said "He said he would give it back to me when he could afford it". In fact he never gave it back, and at no time did Mrs. Bevis appear to press for payment. There seems to be no doubt on this evidence that the loan was to the deceased, but it was made in order that he and the defendant should be able to obtain possession of the house. The tenancy was in the name of the deceased. The defendant was working at that time and earning £6 to £7 per week. The deceased gave her £2 to £2 10s. per week, sometimes a little more, and she paid the rent and other outgoings. The defendant's contention is that the tenancy I

- A of No. 13 was obtained with her mother's assistance through her, that she kept the tenancy in being by paying the rent and that it was possible to buy the house for the low price of £900 only because of the existence of the tenancy, which was a protected tenancy within the meaning of the Rent Restrictions Acts. It was this that made possible the subsequent sale at a substantial profit, and the defendant contends that she is consequently entitled to a share in that profit.
- B For my part I cannot accept this view. There is no evidence that at the time the parties went into possession either of them had any intention of buying the house. The defendant and the deceased were anxious to have a house where they could live together and bring up the child of their association. But I cannot see what rights the defendant acquired by paying the rent out of such moneys as came into her possession and so, as she contends, keeping the tenancy
- C alive. It would appear that had he been so minded the deceased could at any time have terminated the tenancy, and the defendant would no longer have been entitled to remain in the house. If in similar circumstances a husband and wife lived together in a house, the wife working and paying the rent out of a common fund, and the house was subsequently bought by the husband out of his own money, the wife would, I think, have considerable difficulty in establishing a
- D claim if the house was then sold at a profit. The parties here must be treated as strangers and the defendant cannot be in a better position than a wife. In my judgment, although the possession of the parties was the factor which made the purchase of No. 13 possible at so low a price, the fact that the defendant paid the rent out of a common fund, contributed to by herself and the deceased, could give her no other right than to remain in the house so long as the deceased
- E allowed her to stay and refrained from terminating the tenancy.

The question with which I have just dealt is of no importance if counsel for the plaintiff is right in his contention that the defendant is entitled to nothing because the amount of the mortgage payments made by her cannot be ascertained with reasonable certainty, or, in his alternative contention, that if the payments can be ascertained they should be treated only as payments of the mortgage which

F would entitle the defendant to be subrogated. If, however, the true position be that the payments should be treated as on account of the purchase price of the house then the question becomes important. In these circumstances there would clearly be a resulting trust of a portion of the beneficial interest of the house and whether the tenancy should be taken into account would obviously affect the calculation of that portion.

- G In the first place, in my judgment, the payments can be ascertained with reasonable certainty. Counsel for the plaintiff relied on a passage in the judgment of the deputy county court judge where he said:

"I do not think it necessary or even possible to determine whose money it actually was [by which the payments were made]."

- H If I understood counsel for the plaintiff, his contention was that this was a finding of fact on the part of the deputy county court judge, and should not be disturbed. I do not think it was a finding of fact. It was an expression of opinion in passing on something to which he had not really applied his mind because he did not regard it as relevant. But accepting the uncontradicted evidence there is, in my view, sufficient material before the court on which the necessary calculation can be founded.

- I The next question is, I think, more difficult, but I have come to the conclusion that the payments should be treated as having been made on account of the purchase price and not as instalments of the mortgage. It is true that ROMER, L.J., said, in *Rimmer v. Rimmer* (2) ([1952] 2 All E.R. 863 at p. 869),

"... the [the county court judge] applied legal principles which, although perfectly right and accurate in a dispute as between strangers, require modification as between a husband and wife when the subject of dispute is the ownership of what was the matrimonial home. In effect, he held,

as would certainly follow had this been a case as between strangers, that the wife's contribution to the building society's mortgage resulted in her being subrogated pro tanto to the society's rights. In other words, that by reducing the debt she took over to the extent of her contributions the security which the building society had."

On the other hand, in *Silver v. Silver* (5) ([1958] 1 All E.R. 523) LORD EVERSHED, M.R., clearly regarded such payments as being on account of the purchase price. It appears that each case falls to be decided on its own facts. The mortgage here was for the whole of the purchase price of No. 13, and the payments were equal monthly payments which took account of capital and interest according to the usual practice of building societies, and should in my view be regarded as instalments of the purchase price.

It follows that the defendant is entitled to a share by way of resulting trust in the beneficial interest in No. 15. The only question is whether that share should be in the proportion which her contributions bore to the purchase price of No. 13, or should be of some other amount. I have set out the plaintiff's contention that the most to which she is entitled is the proportion based on her contributions. The defendant contends that she should be entitled to a one half share. The contention of counsel for the defendant was that the principle "Equality is equity" is not confined to cases between husband and wife (see *Re Dickens* (4), [1935] Ch. 267) but is a rule or device to which resort should be had in every case in which precise quantification is impossible or difficult or irrelevant. It is certainly true that the rule is not confined to matrimonial cases, and *Re Dickens* (4) where each party was clearly entitled to a share of royalties, substantial but impossible to quantify, affords an example of the circumstance in which the rule may be applied as between strangers. If the tenancy of No. 13 should have been taken into account it would, I think, have been impossible to have arrived at any other apportionment than that the parties should share equally. But as I have said in my judgment, the tenancy of No. 13 is not a factor to be considered, and the plaintiff's contention on this part of the case is in my view the right one. I would allow the appeal and vary the order of the deputy county court judge on the basis that the defendant is entitled to a share of the beneficial interest proportionate to her contributions to the purchase price of the house No. 13, Havering Road. In addition, she is in my view entitled to be repaid the sums she has paid or rendered herself liable to pay in respect of the water heater.

WILLMER, L.J.: The plaintiff claims as against the defendant an order for possession of a house known as No. 15, Havering Road, Romford, and it is not disputed that the freehold estate is vested in her. It is important to observe, however, that she claims only as administratrix of the estate of her late husband. In law, therefore, she stands in the shoes of the deceased, and is entitled to assert only such rights as could have been asserted by the deceased, had he lived. The defendant had lived with the deceased as his mistress from 1941 until the date of his death in March, 1957. In 1942 she bore him a child, a daughter who is now nearly grown up. The defendant and the deceased lived together continuously till 1948, when the deceased obtained work in the neighbourhood of Birmingham. After that they lived together only intermittently, during week-ends and holiday times, when the deceased was able to come to London. From 1945 onwards the defendant and the deceased lived at No. 13, Havering Road, as weekly tenants in the first instance. In 1954 the opportunity arose of purchasing the freehold, which the deceased did with the aid of a mortgage from a building society. In 1956 he sold No. 13, and the proceeds of sale were sufficient not only to discharge the mortgage but also to purchase the freehold of No. 15, which is the subject of the present claim.

Had the defendant and the deceased been married, this house would properly have been described as the matrimonial home. The defendant's case is that she is in a position analogous to that of a wife, and having, as she asserts, made

A substantial contributions to the purchase and upkeep of the successive homes, she claims to have acquired an equitable interest in No. 15, which, if established, would not only afford her a good defence to the plaintiff's claim for possession, but would also support a counterclaim by her against the plaintiff. In the first instance the defendant counterclaimed for a declaration that the plaintiff holds the property on a resulting trust for her absolutely. But this claim was not fully pressed, and the learned judge in fact found that she was entitled to a half share.

The defendant contends that, No. 15 having been purchased with the proceeds of sale of No. 13, her contributions in respect of No. 13 must be taken into account as giving her an equitable interest in No. 15. It is not in dispute that, by reason of the fact of his being the sitting tenant of a rent-controlled house, the deceased was enabled to purchase the freehold of No. 13 on exceptionally favourable terms. He in fact obtained for £900 a house which he was able to sell shortly afterwards for £2,300, thereby obtaining a windfall of some £1,400. It is, therefore, said for the defendant that it is proper to take into account not only such contributions as she claims to have made towards the purchase of the freehold of No. 13, but also the amounts she contributed towards obtaining and maintaining the tenancy of that property. She relies on the fact that she obtained from her mother a loan of £100 in 1945, which sum the deceased was required to furnish, ostensibly for the purchase of fittings but in reality as key money. The learned judge, who had the advantage of hearing evidence both from the defendant and from her mother, drew the inference, which in my judgment was abundantly justified, that this loan was intended as a loan to the defendant and the deceased jointly. The defendant claims that throughout the whole period of the tenancy, i.e., from 1945 to 1954, she paid the whole of the rent out of her own pocket, amounting to £1 5s. 9d. per week at first, but subsequently increased to £1 9s. 1d. By doing this she claims to have been largely instrumental in putting the deceased in a position to purchase the freehold on such favourable terms, thereby obtaining the windfall already referred to. This is enough, it is contended, to justify a claim on her part to have made, albeit indirectly, a very notable contribution towards the purchase of No. 13, and through it of No. 15. Furthermore, the defendant alleges that after the purchase of No. 13, until it was sold in June, 1956, she paid all the mortgage instalments, sixteen in all, at the rate of £5 1s. 3d. per month. After the purchase of No. 15 the defendant claims to have incurred a further liability, under a credit sale agreement, for £47 for the purchase of a water heater, which was installed in the house. It should be said, however, that the mortgage of £900 on No. 13 was entered into by the deceased in his own name, so that he alone incurred the legal liability for discharge thereof. Moreover, it appears that after the purchase of No. 15 the deceased borrowed a further sum of £600 on mortgage in his own name, and repayment of this was secured by a single premium policy on his own life, the cost of which he bore himself. Of the sum so raised about £200 was spent on improvements to No. 15, the balance of £400 being apparently spent by the deceased for his own purposes. In substance, therefore, the defendant's case is that, so far as actual money payments were concerned, she made practically all the payments required for the purchase of No. 13, and through it of No. 15, the contribution of the deceased being virtually confined to the incurring of the legal liability for discharge of the respective mortgages.

It is conceded that, as the defendant and the deceased were not married to each other, the many decisions of the court in cases arising out of disputes between husband and wife with regard to matrimonial property are of no direct authority. Many of these cases were, however, cited to the learned judge, and were again referred to in argument before us, and it has been contended that the principles applicable as between husband and wife cannot be wholly ignored, but may on the contrary be properly applied by way of analogy in deciding the rights of the defendant and the deceased *inter se*. Thus it is argued that by

reason of her contributions towards the purchase of the respective houses the defendant acquired an equitable interest, first in No. 13, and then in No. 15, at least to the extent of the proportion which her contributions bore to the whole outlay. But because of the extreme difficulty in this case, as in many husband and wife cases, of calculating the exact amount of the respective contributions, the husband and wife cases are invoked, by way of analogy, as illustrative of the principle that "Equity delighteth in equality" where precise calculation is difficult or impossible. A B

The argument for the defendant found favour with the learned judge, who based his conclusion on the view which he took that the defendant and the deceased, by setting up house together, were engaged on a "joint venture" or a "joint enterprise", in the same way as might be said of any other two persons (as for instance two unrelated bachelors) who, though strangers in law, choose to set up house together and run a joint establishment. This conclusion was vigorously attacked by counsel for the plaintiff, who objected that such a finding of "joint enterprise" as between strangers could only be justified by proof of an express agreement, or at least by evidence of facts from which an agreement could properly be implied. Here, it is pointed out, no such agreement has been pleaded on behalf of the defendant—nor could it have been pleaded, for the reason that any such agreement could only be based, in the circumstances of this case, on an immoral consideration. C D

In these circumstances, so far from being entitled to rely on the husband and wife cases, the defendant must be treated, according to the plaintiff's argument, as a complete stranger, and before she can be entitled to any relief at all she must discharge the onus of proving strictly the precise extent of her contributions, if any, towards the purchase of the property in dispute. The plaintiff contended, in the first instance, that the defendant had failed to prove that she made any contributions at all. In support of this submission reliance was placed on the absence of any finding by the learned judge as to what the defendant's contributions, if any, were. Having regard to his view that the defendant and the deceased were engaged on a joint enterprise, the absence of such a finding was perhaps hardly surprising. What the learned judge in fact said was: E F

"I do not feel it necessary to decide whose actual money paid the rent or for that matter the other outgoings . . . This problem cannot be resolved by considering what money came out of or went into what purse."

Secondly, and in the alternative, it was argued that, if the defendant be proved to have made any actual contributions towards the purchase of the property in dispute, the effect of such contributions would be to do no more than create a charge in her favour. By paying off a part of the mortgage debt the defendant would at the most be subrogated to the right of the mortgagee pro tanto, so as to become a creditor of the deceased's estate to the extent of the amount of her contributions. In support of this submission reliance was placed on a dictum of ROMER, L.J., in *Rimmer v. Rimmer* (2), where he said ([1952] 2 All E.R. 863 at p. 869): G H

"In effect, he [the county court judge] held, as would certainly follow had this been a case as between strangers, that the wife's contribution to the building society's mortgage resulted in her being subrogated pro tanto to the society's rights. In other words, that by reducing the debt she took over to the extent of her contributions the security which the building society had." I

In the further alternative, it was contended that if the fact of her contributions did confer on the defendant any equitable interest in the disputed property, such interest could not in any circumstances exceed the proportion which her contributions bore to the total outlay. We were invited to say that on the facts such proportion could only be a very small one, having regard to the fact that it was the deceased, and only the deceased, who incurred the legal liability for

A repayment of the respective mortgages. Moreover, it was pressed on us that any payments made by way of rent, during the time before either of the houses was purchased, were entirely irrelevant and should be totally disregarded. Thus, even assuming the defendant to have proved some equitable interest in the property in dispute, such interest could not exceed an aliquot share, based on the proportion which the mortgage payments made by her bore to the total amount due. In no circumstances could she, as a stranger, claim to be put in the privileged position which the law accords to a married woman who has made contributions towards the purchase of the matrimonial home.

Let me deal in turn with each of these three alternative submissions put forward on behalf of the plaintiff. As to the first, it appears to me that, even in the absence of any specific finding by the learned judge, the defendant abundantly proved that she did in fact make substantial contributions towards the purchase of the home. The learned judge found, on the uncontradicted evidence of the defendant, that the deceased's contribution to the ménage never averaged more than £3 per week. The defendant herself, at the commencement of their association, was earning £6 per week, which increased towards the end to £7 10s. per week, all of which, as found by the learned judge, she put into the establishment, in the sense that she paid all the usual outgoings on the property (including small repairs), all the food for all three persons, and the clothing for her daughter and herself. It would not, I think, be unfair to allocate at any rate a large proportion of the deceased's contribution to the discharge of his legal obligation to maintain the child. But even on the view most favourable to him, i.e., on the assumption that the contributions of both were pooled and applied pro rata to the whole range of the household expenditure, the defendant's contribution throughout was at least double that of the deceased. This would mean that at least two-thirds of the rent, during the time before the purchase of No. 13, and thereafter at least two-thirds of the mortgage instalments must be regarded as being paid out of funds provided by the defendant herself. Let me pause here to remark that in my judgment it is not possible, as contended on behalf of the plaintiff, to disregard the weekly payments of rent during the period from 1945 to 1954 before the actual purchase of No. 13. It was only by virtue of the defendant regularly paying the rent, and thereby maintaining the tenancy, that the deceased was put in the favourable position of being able, as sitting tenant, to purchase No. 13 for a sum representing only a fraction of what the property was worth. What may be called the "windfall" element in the value of No. 13, i.e., the amount by which its value exceeded the purchase price, was in effect purchased by the regular payments of rent during the nine years preceding the purchase of the freehold. In my judgment, therefore, the defendant, by contributing a preponderating share of the rent paid from 1945 to 1954 and of the mortgage instalments paid thereafter, must be held to have made a substantial contribution to the purchase of No. 13, and consequently of No. 15 also, seeing that the latter was purchased out of the proceeds of sale of the former.

As to the plaintiff's second submission, I am satisfied that, if it be right to treat the defendant as having contributed substantially to the purchase of the property, she acquired something more than a mere right to be subrogated to the extent of her contributions to the rights of the mortgagee. In my judgment, on the well-known principle of *Dyer v. Dyer* (8) ((1788), 2 Cox, Eq. Cas. 92), the defendant, by making these contributions, acquired an equitable interest of her own in the property. In that case the rule was stated by EYRE, C.B., as follows (*ibid.*, at p. 93):

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several;

whether jointly or successive, results to the man who advances the purchase-money . . . and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."

This principle was applied by the Court of Appeal in *The Venture* (6) ([1908] P. 218), where it was held that a party who provided part of the purchase money for the purchase of a yacht registered in the name of another was entitled to share in the proceeds of sale in the proportion which his contribution bore to the total of the purchase money. The same principle was again applied in *Gravesend Corpn. v. Kent County Council* (7) ([1934] All E.R. Rep. 362), in favour of one local authority which had discharged mortgage instalments due in respect of a loan raised by another local authority. Another illustration of the application of this principle is to be found in *Bull v. Bull* (9) ([1955] 1 All E.R. 253), where a mother and her son both contributed to the purchase of a house as a home for themselves, but the conveyance was in the name of the son. When later the parties quarrelled, and the son sued his mother for possession of the house, it was held that he was not entitled to do so. As was said by DENNING, L.J., in delivering the judgment of the Court of Appeal (*ibid.*, at p. 255):

"Each is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her contribution."

In the light of these authorities I do not think that the dictum of ROMER, L.J., in *Rimmer v. Rimmer* (2), to which I have already referred, can be supported. It is to be observed that neither *Dyer v. Dyer* (8), nor any of the other authorities where the principle of that case was applied, was cited to the Court of Appeal in *Rimmer v. Rimmer* (2). Moreover, it appears to me that ROMER, L.J.'s dictum in that case is difficult to reconcile with the reasoning underlying the judgment of SIR RAYMOND EVERSHED, M.R., in the same case. In these circumstances I find myself unable to accept the submission that the defendant's right in the present case is restricted to a right of subrogation to the extent of her actual contributions.

This brings me to the third submission put forward on behalf of the plaintiff, and to what I regard as the most difficult aspect of the case. Assuming that the defendant has an equitable interest in the disputed property, as I think is established, how is it possible to quantify the extent of that interest in the light of the rather confused facts of the present case? The cash expenditure of the defendant in paying rent and mortgage instalments in respect of No. 13—expenditure which she made out of funds contributed in the main by herself, but also in some lesser degree by the deceased—must be balanced, as I see it, against the fact that the deceased, by taking the mortgage in his own name, rendered himself liable in law for the discharge of that mortgage up to the full amount of £900. He was never in fact called on to discharge one penny of that obligation, and I think it fair to say that, so long as the defendant lived with him and was herself earning, there was no great likelihood of his ever having to do so. Nevertheless, the liability in law was his, and in so far as he thus rendered himself liable I think he must be regarded as having contributed in a substantial degree to the purchase of the property. It was in these circumstances that the learned judge fell back on the conception of a joint enterprise—analagous to the joint enterprise on which a husband and wife embark when they set up a matrimonial home—but appropriate also to the case of any two persons who, though strangers in law, set up house together on the basis of financing the ordinary domestic expenditure out of a common purse. Clearly if there is an agreement between two such persons as to the proportions in which they are to contribute to the expenditure, or if it is possible to imply an agreement from the amount of the contributions actually made by each of them, the court must give effect to such agreement and apportion the equitable interests of the

A respective parties in accordance with the principle of *Dyer v. Dyer* (8). Here the defendant has not alleged any such agreement, and for reasons already stated was not in a position to do so. But, as it seems to me, it is at this point that it is appropriate to remember that the burden is on the plaintiff, who has instituted the action for the purpose of obtaining possession against the defendant, to prove her case. Furthermore, as already pointed out, the plaintiff stands
B in the shoes of the deceased, and is only entitled to assert such rights as the deceased himself could have asserted had he himself instituted the action in his lifetime. Assuming the facts proved by the defendant—and there has been no evidence to the contrary—could he have been heard to deny that in setting up house together at No. 13, Havering Road, he and the defendant were engaging in a joint enterprise similar to that of a legally married husband and wife? He
C had taken the defendant to live with him in 1941 and for sixteen years prior to his death had held her out as his wife. He had apparently allowed her to assume his name, and was content that she should make the payments, whether of rent or of mortgage instalments, in the guise of a wife. In such circumstances he can well be held to have represented by his conduct that he was agreeable to her setting up house with him as a joint enterprise. Moreover, the same
D inference is, I think, to be drawn from certain letters written by the deceased to the defendant, which have survived and are included in the bundle of correspondence. These letters can be dated, from internal evidence, as belonging to the time when No. 13 was being sold and No. 15 purchased. He writes:

“If *our* sale goes through I will make it up to you and in 15 *our* expenses won't be so high.”

E He also writes:

“He [the solicitor] has the contract for me to sign for the buying of next door but I am signing it when *we get the contract for our own place*. When the man comes from the council get Mrs. Sibthorp to explain *we intend to spend some of the borrowed money on improving the place*.”

F He also writes:

“I realise you have a lot to do but the sooner you can get 13 sold the better. If I were you I would make a list of what you are going to do in 15 get the materials yourself and get someone you know local to do the work.”

G Lastly he writes:

“As you know I paid this month's mortgage and fire insurance and now I have just signed the papers for my insurance policy on the mortgage so if anything happens to me from now on the mortgage is completely covered.”

H Such words could hardly have been written to the defendant unless the deceased contemplated and intended that the house being purchased was to be the joint concern of himself and the defendant.

I In the light of these letters, and in the light of his conduct over the whole period from 1941 onwards, it seems to me that, had the deceased himself sued the defendant in his lifetime, he would have been estopped from denying that the houses in which he installed the defendant—first No. 13 and then No. 15—were intended to be purchased, and were intended to be run by the defendant, as a joint enterprise for the benefit of both of them. In these circumstances I am not persuaded that the learned judge was wrong in taking the view that the relationship between the deceased and the defendant was one of joint enterprise.

This conclusion is not of course to be taken as meaning that the relationship between the deceased and the defendant is to be treated as equivalent for all purposes to that of husband and wife. In the case of husband and wife, the Married Women's Property Act, 1882, s. 17, specifically empowers the judge

who has to adjudicate in property disputes between them to make such order "as he thinks fit". In the exercise of that power the court, in dealing with disputes between husband and wife, where there has been a common purse, and where it has been difficult or impossible to say with certainty out of whose pocket this or that payment was made, has frequently, as the reported cases show, had recourse to the principle that "Equity delighteth in equality", and has apportioned the property in dispute equally between the spouses. But it would be a mistake to suppose that the application of this principle is to be confined to cases of husband and wife. It is in fact of much wider application, and may be invoked in any case where it is shown that both parties have an equitable interest in the disputed property, but where it would be difficult or impossible to quantify with exactitude the proportions in which they have respectively contributed to the acquisition of the property. It is, of course, true that where the parties' actual contributions are capable of precise ascertainment, the ordinary rule will apply that each has an equitable interest in the property in proportion to his or her contribution. But where such ascertainment is not possible, yet it is clear that both parties have substantially contributed towards the acquisition of the property, then the principle of equality may be invoked, not only in cases of dispute between husband and wife, but in any other case where it is equitable to do so. In *Rimmer v. Rimmer* (2) SIR RAYMOND EVERSHED, M.R., is reported as saying ([1952] 2 All E.R. at p. 867):

"Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows. VAISEY, J., for example, in *Jones v. Maynard* (10) ([1951] 1 All E.R. 802), rightly, in my judgment, applied that reasoning, and I think that an analogous application of the same reasoning was adopted by this court when the question of beneficial ownership of a copyright was considered in *Re Dickens* (4) ([1935] Ch. 267). MAUGHAM, L.J., said (*ibid.*, at p. 309): "In these circumstances, my opinion is that part of the sum realised properly belongs to the estate of Sir Henry Dickens and part to the estate of Charles Dickens. There are no materials for apportioning the sum otherwise than in equal shares between the two estates; and that is, in my opinion, the proper conclusion, not only because, according to the language of LORD SOMERS . . . "equity did delight in equality", but also because, in the exceptional circumstances of the present case, the two contending parties have equal rights to share in the proceeds of sale". I venture to apply that reasoning to this case."

Rimmer v. Rimmer (2) was a case of dispute between a husband and wife. But I do not understand SIR RAYMOND EVERSHED, M.R., to be confining his remarks only to such a case. As I understand him, he was intending his statement of principle to be of general application, as is shown by his reference to *Re Dickens* (4). So read, I think his words are apt to cover the facts of the present very unusual case, and in all the circumstances I think that the learned judge came to a correct conclusion when he held that the defendant was entitled to a half share of the beneficial interest in the disputed house.

I would, for my part, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Ernest W. Long & Co.* (for the plaintiff); *C. W. Smith & Co.*, Romford, Essex (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A ATTORNEY-GENERAL (on the relation of MANCHESTER CORPORATION) v. HARRIS AND OTHERS.

[QUEEN'S BENCH DIVISION (Salmon, J.), March 19, May 4, 1959.]

Injunction—Contravention of statute—Relator action for injunction after repeated contraventions—Scope of court's discretion in relator action for an injunction—Need to show injury to public.

B In all relator actions, notwithstanding that the Attorney-General has exercised his discretion in bringing the action and that the defendant has contravened the provisions of a statute, it is the duty of the court to inquire whether the acts done by the defendant injure, or tend to injure, the public; and if it is established that the public has in fact suffered no injury, the court may in its discretion refuse to grant an injunction restraining the defendant's acts, though it is only in the most exceptional circumstances that a statutory provision can be contravened without public injury (see p. 398, letters H and I, post).

D For some years, on almost every Sunday in the year, the defendants had sold flowers from two stalls which were placed close to railings dividing a footpath from the adjoining cemetery and near to the pedestrian entry to the cemetery. The footpath was between fifteen and sixteen feet wide, and the flower stalls projected about three feet six inches from the railings on to the path. Except on Mothering Sunday, few pedestrians used the footpath. In offering flowers for sale in this manner the defendants did not incommode anyone using the footpath, and such obstruction as they caused was so slight as not to amount to a nuisance. However, probably at the instigation of the owners of some nearby flower shops who disliked the competition from the defendants' stalls, prosecutions were instituted against the defendants for two offences under a section of the Manchester Police Regulation Act, 1844. The defendants clearly committed these offences every time that they offered flowers for sale outside the cemetery in the above manner and they were duly convicted and fined on many occasions although the offences were trifling (which was usually marked by the smallness of the fines imposed), and did not cause the slightest injury to the public. Notwithstanding the convictions and fines, the defendants continued to operate the flower stalls: accordingly, the Attorney-General, suing on the relation of the local authority, now brought this action for an injunction restraining the defendants from contravening the Act of 1844. There were no other means available to prevent the defendants' continuing their contraventions of the Act of 1844.

Held: an injunction would not be granted because—

(i) in determining whether to grant an injunction the court must exercise its discretion independently of the Attorney-General's decision to institute proceedings for that relief (see p. 396, letter D, post).

Dicta of FARWELL, L.J., in *A.-G. v. Birmingham, Tame & Rea District Drainage Board* ([1910] 1 Ch. at p. 61) and DEVLIN, J., in *A.-G. (on the relation of Hornchurch U.D.C.) v. Bastow* ([1957] 1 All E.R. at p. 501) applied.

(ii) in the special circumstances of this case the defendants' acts had not caused injury to the public, although they contravened a statute (see p. 399, letter A, post).

A.-G. v. Kerr & Ball ((1915), 79 J.P. 51) followed.

[As to the granting of an injunction for the protection of public rights and the administration of justice, see 21 HALSBURY'S LAWS (3rd Edn.) 403, 404, paras. 844-846; and for cases on relator actions, see 16 DIGEST 486, 487, 3681-3692.]

Cases referred to:

(i) *A. G. v. Wilcock*, [1938] 3 All E.R. 367; [1938] Ch. 934; 159 L.T. 212; Digest Supp.

- (2) *R. v. Bartholomew*, [1908] 1 K.B. 554; 77 L.J.K.B. 275; 98 L.T. 284; 72 J.P. 79; 26 Digest 446, 1632. A
- (3) *London County Council v. A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 16 Digest 482, 3637.
- (4) *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; *varying*, [1910] 1 Ch. 48; 79 L.J.Ch. 137; 101 L.T. 796; 16 Digest 483, 3652. B
- (5) *A.-G. (on the relation of Horncchurch U.D.C.) v. Bastow*, [1957] 1 All E.R. 497; [1957] 1 Q.B. 514; 121 J.P. 171; 3rd Digest Supp.
- (6) *A.-G. v. Kerr & Ball*, (1915), 79 J.P. 51; 16 Digest 487, 3690.
- (7) *A.-G. v. Cokermonth Local Board*, (1874), L.R. 18 Eq. 172; 30 L.T. 590; 38 J.P. 660; 16 Digest 487, 3687.
- (8) *A.-G. v. Shrewsbury (Kingsland) Bridge Co.*, (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 16 Digest 487, 3688. C
- (9) *A.-G. v. London & North Western Ry. Co.*, [1900] 1 Q.B. 78; 69 L.J.Q.B. 26; 81 L.T. 649; 63 J.P. 772; 16 Digest 487, 3689.
- (10) *A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 28 Digest 368, 42.

Action.

In this action the Attorney-General, suing on the relation of the Corporation of the City of Manchester, claimed against each of the defendants, Robert Harris, his wife Audrey Harris, and Jack Ferst, an injunction perpetually restraining the defendants from placing or using any stall or other article on any footway in the City of Manchester and from exposing for sale on or near any such footway flowers or other articles so as to obstruct or incommode the passage of the footway contrary to s. 102 of the Manchester Police Regulation Act, 1844. The action was tried at Manchester Assizes and the following facts were found by SALMON, J. On the outskirts of the City of Manchester, at West Didsbury, there is the Manchester Southern Cemetery. The cemetery is bounded on one side by Princess Road and on another side by Barlow Moor Road; in Barlow Moor Road there are several florists' shops. The footway of Princess Road, which is contiguous with the cemetery, is between fifteen and sixteen feet wide and is divided from the cemetery by iron railings. Close to the railings there is a line of trees about fifty feet apart. Since 1955, on almost every Sunday, the defendants sold flowers from stalls which were placed close to the railings between two trees to the left of the pedestrian entry to the cemetery. The defendants Robert Harris and Audrey Harris operated from one stall, which was about seven feet long and which projected about three feet six inches from the railings, while the defendant Ferst operated from an adjacent stall of similar dimensions. Except on Mothering Sunday there were never more than a few pedestrians using this wide footway. On rare occasions, the defendants may have placed their stalls on that part of the footway which was adjacent to the lay-by. In offering flowers for sale in the above manner, the defendants (who were respectable citizens) were not causing the slightest nuisance or inconvenience to the public using the footway in Princess Road; they were carrying on a business which was of advantage to the public as well as to themselves. Moreover, it seemed to be clear that, but for pressure brought to bear on Manchester Corporation by the owners of some of the flower shops in Barlow Moor Road, no prosecution would have been instituted against the defendants because, after the defendants had been selling flowers for many months and their activities had been observed and reported on by the police and the city surveyor and engineer, the unanimous conclusion was reached by the police, the highways committee and the town clerk, that no action could justifiably be taken against them (a decision with which His Lordship was not disposed to differ). However, as appeared from the agreed correspondence, the owners of the flower shops had enlisted the support of two councillors who had put it to the town clerk that

A the defendants' flower stalls amounted to unfair competition. As a result, in February, 1956, the first of a large number of prosecutions was instituted against the defendants for offences under s. 102 of the Manchester Police Regulation Act, 1844; the relevant part of s. 102 provides:

B "... every person shall be liable to a penalty of not more than forty shillings who in any street shall commit any of the following offences . . . every person who shall . . . place or use any . . . stall . . . on any footway . . . Every person who . . . by hawking or exposing for sale any . . . article on or near any footway or by any other means shall obstruct or incommode the free passage of any such footway."

C Notwithstanding the numerous prosecutions and the convictions and fines* imposed on them, the defendants continued to operate their flower stalls in breach of s. 102 of the Act of 1844.

Fenton Atkinson, Q.C., and J. M. Lever for the Attorney-General, the plaintiff.
Rose Heilbron, Q.C., and I. R. Taylor for the defendants.

Cur. adv. vult.

D May 4. SALMON, J., having stated the facts and referred to the relevant provisions of s. 102 of the Manchester Police Regulation Act, 1844, read the following judgment: There can be no doubt but that the defendants committed offences under the Manchester Police Regulation Act, 1844, every time they offered flowers for sale outside the cemetery in the way described. The defendants did place a stall against the railings which projected a little on to this very wide footway, and accordingly this stall technically obstructed that part of

E the footway on which it rested although it did not in the slightest incommode anyone using the footway. I find that the obstruction was so slight and inappreciable that it certainly did not amount to nuisance. Accordingly, if any proceedings had been brought against these defendants based on nuisance, such proceedings would have been doomed to failure; see *A.-G. v. Wilcock* (1) ([1938] 3 All E.R. 367), and *R. v. Bartholomew* (2) ([1908] 1 K.B. 554 at p. 561).

F The defendants, however, have been prosecuted under the Act of 1844 on a very large number of occasions. Although the offences were trifling and caused not the slightest injury to the public, since they had been committed the magistrate had no course open to him other than to convict; as a rule he marked his view of the triviality of the matter by the smallness of the fines imposed even

G after many convictions. The last twenty-two fines for obstruction recorded against the defendant Robert Harris are for 2s. 6d. each. In spite of the convictions and fines over a number of years, the defendants continued and continue to ply their trade outside the cemetery, and thereby to commit the technical offences to which I have referred. These are the circumstances in which the town clerk was authorised to apply to the Attorney-General that all necessary

H steps should be taken to obtain an injunction against the defendants. This action was then instituted.

I It is conceded that the granting of an injunction is discretionary. Counsel on behalf of the plaintiff, however, argues that since the Attorney-General has in the exercise of his discretion come to the conclusion that an injunction should be granted, and accordingly brought this action, the court must exercise its discretion by granting an injunction. I reject this argument. In support of this argument counsel relied chiefly on *London County Council v. A.-G.* (3) ([1902] A.C. 165). In that case the EARL OF HALSBURY, L.C., observed (*ibid.*, at p. 168):

"It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown

* The defendants were convicted and fined on the following numbers of occasions respectively: Robert Harris on seventy-four occasions; Audrey Harris on thirty-four occasions; and Jack Ferst on eighty-one occasions.

in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not."

That no doubt is perfectly accurate, but as was pointed out by FARWELL, L.J., in *A.-G. v. Birmingham, Tame & Rea District Drainage Board* (4) ([1910] 1 Ch. 48 at p. 61), *London County Council v. A.-G.* (3) decided no more than that:

"It is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation shall be . . . That is to say, the court cannot say: 'You ought never to have instituted these proceedings': it must listen to his application, and then adjudicate whether there should be an injunction granted or not."

In my judgment it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General. He is for this purpose in no better position to obtain judgment in his favour than any other litigant claiming an injunction.

In *A.-G. (on the relation of Hornchurch U.D.C.) v. Baston* (5) ([1957] 1 All E.R. 497), DEVLIN, J., points out (*ibid.*, at p. 501), that:

" . . . the fact that the Attorney-General asks for the injunction does not mean that the court has to grant it, even if a clear and deliberate invasion of a public right is proved. The court still has its discretion in the matter and it must have regard to the circumstances to which it usually has regard in considering whether or not it will grant this type of relief."

It is true that towards the end of his judgment ([1957] 1 All E.R. at p. 502) there occurs the passage on which counsel for the plaintiff relies. It reads as follows:

"I distinguish, therefore, between administrative discretion and judicial discretion. The Attorney-General . . . is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective way is to ask this court for a mandatory injunction . . . then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances."

But DEVLIN, J., added (*ibid.*):

"I am dealing . . . purely with that type of case in which the only substantial ground for not giving an injunction is that there are other remedies available. In cases where other circumstances arise which are not primarily a matter for administrative discretion, then different considerations might apply and a different view be taken."

In that case the defendant's acts in their nature tended indubitably to injure the public. The only real question for decision was one which may be regarded as primarily a matter of administrative discretion, namely, whether there were other remedies available more appropriate than an injunction.

The present case, however, in my view depends on whether what the defendants are doing in any way injures the public; and this is not a matter on which the discretion of any officer of the Crown can have any influence on the court. I have no hesitation in holding on the special circumstances of this case that the defendants have caused no injury to the public. I do not, however, hold that there are any means available other than an injunction to prevent these defendants from doing what they are doing.

A This seems to me to be a similar case to *A.-G. v. Kerr & Ball* (6) ((1915), 79 J.P. 51) where LUSH, J., refused an injunction although there had been persistent breaches of certain bye-laws on the ground that no public injury had been suffered, and that in all the circumstances of the case it was not desirable that an injunction should be granted. It was sought to distinguish that case from the present
B breaches of a public Act of Parliament. I cannot think that that distinction makes any difference. Indeed LUSH, J., points out (*ibid.*, at p. 53) that bye-laws impose a public duty and that their breach is *prima facie* a public wrong although on the facts of that case the breaches did not in reality injure the public.

It is further argued on behalf of the Attorney-General that if in a relator action he can show a clear and deliberate breach of an Act of Parliament, then
C an injunction is granted as a matter of course, not only on the ground with which I have already dealt, namely, that the court is virtually bound by the exercise of the Attorney-General's discretion, but also on the ground that the doing of the acts prohibited by statute is deemed to constitute a public injury and it is not competent for the courts to inquire whether or not such acts in fact injure the public. This contention is difficult to reconcile with the two
D decisions in *A.-G. v. Kerr & Ball* (6), and with the observations of DEVLIN, J., in *A.-G. v. Bastow* (5). It does, however, at first sight appear to gain some support from certain dicta relied on by counsel for the plaintiff, if those dicta are looked at out of their context. When, however, they are considered in their
E judgment of SIR GEORGE JESSEL, M.R., in *A.-G. v. Cockermouth Local Board* (7) ((1874), L.R. 18 Eq. 172 at p. 178) which reads as follows:

"... it is not necessary for the Attorney-General to show any injury at all. The legislature is of opinion that certain acts will produce injury, and that is enough."

F In that case the defendants had constructed works for the removal of the sewage of Cockermouth with an outfall into the River Derwent outside the defendants' district and in that of the Workington Local Board. This the defendants were empowered to do only by virtue of certain Acts of Parliament which in effect imposed a condition that the defendants should not impair the purity of
G from the town of Workington—where it entered the river. No polluted water, however, arrived at the town of Workington. It was held on the information at the relation of the clerk of the Workington Local Board that an injunction should be granted but that the bill of the local board of Workington alleging nuisance must be dismissed.

The basis of the decision stated by the Master of the Rolls was that as the Act
H of Parliament gave the defendants the power only on certain terms of doing something which would otherwise be illegal, that is, the discharging of sewage into the river outside their own district, they could not take that power without observing the terms on which it was granted. The Master of the Rolls, in making the observations on which counsel for the plaintiff relies, was I think only pointing out that in the circumstances of the case it mattered not so far
I as the case for an injunction was concerned that the defendants' breach caused no nuisance to the inhabitants of the town of Workington. Moreover, as was stated by FRY, J., in the case to which I next refer, the pollution of the river was something which in its nature tended to the public injury.

In *A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (8) ((1882), 21 Ch.D. 752), the defendants without any power did certain acts which undoubtedly tended in their nature seriously to interfere with public rights, and so tended to injure the public. These acts consisted of driving piles into the River Severn for the construction of a bridge and interfering with a public highway and with the

towing path of the river; no evidence was called of actual damage to the public by reason of these acts. Since, however, the defendants' acts in their nature tended to the public injury it was unnecessary for the plaintiff to adduce evidence of actual injury. It is to be observed that in that case there was no evidence called by the defendants, nor on the facts of the case could there have been any acceptable evidence that public injury had not been caused or was not to be apprehended from the defendants' acts. There seems to be a sensible difference between what the defendant company did in that case, and what the defendants have done in this case. The basis of FRY, J.'s decision to grant the injunction was that the defendant company's acts were not only illegal but were acts which in their nature tended to injure the public.

In *A.G. v. London & North Western Ry. Co.* (9) [1900] 1 Q.B. 78, the Trent Valley Railway Act, 1845, incorporating the Railways Clauses Consolidation Act, 1845, empowered the defendants to carry their railway across a certain highway providing they ran their trains over the crossing at no more than four miles per hour. The defendant company exercised the power and then proceeded to run 120 trains in every twenty-four hours over the crossing at speeds much in excess of four miles per hour. In the action it was contended by the defendants that the public was not injured by the speed of the trains, and indeed if the trains ran over the crossing only at four miles per hour the crossing would be closed to the public for much longer than under the system thus operated by the defendants. The court granted the injunction and counsel for the plaintiff relies on the following passage in the judgment of A. L. SMITH, L.J. ([1900] 1 Q.B. at p. 85):

"... the legislature having prohibited the running of trains over this crossing which adjoins a railway station at a greater . . . speed than four miles an hour, the question whether it is for the benefit of the public to run trains over it at a greater speed is one with which we in a court of law have nothing to do."

This passage also must, however, be considered in its context. The basis of the decision stated in the judgments of the Court of Appeal was that to run a train across a highway without statutory permission was an act which in its nature tended to injure the public, and indeed constituted a serious public nuisance. The defendant company had statutory permission to run its trains across the highway but only on condition that it did so at no more than four miles per hour. In breaking this condition the defendant company was committing a nuisance in a highway and was unable to defend itself by showing that it was complying with the terms on which it had statutory permission to cross the highway. In these circumstances it was not germane for the court to consider whether a speed in excess of four miles per hour benefited or injured the public.

Notwithstanding that the Attorney-General has exercised his discretion in bringing the action, and that the defendants have contravened the provisions of a statute, in my judgment it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold an injunction; *A.G. v. Wimbledon House Estate Co., Ltd.* (10) [1904] 2 Ch. 34. Nor would it be germane that the public, though injured, may have received some compensating advantage from the defendants' acts; *A.G. v. London & North Western Ry. Co.* (9). If, however, it is established that the public has in fact suffered no injury as a result of the defendants' acts, the court may in the exercise of its discretion refuse an injunction. In every reported case the acts relied on by the plaintiff in actions such as these have clearly tended to the public injury. I have moreover searched the reports in vain for any relator action in which the acts complained of were as trivial as, or even approached the triviality of, the acts relied on in this action.

- A Undoubtedly it is only in the most exceptional circumstances that any statutory provision can be contravened without public injury. The circumstances of this case are, however, most exceptional. The acts done by the defendants do not on the very special facts of this case tend to injure the public, and indeed I am completely satisfied that no member of the public has been in the slightest degree inconvenienced by the defendants. I am uneasy, too, about the circumstances in which the prosecutions were originally launched. I do not consider that in all the circumstances of this case an injunction should be granted, and in the exercise of my discretion I refuse an injunction. There will be judgment for the defendants.

Judgment for the defendants.

- Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Manchester (for the plaintiff); *Julian S. Goldstone & Co.*, Manchester (for the defendants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

D EVANS v. BROOK.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, JJ.), April 30, 1959.]

- E *Rates. Distress warrant—Jurisdiction on application—Defence by ratepayers claiming partial relief from rate—No appeal by ratepayers to quarter sessions against the rate—Nothing due if ratepayers entitled to relief—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (c), (2).*

- F On an application by a rating authority for a distress warrant magistrates have jurisdiction to determine whether the defendant ought not to have been rated at all or on the full rateable value; the possible exception to this rule where the facts are complicated and disputed is an exception based on convenience (see p. 402, letters A, B and E, post).

Whenman v. Clarke ([1916] 1 K.B. 94) and *West Hartlepool Corpn. v. Northern Gas Board* ([1957] 1 All E.R. 394) followed; *Churchwardens of Birmingham v. Shaw* ((1849), 10 Q.B. 868) not followed.

- G A rating authority levied general rates totalling £275 9s. 2d. on premises occupied by a bowling club. The ratepayers applied to the rating authority for partial relief under s. 8 (1) (c), (2)* of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, but the rating authority refused the application. The ratepayers did not appeal against the rate to quarter sessions, but paid only £148 17s. 6d., the total rate due if they were entitled to relief. On an application to petty sessions for a distress warrant in respect of the unpaid balance of £126 11s. 8d. the facts were not in dispute, but the ratepayers claimed limitation of rates under s. 8 (1) (c), (2). On appeal by the ratepayers, the magistrates having decided that they had no jurisdiction to determine the claim to limitation of rates,

- I **Held:** as the facts were simple and not in dispute the magistrates had jurisdiction to determine the ratepayers' claim to limitation of rates and the case must be remitted to the magistrates to do so.

Appeal allowed.

[As to objection to an application for a distress warrant on the ground that the property is exempt from rating, see 12 HALSBURY'S LAWS (3rd Edn.) 181, para. 339, and for cases on the subject, see 18 DIGEST (Repl.) 390-394, 1402-1437.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

* The relevant parts of s. 8 are printed at p. 400, letters F to I, post.

Cases referred to:

- (1) *Birmingham (Churchwardens) v. Shaw*, (1849), 10 Q.B. 868 (116 E.R. 329); sub nom. *Re Birmingham New Library, Ex p. Birmingham Overseers*, 18 L.J.M.C. 89; sub nom. *R. v. Shaw, Birmingham JJ.*, 13 L.T.O.S. 23; 13 J.P. 395; 38 Digest 496, 502.
- (2) *Whemman v. Clarke*, [1916] 1 K.B. 94; 85 L.J.K.B. 424; 114 L.T. 116; 80 J.P. 128; 18 Digest (Repl.) 392, 1426.
- (3) *R. v. Hannam*, (1886), 34 W.R. 355; 18 Digest (Repl.) 409, 1578.
- (4) *Wilson v. Thomas, Lambert v. Thomas, Burrows v. Thomas*, [1911] 1 K.B. 43; 80 L.J.K.B. 104; 103 L.T. 731; 75 J.P. 58; *on appeal*, [1912] 1 K.B. 690; 18 Digest (Repl.) 392, 1425.
- (5) *West Hartlepool Corpn. v. Northern Gas Board*, [1957] 1 All E.R. 394; 121 J.P. 161; 3rd Digest Supp.

Case Stated.

The ratepayers, the Crewe Bowling Club, appealed by their secretary against the decision of the Crewe borough justices, on the application of the town clerk of the borough of Crewe on behalf of the borough council, the rating authority, to issue a distress warrant in respect of £126 11s. 8d. unpaid rates, alleged to be due on a hereditament known as a bowling green, pavilion and premises. The ratepayers claimed to be exempt under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8. The facts are stated in the judgment of LORD PARKER, C.J.

Robin David for the appellant, the ratepayers' secretary.

The respondent, the clerk to the rating authority, did not appear and was not represented.

LORD PARKER, C.J.: The facts are simple. The total amount of rates levied by the rating authority for the period from Apr. 1, 1956, to Sept. 30, 1958, was the sum of £275 9s. 2d. Of that, £148 17s. 6d. had been paid by the ratepayers. Accordingly, there was due still £126 11s. 8d. unless, as the ratepayers claimed, they were entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The relevant provisions of that section for this purpose are:

"(1) This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . .

"(2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows . . .",

and then there are set out certain limitations. The ratepayers had put in an application for relief under that section, and it had been rejected by the rating authority. What the reason for that was, we do not know, but it is suspected that it was that the rating authority were not satisfied that the hereditament was used mainly or exclusively for the purposes of open-air games. At any rate, relief was refused, and accordingly this application was made for a distress warrant in respect of the amount alleged by the rating authority to be due.

A The magistrates, with whom I personally have every sympathy, quite clearly struggled to find that they had no jurisdiction to determine the question whether relief was due or not. They declined jurisdiction. It is against that that the appellant on behalf of the ratepayers appeals. It is only right to say that before the magistrates the rating authority combined with the appellant to try to persuade the magistrates to deal with the matter. No doubt in a case such as this, B which is perfectly simple and where, as we are told, the facts are not really in dispute, it is convenient for both the ratepayers and the rating authority to have the matter determined by the magistrates; but, from the magistrates' point of view, if they have jurisdiction in this case they may be thought to have jurisdiction in the more difficult cases that arise under s. 8 (1) (a).

C The position seems to have been that for a long time it was held that on an application for a distress warrant the magistrates had no jurisdiction to go into the question of the validity of the amount claimed if that could be the subject of an appeal, and I confess that at one time I felt, on that line of case, that here there was an appeal to quarter sessions and that, the right of appeal not having been exercised, it was not for the magistrates to deal with the matter.

D The leading case on what I may call the earlier practice was *Churchwardens of Birmingham v. Shaw* (1) ((1849), 10 Q.B. 868). The matter was put by LORD DENMAN, C.J., in this way (*ibid.*, at p. 878):

E "We are driven, therefore, to consider the second ground on which the rule is supported, whether namely, as regards the present rates, the society is deprived of the benefit of its exemption, because it has not appealed against them. And, as it cannot be successfully contended that the president might not have appealed, the question is narrowed to this, whether, there being a remedy by appeal, and that remedy passed by, the law will allow an action to be brought for the enforcement of a rate, good on its face, and made by a competent authority, on a person, and in respect of the occupation of property, apparently within the jurisdiction of that authority. This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application. The right of appeal is coextensive with the operation of the rate. Whether it has defects which make it even a nullity in law, or be objectionable only as excessive in amount, or unequal in its assessment, anyone who is grieved by it may appeal; but the right of action is limited, as well for the sake of convenience, as on principles of law and justice."

G Accordingly it was held in that case that the magistrates had no jurisdiction. That was in 1849.

H By 1916 and, indeed, earlier, the position had been rather changed, cf. *Wheman v. Clarke* (2) ([1916] 1 K.B. 94). Similar questions there arose, and SWINFEN EADY, L.J., in the Court of Appeal, referred to *Churchwardens of Birmingham v. Shaw* (1), and he went on to refer to a dictum of BOWEN, L.J., in *R. v. Hannam* (3) ((1886), 34 W.R. 355). BOWEN, L.J., said ([1916] 1 K.B. at p. 110):

I "I desire to reserve a further possible exception, upon which I express no opinion—namely, where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which, as soon as the statute is read, destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices may not in that case refuse to enforce the rate."

SWINFEN EADY, L.J., cited from *Wilson v. Thomas* (4) ([1911] 1 K.B. 43) where LORD ALVERSTONE, C.J., said (*ibid.*, at p. 53):

"It is impossible at the present day to apply in all its strictness the old rule that justices are not entitled to entertain, on an application for a warrant, any matter which might be raised on an appeal."

SWINFEN EADY, L.J., approved a rule which was laid down by BRAY, J., and ATKIN, J., in the Divisional Court ([1915] 1 K.B. at p. 559) in these terms ([1916] 1 K.B. at p. 111):

"... that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value." In my opinion this is a good working rule, and ought to be followed, where the material facts are not really in dispute."

To the same effect were the judgments of PHILLIMORE, L.J., and PICKFORD, L.J., PICKFORD, L.J., pointing out (*ibid.*, at p. 122) that no principle could really be found that underlay all the cases, but that it was a question of the balance of convenience. Ever since that case it has been clear that when there is no substantial dispute on the facts it is for the magistrates to inquire whether the amount claimed is due having regard to some exceptions in relief.

The latest case dealing with the matter is *West Hartlepool Corpn. v. Northern Gas Board* (5) ([1957] 1 All E.R. 394), where LORD GODDARD, C.J., stated categorically (*ibid.*, at p. 397):

"It is said that the justices had no power to inquire into what was the amount leviable, but the appellants [the rating authority] had gone to the justices for the purpose of enforcing arrears of rates; they were asking... for a distress warrant. The first thing the justices have to do is to be satisfied that some sum was due and owing..."

In the present case, at any rate, the facts are largely agreed. It is a perfectly simple issue and, reluctant as I am to come to this decision, I feel that the authorities force one to hold that this was a matter within the jurisdiction of the magistrates. Indeed, such matters are always within their jurisdiction, subject to the possible exception that arises if the facts are not agreed and are complicated. That exception is, however, an exception based on convenience and not on any rule of law. In my judgment, the appeal must be allowed and the matter remitted to the magistrates.

DONOVAN, J.: I agree. The only doubt that I have had in this case is whether the right of appeal to quarter sessions against the rate, on which appeal this point could be raised, must be regarded as exclusive of any right when a distress warrant is applied for at petty sessions. The decisions cited by the Lord Chief Justice resolve this doubt quite clearly in a case like the present, where the primary facts relating to the question of relief are not in dispute. The magistrates say:

"The question whether or not the Crewe Bowling Club is a playing field within the meaning of s. 8 of the [Rating and Valuation (Miscellaneous Provisions) Act, 1955] is essentially a question of fact."

So expressed I should have thought that the question was one of law rather than fact, but I suspect that the real question is whether the admitted facts mean that the bowling green and the pavilion constitute a hereditament used mainly for the purposes of open-air games or for open-air athletic sports within the meaning of s. 8. However, if all the primary facts bearing on that question are agreed and the only problem remaining is the true conclusion to be drawn from them, I do not think that that circumstance is enough to deprive the magistrates of jurisdiction. I agree, therefore, that the case should go back to the magistrates for further consideration.

SALMON, J.: I agree.

Appeal allowed; case remitted.

Solicitors: *Gibson & Weldon* (for the appellant).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

DUNN v. BIRDS EYE FOODS LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, JJ.), April 29, 30, 1959.]

Factory—Offence—Contravention of provision of Factories Act, 1937, by occupiers—Accident due to employee's wilful disobedience to orders—Employee's hand injured—Whether injury was in consequence of contravention of statutory duty—Whether injury was an injury to health—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1), s. 133.

While a workman employed in a factory to clean machines at night was cleaning an electrically driven belt-conveyor his hand got caught in the nip between the moving belt and the drum over which the belt moved and was injured. At the time of the accident no machinery was in use, but the workman, despite instructions never to clean machinery while it was in motion, switched the machine on and tried to dislodge waste particles from the drums by hand instead of with a brush. The accident was the fault of the workman, who, knowing that he was doing wrong, left the machine running while he cleaned it to save himself the trouble of switching it on and off each time he cleaned a different part of the machine. When the machine was in use its operator was so placed as to be in no danger from it, and it was not fitted with a guard. If it had been fitted with a guard the workman would have had to remove the guard each time he cleaned a portion of the machine, and should have replaced the guard, switched the machine on for a few moments and then off and removed the guard again whenever he wished to clean a different portion. On appeal against the dismissal of information against the occupiers of the factory for an offence under s. 133* of the Factories Act, 1937, in consequence of a contravention by them of s. 14 (1)* in that a dangerous part of machinery was not securely fenced,

Held: the facts disclosed an offence against s. 133 of the Factories Act, 1937, for the following reasons—

(i) the unfenced nip was a reasonably foreseeable cause of injury to the night cleaning shift and therefore at the time of the accident the occupiers were in contravention of s. 14 (1).

Test stated by LORD REID in *John Summers & Sons, Ltd. v. Frost* ([1955] 1 All E.R. at p. 883) applied.

(ii) the injury was a consequence of the contravention of s. 14 (1) for the purposes of s. 133, notwithstanding that the breach of s. 14 (1) was occasioned solely by the plaintiff's own fault, because the duty imposed by s. 14 (1) was an absolute duty.

(iii) the proviso to s. 133 did not except the occupiers from liability because the words "injury to health" in that proviso referred to disease, not to such an injury as the plaintiff had suffered.

Appeal allowed.

[As to the duty to fence dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 74-77, paras. 126, 127; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1056, 180-215; as to fines in cases of death or injury, see 17 HALSBURY'S LAWS (3rd Edn.) 65, para. 113; and for cases on the subject, see 24 DIGEST (Repl.) 1045, 1046, 165-174.

For the Factories Act, 1937, s. 14 (1), s. 133, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009, 1105.]

Case referred to:

(1) *Summers (John) & Sons, Ltd. v. Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; 24 Digest (Repl.) 1055, 217.

* The relevant terms of s. 133 and of s. 14 (1) of the Factories Act, 1937, are printed at p. 405, letters B and D, and p. 406, letter F, post.

Case Stated.

The prosecutor appealed by way of Case Stated against the decision of the justices for the County of Lancaster acting in and for the petty sessional division of Liverpool county, dismissing an information that the prosecutor had laid on Sept. 25, 1958, against the respondents under the Factories Act, 1937, s. 133. The information preferred by the appellant against the respondents was that they on Aug. 22, 1958, being occupiers of a certain factory within the meaning of the Factories Act, 1937, contravened s. 14 (1) of the Factories Act, 1937, in that a dangerous part of certain machinery in the factory was not securely fenced, and that in consequence of such contravention one James Malcolm Owens suffered bodily injury whereby the respondents were liable to a fine as provided by s. 133. The justices were of opinion that there was no case for the respondents to answer and dismissed the information. The facts are stated in the judgment of SALMON, J.

S. B. R. Cooke for the appellant.

Andrew Rankin for the respondents.

LORD PARKER, C.J.: I will ask SALMON, J., to give the first judgment.

SALMON, J., read the following judgment: On Sept. 25, 1958, the appellant, who is one of Her Majesty's Inspectors of Factories, preferred an information against the respondents before the Justices for the County of Lancaster in the petty sessional division of Liverpool County, under s. 133 of the Factories Act, 1937. At the conclusion of the appellant's case it was submitted on behalf of the respondents that there was no case to answer. The justices upheld that submission and dismissed the information. This case now raises the question whether the justices came to a right decision in point of law.

The respondents are the occupiers of certain premises at Lees Road, Kirkby, in the County of Lancaster, and these premises are a factory within the meaning of the Factories Act, 1937. At 11.20 on Aug. 22, 1958, James Malcolm Owens was employed in the factory on a sanitation shift. There were seven men on this shift and they were the only persons in the premises at the time. Owens was engaged in cleaning a belt conveyor driven by an electric motor. The conveyor ran alongside a row of bean snipping machines. The conveyor consisted of an endless belt twenty-four inches wide stretched over two revolving drums and about twenty-seven inches above the floor of the factory. When the drums were revolving under power a nip was created between each drum and the belt at the point where the belt first came in contact with the drum. The drums and the belt could have been securely fenced by a fixed guard but were unfenced at the time of the accident. The operator of the machine was so placed that he was in no danger from any nip when he was operating the machine. Any member of the sanitation shift, however, might be in danger of having his hands caught in a nip if, for example, the belt were to be set in motion whilst it was being cleaned.

Owens had been instructed by the respondents not to clean machinery while it was in motion; but notwithstanding his instructions Owens switched the machine on for the purpose of cleaning it and proceeded to clean it whilst in motion under power. There were waste particles of beans from the drum, and instead of cleaning them off as he should have done with a hose or a brush, he tried to sweep them manually from the revolving drum. Not very surprisingly his hand became caught in one of the nips to which I have referred, and was hurt badly enough to prevent him from working for four weeks. Owens had turned the machine on and left it in motion to save him walking up and down to the switch, and he did this knowing that it was quite wrong. The accident to Owens was his own fault. If fitted with a guard, the machine could have been cleaned in the following manner: the machine would have been stopped and the guard removed and the exposed portions of the machine cleaned. The guard would

A then have been replaced and the machine inched round to expose a previously unexposed portion of the machine. The machine would then have been stopped, the guard removed and the newly exposed portion of the machine cleaned and the guard then replaced and the inching process continued, the guard being removed when the machine was stationary and replaced when it was put in motion for the inching process until the whole of the machine had thereby been
B cleaned.

The prosecution was brought, as I have said, under s. 133 of the Act, which provides that:

C "If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act or of any regulation or order made thereunder, the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine not exceeding £100 . . ."

I need not read the rest of the main part of the section. There is a proviso, to which I shall presently refer. It was alleged against the respondents that Owens had suffered bodily injury in consequence of the respondents having contravened the provisions of s. 14 (1) of the Act, which relates to fencing, and
D I will read the words of s. 14 (1) relevant to this case:

"Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

E The first question, therefore, that arises is whether or not the nip formed by the drum and the conveyor belt in which Owens caught his hand is a dangerous part of the machinery in the respondents' factory. It is argued on behalf of the respondents that the nip was in such a position as to be as safe to every person employed or working on the premises as it would have been if securely fenced. To my mind that argument is quite untenable. There is an appreciable
F risk, although perhaps not a very serious one, that any member of the night sanitation shift might have had his hand caught in the unfenced nip if the machinery were to be set in motion whilst he was cleaning the conveyor belt or drum. The unfenced nip may not have been a very probable cause but, in my judgment, it was a reasonably foreseeable cause of injury. Accordingly, at the time of the accident the respondents were contravening s. 14 (1) of the Act
G (see *John Summers & Sons, Ltd. v. Frost* (1), [1955] 1 All E.R. 870, per LORD REID at p. 883).

The question then arises whether Owens' injury was in consequence of the respondents' contravention of the statute within the meaning of s. 133. Mr. Rankin, who has urged every point that could be urged on the respondents' behalf, contends that as the accident was Owens' own fault, in that, contrary to
H instructions and with full knowledge of the danger, he tried to clean the drum with his bare hands whilst it was in motion, his injury cannot be said to be in consequence of the machinery being unfenced. He says that the injury was solely in consequence of Owens' own fault. He argues that the contrary view is unreal because even had the respondents fitted the nip with a guard it would not have made the slightest difference. Owens would have removed the guard
I to clean the drum and the accident would certainly have happened just as it did happen. I must confess that at first sight I was attracted by this argument, and I have every sympathy with the justices in accepting it. They certainly took the greatest trouble with this case and have stated it with admirable clarity. I have, however, come to the conclusion that the argument that the injury to Owens was not in consequence of the respondents' breach of s. 14 ought not to be accepted. It is to be observed that this section imposes an absolute duty. Every time a dangerous part of any machinery to which the section applies is in motion unfenced the section is contravened. The nip was a

dangerous part of the machinery to which the section applies and was unfenced at the time of the accident. At that moment, therefore, the respondents were in breach of the section and, but for that breach, that is to say, if at that moment the nip had been fenced, the accident would not have occurred. A

In these circumstances it seems impossible to hold that the injury was not in consequence of the respondents' contravention of s. 14. It is, in my judgment, no answer to say that in a civil action Owens' contributory negligence was such that he might have been held ninety per cent. or even ninety-nine per cent. to blame for his injury. Even if the respondents had fitted a guard and Owens had deliberately removed it contrary to instructions, it would have made no difference to the respondents' liability under s. 133. They would still have been in breach of their absolute duty under s. 14 (1) at the moment of the accident, notwithstanding that the breach was occasioned solely by the fault of Owens. This breach would therefore have been a cause of the injury inasmuch as the accident would not have occurred if at the critical moment the nip had been fenced. The policy of the legislature seems to be to impose an absolute obligation on the occupiers of factory premises so to arrange their affairs that accidents of this kind shall not occur however careless their servants may be. The provisions of the statute are rigorous and in the circumstances of this case impose an onerous burden and, indeed, considerable hardship on the respondents. These considerations, however, cannot affect the true construction of the statute although they provide a strong basis for mitigation which the justices will no doubt take into account. B C D

Counsel took another point on behalf of the respondents with which I ought briefly to deal. He contends that even if the injury to Owens was in consequence of the respondents' contravention of s. 14 (1), the proviso to s. 133 applies, and that accordingly the respondents are not liable under that section unless the injury to Owens was directly caused by that contravention. The proviso to s. 133 reads as follows: E

"Provided that—(a) in the case of injury to health, the occupier or owner shall not be liable to a fine under this section unless the injury was caused directly by the contravention." F

I am disposed to agree that if the proviso applies the respondents would not be liable since, although the contravention of s. 14 (1) was a cause, it was not the direct cause of Owens' injury. The direct cause was his own carelessness. In my judgment, however, the proviso does not apply to this case. The injury which Owens suffered was not an injury to health within the meaning of the proviso. These words are apt to describe a disease which a workman may suffer as a result, for example, of a contravention of s. 47, which deals with the removal of dust and fumes, but are not apt to describe a mangled hand suffered as the result of a contravention of s. 14 (1). Section 133 imposes a liability if any person is killed or dies or suffers bodily injury in consequence of the contravention of any provision of the Act. The definition section of the Act, s. 152, provides that "bodily injury" includes injury to health, that is to say, disease, which the words "bodily injury" would not in my view otherwise cover. If the respondents' contention were right, one would expect the proviso to follow the words of the main part of the section and to read: "in the case of bodily injury there shall be no liability unless the injury was caused directly by the contravention". The proviso, however, uses different language and, in my view, is confined to cases of injury to health which form only one class of the injuries covered by the words "bodily injury" and not the class of injury occasioned by breaches of s. 14 (1). It is to be observed that this construction gives s. 133 the same meaning as the corresponding sections of the Factory and Workshop Acts of 1878 and 1895. If in 1937 the legislature had intended to alter the law in this respect it would, in my view, have used the words "bodily injury" and not the words "injury to health" in the proviso to s. 133. G H I

A For these reasons I would allow the appeal and remit the case to the justices with a direction that unless any further evidence is called on the part of the defendants the evidence now before them discloses an offence.

DONOVAN, J.: I agree, and in view of the very full judgment delivered by SALMON, J., I have nothing to add.

B LORD PARKER, C.J.: I also agree.

Appeal allowed: case remitted to justices.

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the appellant); *Simpson, North Harley & Co.* (for the respondents).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

D R. v. ARUNDEL JUSTICES, *Ex parte* JACKSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.).
April 29, 1959.]

E *Certiorari*—*Excess of jurisdiction*—*Conviction for careless driving*—*Disqualification for twelve months*—*Order for disqualification severable*—*Road Traffic Act, 1930* (20 & 21 *Geo. 5* c. 43), s. 12 (2), as substituted by the *Road Traffic Act, 1934* (24 & 25 *Geo. 5* c. 50), s. 5 (2), as amended by the *Road Traffic Act, 1956* (4 & 5 *Eliz. 2* c. 67), s. 55 (3) and *Sch. 9*.

F Disqualification for holding a driving licence imposed together with a fine on conviction for careless driving, is severable from the conviction and fine so that, if excessive disqualification has been imposed, certiorari may issue to quash the disqualification without the conviction and fine also being quashed.

R. v. Willesden JJ., Ex p. Utley ([1947] 2 All E.R. 838) distinguished.

[For the Road Traffic Act, 1930, s. 12 (2), as substituted by the Road Traffic Act, 1934, s. 5 (2), see 24 HALSBURY'S STATUTES (2nd Edn.) 588; for the Road Traffic Act, 1956, s. 55 (3), Sch. 9, see 36 HALSBURY'S STATUTES (2nd Edn.) 856, 886.]

Cases referred to:

(1) *R. v. Willesden JJ., Ex p. Utley*, [1947] 2 All E.R. 838; [1948] 1 K.B. 397; [1948] L.J.R. 394; 112 J.P. 97; 2nd Digest Supp.

H (2) *R. v. Droxford JJ., Ex p. Hale*, (1953), 117 J.P. Jo. 177.

Certiorari.

I This was an application by Martin Burton Jackson for an order of certiorari to remove into the High Court and quash an order of the Arundel justices made on Jan. 26, 1959, whereby they adjudged the applicant guilty of driving a motor vehicle on a road without due care and attention contrary to s. 12 of the Road Traffic Act, 1930, fined him £20 and disqualified him for holding or obtaining a driving licence for twelve months. The application was made on the grounds that the order was bad in law and made without or in excess of jurisdiction in that by s. 12 (2) of the Road Traffic Act, 1930, as amended by the Acts of 1934 and 1956, the maximum period of disqualification in the case of a first offence, as this was, was one month.

J. R. Phillips for the applicant.

Anthony Harmaworth for the respondent.

LORD PARKER, C.J., stated the facts and continued: The justices did exceed their jurisdiction, and the sole question is whether the court must, therefore, quash the whole of the order, conviction and sentence or whether the disqualification is supplemental to the conviction and severable from it, so that the court need only quash the disqualification. It seems perfectly clear that the fine of £20 and the conviction are clearly not severable, and if £20 had been in excess of jurisdiction then the whole order including the conviction would have to be quashed. That is the effect of *R. v. Willesden JJ., Ex p. Utley* (1) ([1947] 2 All E.R. 838). A B

In the present case, however, the disqualification in question is really supplementary to the rest of the order, and without going into the reasons therefor, I need only say that the matter has been twice before this court, and in both cases this court has decided that that is the proper view and the court need only quash the disqualification. The cases are not fully reported, but they appear sufficiently from 117 J.P. Jo. 177. In one of those cases [*R. v. Droxford JJ., Ex p. Hale* (2), ((1953), 117 J.P. Jo. 177)] LORD GODDARD, C.J., is reported to have said: C

"The court, therefore, quashes the order of disqualification. We do not quash the conviction or the penalty because s. 6 (2) of the Road Traffic Act, 1930, points out that the order for disqualification is different from the conviction, and it expressly gives power to a disqualified person to appeal against the order of disqualification as if it were a conviction. That shows that it is something separate, and it is perfectly easy to sever that part of the order which deals with disqualification from that part of the justices' adjudication which deals with the penalty. We cannot, in quashing the order for disqualification, substitute the right period, but there is no reason why we should quash that part of the order which deals with the penalty." D E

Accordingly, in my judgment an order of certiorari must issue and that part of the order which provides for a disqualification of twelve months must be quashed. F

DONOVAN, J.: I agree.

SALMON, J.: I agree.

Certiorari granted.

Solicitors: *Chalton Hubbard & Co.*, agents for *Malcolm, Wilson & Cobley*, Worthing (for the applicant); *Dell & Loader*, Shoreham (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ROBERTS v. NAYLOR BROTHERS, LTD.

[QUEEN'S BENCH DIVISION (Paull, J.), April 24, 1959.]

Negligence—Damages—Personal injury—Measure of damages—Loss of earnings—Deduction of industrial disablement benefit—Disablement assessed within five years of accident at less than twenty per cent.—Assessment made in respect of period covering whole of plaintiff's life—Benefit payable in form of lump sum—What amount to be deducted from loss of earnings—Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6 c. 41), s. 2 (1).

By s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, in assessing the damages in an action for damages for personal injuries, there shall be taken into account against any loss of earnings arising from the injuries, "one half of the value of any rights which have accrued or probably will accrue...in respect of...industrial disablement benefit....for the five years beginning with the time when the cause of action accrued". The plaintiff, having sustained personal injuries in April, 1957, in the course of his employment by the defendants, brought an action against them for damages for the injuries. The defendants admitted liability. As a result of his injuries, the plaintiff was away from work for seven and a half weeks and his loss of earnings for that period amounted to £106 7s. 6d. From this, as was conceded, a total of £19 4s. 9d. (viz., £14 16s. 3d. for industrial injury benefit and £4 8s. 6d. for interim disability assessment in respect of the first six months) was to be deducted, leaving £87 2s. 9d. The plaintiff's disability was assessed at the end of the six months at five per cent., entitling him under the National Insurance (Industrial Injuries) Act, 1946, s. 12 (6), to a lump sum as disablement gratuity, viz., £67 10s.* which was paid to him. This gratuity was a life assessment, and no further benefit would accrue.

Held: one half of the disablement gratuity should be deducted from the plaintiff's loss of earnings in assessing special damage because, under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, it was one half of the value of the right that had accrued within the five years that had to be taken into account, and the gratuity, though a life assessment, was a lump sum payable within the period; therefore the plaintiff was entitled, in respect of special damage for loss of earnings, to £53 7s. 9d., viz., £87 2s. 9d. (computed as indicated above) less £33 15s., which was one half of £67 10s., the amount of the disablement gratuity.

[**Editorial Note.** The present case should be considered with *Perez v. C.A.V., Ltd.*, p. 414, post, in which a different conclusion was reached.

As to allowances for statutory benefits when computing damages in respect of loss of earnings, see 11 HALSBURY'S LAWS (3rd Edn.) 259, 260, para. 431.

For the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 365.

For the National Insurance (Industrial Injuries) Act, 1946, s. 12 (6), see 16 HALSBURY'S STATUTES (2nd Edn.) 821.]

Cases referred to:

- (1) *Meagher v. Parnall (Yate), Ltd.*, Unreported.
- (2) *Watkin v. C. A. Parsons & Co., Ltd.*, Unreported.

Action.

In this action, the plaintiff, Stanley Roberts, claimed damages from the defendants, Naylor Brothers, Ltd., his employers, in respect of personal injuries suffered by the plaintiff on Apr. 10, 1957, in the course of his employment as a steel erector by reason of the defendants' alleged negligence. The defendants having admitted liability for the injuries, the sole question before the court was

* The scale sum was subsequently raised to £84 for a 5 per cent. disability (see S.L. 1957 No. 2074, reg. 2, Sch. 1, Part 2).

the assessment of the damages to be awarded to the plaintiff, and in particular, what proportion of a lump sum paid to the plaintiff in respect of industrial disablement benefit under s. 12 (6) of the National Insurance (Industrial Injuries) Act, 1946*, fell to be deducted from the special damages under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948†.

P. R. Pain for the plaintiff.

D. J. C. Ackner for the defendants.

PAULI, J.: In this case Stanley Roberts sues Naylor Brothers, Ltd., alleging that on Apr. 10, 1957, he suffered injuries by reason of the negligence of one of the servants of the defendants. Negligence is now admitted, and the sole question before me is how much I should award for the injury which the plaintiff received.

[His LORDSHIP then considered the particulars of the plaintiff's injury, which resulted in the removal of part of the top portion of the first finger of his right hand leaving him with that finger in a condition that caused pain if he touched anything with part of it, and referred to the resulting disability suffered by the plaintiff in his work as a steel erector who had to work at heights. His LORDSHIP awarded the plaintiff general damages of £450 stating that this was a larger sum than he would award for the same injury to a worker on the ground, and continued:] There then arises the question of special damage. The plaintiff was away from work for seven and a half weeks, and, as I understand it, his total loss of wages during that period was £106 7s. 6d. Under the provisions of the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), I have to deduct from any sum which I award him by way of special damages

"one half of the value of any rights which have accrued or probably will accrue to [the plaintiff] . . . in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued."

Those words are directory, and direct me to do that mathematical sum, and I must, of course, obey that instruction. So I have to consider what is one half of the value of any right which has accrued, or which will accrue, to the plaintiff in respect of industrial injury benefit, industrial disablement benefit, or sickness benefit.

It is agreed that in respect of the seven and a half weeks during which the plaintiff was off work he received £29 12s. 6d. by way of injury benefit, injury benefit being payable while a man is away from work owing to his injury for, at any rate, the first six months. That being agreed, I must set off against the £106 7s. 6d. the sum of £14 16s. 3d.

After seven and a half weeks he went back to work. Under s. 12 of the National Insurance (Industrial Injuries) Act, 1946, he was then entitled to have an assessment of future disability. I need not at this moment refer to the actual words of the section, but the effect of the section is this. If, when he goes back to his work, the plaintiff's condition is not stabilized, there is what may be called an interim assessment‡, and, in this case, there was an assessment of ten per cent. disability in respect of the following six months. That disability having been assessed for that period the plaintiff received a lump sum payment of £8 17s. It is agreed that half of this sum also should be set off against his loss of earnings, that is the sum of £4 8s. 6d.

Then comes the dispute. At the end of six months there was a final assessment of five per cent. disability. In order to see what that dispute is one must look at the provisions of the National Insurance (Industrial Injuries) Act, 1946, s. 12, somewhat carefully. Under s. 12 (1) it is provided:

* For the terms of s. 12 (6) of the Act of 1946, see p. 411, letter F, post.

† For the relevant terms of s. 2 (1) of the Act of 1948, see letter E, *infra*.

‡ See the proviso to sub-s. (4) of s. 12 of the Act of 1946.

A "Subject to the provisions of this section, an insured person shall be entitled to disablement benefit if, as the result of the relevant injury . . ."

he is likely to have permanent physical loss. Now the plaintiff clearly came within those words, so that he was entitled to disablement benefit for future physical loss. By sub-s. (2) of s. 12: "... the extent of disablement shall be assessed, by reference to the disabilities . . ." to which the claimant may be expected to be subject during the period taken into account by the assessment. By sub-s. (4) the period to be taken into account by the assessment may either be a definite period or life. The assessment of the sum of £8 17s. was, of course, an assessment in respect of a definite period, namely, for six months. The assessment made at the end of the six months was an assessment of five per cent., and that assessment was not for a fixed period, so it was an assessment for life.

C Then one has to turn to the subsections dealing with how the assessment shall be calculated and how it shall be paid. The Act of 1946 divides assessments for this purpose into two categories—one where the assessment is under twenty per cent., and one where the assessment is over twenty per cent., and those two assessments are dealt with by two quite separate subsections. The first of the subsections (sub-s. (6) of s. 12) deals with the case where the assessment is under twenty per cent., and the second of the subsections, sub-s. (7), deals with the case where it is over twenty per cent. It is a matter of some importance to consider the fact that Parliament has not chosen to make the assessment for under twenty per cent. a proviso to the subsection dealing with assessments of over twenty per cent. The assessment of over twenty per cent. comes in sub-s. (7), and that is an assessment of a weekly sum which is paid week by week. When one deals with assessments of under twenty per cent., it has to be realised that Parliament has chosen not to say, in sub-s. (7), "Provided that where, however, the assessment is under twenty per cent. there shall be the right or the duty to assess the amount by a lump sum to take the place of the weekly sums." That is not how Parliament has approached the problem, and one has to look at the plain provisions of sub-s. (6).

F Now s. 12 (6) says this:

"Where . . . the disablement is . . . less than twenty per cent., disablement benefit shall be an industrial disablement gratuity . . ."

G of a fixed amount. There is no question there of assessing a weekly sum and then turning it into a fixed amount. Subsection (6) simply says the benefit "shall be . . . an amount . . . fixed . . . by a prescribed scale" under certain regulations. The subsection goes on to say that the scale shall be the same for all persons; in other words, it does not take into account the age of the person or yet the physical condition of the person. It is simply a lump sum in accordance with the scale, and every one receives the same lump sum in accordance with the percentage of disability. That scale produces to the plaintiff the sum of £67 10s.

H Three submissions have been made to me how the provisions of the Law Reform (Personal Injuries) Act, 1948, should be applied to that sum of £67 10s. Counsel for the plaintiff says that this is really a payment in respect of the man's life, and that, as the provisions of the Act of 1948 say that the disablement benefit which is to be taken into account shall be in respect of the period of "five years beginning . . . when the cause of action accrued", the right and proper way is, first of all, to disregard the six months during which the plaintiff received his fixed sum, and therefore take a proportion of four and a half years to life. Counsel says that "life" means life expectation on the Ministry of Labour's life expectation figures. So that one takes a proportion, viz., four and a half divided by the number of years which the Ministry's life expectation figures would produce in the case of the plaintiff, and half of that proportion is to be deducted. If that

is right, then it is agreed that the proper figure for special damage is £81 0s. 11d.* A

Counsel for the defendants says that this is quite wrong. He says that the defendants, by the words of the section, should have credit for half of the whole sum paid, that is to say, they should have credit for £33 15s., in which event the proper figure for special damage† would be reduced to £53 7s. 9d.

Counsel for the defendants puts forward a further alternative. He says:

"If that be wrong, then I invite the court to consider the fact that the Ministry in fact based their life payment figures on a seven years' purchase of the weekly sum which would be paid if it were paid week by week."

Counsel says that the proportion ought to be four and a half divided by seven. If that were so, the proper figure for special damage in this case would be £67 2s. 3d.‡

I can deal with that third proposition very shortly. I have no knowledge from any Act of Parliament or from any regulations how the Ministry of Labour chose to arrive at the sum which they have reached under the schedule to the relevant regulations which is Sch. 2 to S.I. 1948 No. 1372§, as amended by S.I. 1955 No. 48. I do not think that I am entitled to delve into what factors the Minister had in front of him when he chose to fix a sum, unless he had to fix that sum by regulation or by Act of Parliament. I therefore can see no ground whatsoever for finding in favour of the third proposition, although, no doubt, it is a curious coincidence that the figures in every case work out exactly right. That deals with the third proposition.

As between the first and second proposition, there has been a difference of judicial opinion. In *Meagher v. Parnall (Yate) Ltd.* (1) (which is not reported, but of which I have a shorthand note) STABLE, J., in his judgment said as follows:

"The defendants contend that under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, [and then he reads the words of the section] this lump sum settlement which [the plaintiff] received ought to be divided into two equal halves, and that I ought to take in assessing the damages one moiety of that sum. In my view the contention of the plaintiff in that respect is manifestly right. The matters that I have to consider are the rights that have accrued or probably will accrue. The rights in relation to which this lump sum payment was made were not rights simply in relation to the five year period, they were rights in relation to the whole period of the possible incapacity. The fact that rights outside the five year period were settled, disposed of and discharged by a lump sum payment does not transform that lump sum payment into a right accrued within the five year period. To take the simplest possible example, if I have got a right accruing ten years hence and that right is to be discharged by an immediate payment, that does not transform that right into a right accruing at the time the payment was made, the payment is made in relation to a right accruing ten years hence. That disposes of that point."

On the other hand, FINNEMORE, J., in *Watkin v. C. A. Parsons & Co., Ltd.* (2) (which again is not reported but of which I have a shorthand note) said in his judgment:

"Another interesting question was canvassed. That is the argument about the application of s. 2 of the Law Reform (Personal Injuries) Act, 1948. Without going into all the arguments, I think that, if the plaintiff

* The total agreed deductions were £19 4s. 9d. (i.e., £14 16s. 3d. + £4 8s. 6d., see p. 410, letters G and H, ante). These left a balance of £106 7s. 6d. - £19 4s. 9d. = £87 2s. 9d. Thus on the basis stated above the deduction for the 5 per cent. disability life assessment would be £6 1s. 10d.

† Viz., £87 2s. 9d. ascertained as indicated in the last preceding footnote.

‡ On this alternative the deduction would thus be £20 0s. 6d.

§ Viz., the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948. Schedule 2 to the regulations was subsequently further amended by S.I. 1957 No. 2074.

- A has in fact received the £180, it is, although described as being for life, a sum of money or a right which has accrued to him within the five years and, he having actually received the money, one ought to regard the whole of it and not work out on a wholly arbitrary basis and a wholly arbitrary calculation what £180 means applied to an individual of the plaintiff's age and then reduce it down to the proportion of what five years would bear to the total.
- B I do not think that anybody drafting this Act thought of any such thing as that. Therefore, I have to have regard to the one half of the £180, which is what he has received. I understand that payments by way of industrial benefits have to be considered "

—and then he gives the figure for his damages.

- C I confess that I prefer the method adopted by FINNEMORE, J. I start by saying this, but counsel for the plaintiff has pointed out to me, that if that method is adopted, it may lead to certain hardships, because the person who has received his lump sum gets a half of the whole of his lump sum taken away; whereas the person who receives weekly payments only gets half of the proportion of the whole sum which he has received taken away from him. I have no doubt that that is right. If I felt that there was real difficulty in translating the words which Parliament has chosen to use, I might very well say "Well, of the two interpretations, both of them being open to me, I prefer the interpretation which does not lead to that hardship". I feel, however, that the words that Parliament used are plain, and I do not think that any question of hardship ought to enter into the effect of my judgment. Hardship is for Parliament; it is not for the courts. A judge's duty is to interpret, by the ordinary canons of interpretation, the words which Parliament has chosen to use. If that results in hardship, it is for Parliament to put the hardship right. So that argument does not impress me in this particular case.
- D
- E

- F Then counsel for the plaintiff says that the word used is "accrue", and that that is something quite different from the word "paid". Parliament has enacted in the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), "any rights which have accrued or probably will accrue"; not "the sums which the plaintiff has been paid, or may be paid". Counsel has referred me to the definition of "accrue" in the OXFORD DICTIONARY. He has also referred me to the fact that in the case, for instance, of rent, although rent may be payable at the beginning of a quarter in respect of that quarter, if anything happens the rent is deemed to "accrue" day by day, irrespective of whether the rent is paid at the beginning or end of the quarter. I agree with that, but I am not at all sure that that is not as a result of particular words in a particular Act of Parliament*.
- G

- H Here, however, one is faced with this. The plaintiff is not, as counsel for the plaintiff submits, entitled under s. 12 of the National Insurance (Industrial Injuries) Act, 1946, to weekly payments at all. He is not entitled to a weekly payment which is to be translated into a lump sum. Parliament has chosen to divide disabilities into those under twenty per cent. and those over twenty per cent., and has chosen to say that, in the case where the disability is under twenty per cent., then the payment is not in any way a weekly payment, but is a definite lump sum. That is what the plaintiff is entitled to, and he is entitled to nothing more and nothing less. It is quite true that that is in respect of his disability during the whole of his lifetime, but, nevertheless, it is a lump sum. The sub-section provides that, where the disability amounts to less than twenty per cent., he is entitled to an amount fixed in accordance with the degree of disablement and the period to be taken into account, and the period is life. The Minister has chosen to fix a lump sum payment to cover that right. The plaintiff is entitled to nothing more; he is entitled to nothing less. So that which has accrued, or which will accrue, is that lump sum, and nothing more will ever accrue to him during his life.
- I

* See the Apportionment Act, 1870, s. 2.

That being so, turning to the words which Parliament has chosen to use in the Law Reform (Personal Injuries) Act, 1948, s. 2, I must, in my judgment, deduct one half of the value of that right which has accrued. I would add that, so far as I can see, no other right will ever accrue to him so far as industrial injury benefit or industrial disablement benefit is concerned in respect of this action. So I think that counsel for the defendants is right on his first point, and that the sum which I have to deduct is one half of the total sum of £67 10s. That means that, in addition to the £450, the plaintiff is entitled to £53 7s. 9d.

Judgment for the plaintiff for £503 7s. 9d.

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters*, agents for *G. Keogh & Co.*, Bolton (for the defendants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

PEREZ v. C.A.V., LTD.

[QUEEN'S BENCH DIVISION (Edmund Davies, J.), May 7, 8, 1959.]

Negligence—Damages—Personal injury—Measure of damages—Loss of earnings—Deduction of industrial disablement benefit—Disablement assessed within five years of accident at less than twenty per cent.—Assessment made in respect of period covering whole of plaintiff's life—What amount to be deducted from loss of earnings—Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6 c. 41), s. 2 (1).

By s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, in assessing the damages in an action for damages for personal injuries there must be taken into account against any loss of earnings arising from the injuries, "one half of the value of any rights which have accrued or probably will accrue . . . in respect of . . . industrial disablement benefit . . . for the five years beginning with the time when the cause of action accrued".

In September, 1957, the plaintiff sustained injuries in the course of his employment with the defendants for which the defendants were held liable. As a result of his injuries the plaintiff was away from work for four and a half weeks and suffered loss of earnings during this period. The plaintiff received injury benefit, and a sum for interim assessment of disability in respect of the first six months after the accident. At the end of the six months, viz., when four and a half years of the five years from the accident were unexpired, the plaintiff's disability was finally assessed at nine per cent. which entitled him, under s. 12 (6) of the National Insurance (Industrial Injuries) Act, 1946, to a lump sum disablement gratuity, which was assessed at £140. The gratuity was a life assessment and was paid to the plaintiff in full and final discharge of all benefits. At the time when the gratuity was paid, the plaintiff had a life expectation estimated at 21.6 years. The defendants contended that one half of the total amount of the gratuity, i.e., £70, fell to be deducted from the plaintiff's loss of earnings under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948.

Held: the proper deduction, under s. 2 (1), from the plaintiff's loss of earnings to be made in assessing his special damage was such proportion of one half the life disablement gratuity as the years unexpired of the five year period (referred to in s. 2 (1)) at the time when the gratuity was paid bore to the plaintiff's expectation of life at that time, because to deduct from the loss of earnings one half of the disablement gratuity was wholly to disregard the words "for the five years beginning with the time when the cause of action accrued" in s. 2 (1); the proper deduction in the present case was, therefore, £14 11s. 8d., which bore to £70 the same proportion as $4\frac{1}{2}$ bore to 21.6.

Roberts v. Naylor Brothers, Ltd. (ante, p. 409) not followed.

A [As to allowances for statutory benefits when computing damages in respect of loss of earnings, see 11 HALSBURY'S LAWS (3rd Edn.) 259, para. 431.

For the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 365.

For the National Insurance (Industrial Injuries) Act, 1946, s. 12, see 16 HALSBURY'S STATUTES (2nd Edn.) 819.]

B Cases referred to:

(1) *Meagher v. Parnall (Yate), Ltd.*, Unreported.

(2) *Watkin v. C. A. Parsons & Co., Ltd.*, Unreported.

(3) *Roberts v. Naylor Brothers, Ltd.*, ante, p. 409.

C Action.

E In this action the plaintiff, Eusebio Perez, claimed damages from the defendants, C.A.V., Ltd., his employers, in respect of personal injuries, and consequential loss thereon, suffered by the plaintiff on or about Sept. 26, 1957, at the defendants' factory premises, in the course of his employment as a machine operator; the plaintiff alleged that the defendants were negligent and were in breach of their statutory duty under s. 14 of the Factories Act, 1937, in failing to fence securely the chuck of the plaintiff's machine. As a result of the accident the plaintiff suffered the following injuries; amputation of the right ring finger and the right middle finger in each case through the terminal phalanx; a small ulcer of the ring finger and a small neuroma on each injured finger; loss of grip and dexterity. EDMUND DAVIES, J., having held that the defendants were in breach of s. 14 of the Act of 1937, but that the plaintiff was guilty of contributory negligence, apportioned the defendants' share of the blame at sixty per cent.; on the basis of full liability on the part of the defendants for the accident, he assessed the general damages at £650. His LORDSHIP then went on to consider what amount, if any, by way of special damages should be added to the general damages. That question, on which this case is reported, arose in the following way. As a result of his injuries the plaintiff was away from work for four and a half weeks during which period his total loss of earnings amounted to £51 18s. 9d. Under s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948, it is necessary to take into account against any loss of earnings, one half of the value of any rights which have accrued or will accrue to the plaintiff from his injuries in respect, inter alia, of industrial injury benefit and industrial disablement benefit for the five years beginning when the cause of action accrued. The plaintiff received £15 16s. injury benefit, and £12 18s. by way of a provisional assessment of disablement benefit and under s. 2 (1) of the Act of 1948, half these amounts, viz., £14 7s., fell to be deducted from the loss of earnings. Six months after the plaintiff had returned to work, his disability was finally assessed for life at nine per cent. which entitled him, under sub-s. (6) of s. 12, to a lump sum as disablement gratuity. The amount of the gratuity was assessed at £140. H The defendants contended that under s. 2 (1) of the Act of 1948, one half of this sum, viz., £70, should also be deducted from the loss of earnings from which it would follow that no special damages would be recoverable. The plaintiff contended that what had to be deducted was merely such sum as would bear the same proportion to £70 as that part of the five years from the accident remaining unexpired when the gratuity accrued bore to the plaintiff's estimated expectation of life. I On this basis, taking four and a half years as the unexpired period, and 21.6 years as the plaintiff's estimated expectation of life, the amount deductible in respect of the gratuity was £14 11s. 8d. Thus, on the plaintiff's contention, it followed that he was entitled to special damages of £23 0s. 1d., viz., £51 18s. 9d. less £14 7s. (in respect of injury benefit and provisional disablement benefit) less also, £14 11s. 8d. in respect of disablement gratuity.

Kenneth Potter for the plaintiff.

R. E. Hopkins for the defendants.

EDMUND DAVIES, J., having held that the defendants were in breach of s. 14 of the Factories Act, 1937, but that the plaintiff was guilty of contributory negligence, apportioned the defendants' share of responsibility for the accident at sixty per cent. His LORDSHIP then assessed the general damages recoverable by the plaintiff on the footing that the defendants were one hundred per cent. to blame at £650* and continued: There remains for determination the difficult question whether the plaintiff is further entitled to any special damages. Fundamentally this turns on the due interpretation of s. 2 of the Law Reform (Personal Injuries) Act, 1948, and its application to the facts of this case. Subsection (1) of s. 2 provides (so far as is material) as follows:

"In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit for the five years beginning with the time when the cause of action accrued."

In the light of events, it is contended for the plaintiff that he is entitled to have added to his general damages the further sum of £23, while the defendants contend that no special damages are recoverable. Although the sum involved is not large, the point is of importance. It arises in this way: s. 12 of the National Insurance (Industrial Injuries) Act, 1946, which created the various benefits referred to in the Act of 1948, regulates the payment of disablement benefit as defined by s. 7. By s. 12 (4) (excluding the proviso),

"The period to be taken into account by an assessment of the extent of a claimant's disablement shall be the period (beginning not earlier than the end of the injury benefit period, and limited by reference either to the claimant's life or to a definite date) during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty."

By sub-s. (5) of s. 12:

"An assessment shall state the degree of disablement in the form of a percentage and shall also specify the period taken into account thereby and, where that is limited by reference to a definite date, whether the assessment is provisional or final."

Then, finally, sub-s. (6) of s. 12 provides:

"Where the extent of the disablement is assessed for the period taken into account as amounting to less than twenty per cent., disablement benefit shall be an industrial disablement gratuity (in this Act referred to as a 'disablement gratuity')—(a) of an amount fixed, in accordance with the length of the said period and the degree of disablement, by a prescribed scale, but not in any case exceeding £150; and (b) payable, if and in such cases as regulations so provide, by instalments. The scale prescribed for the purposes of this subsection shall be the same for all persons . . ."

Then there follow some words which do not appear to be relevant or necessary to be quoted for present purposes. By virtue of these provisions, as I understand, the plaintiff received for some time industrial injury benefit. Then came the time when his disablement benefit was assessed under s. 12 of the Act of 1946 and, as it was assessed for life at less than twenty per cent., he was paid a disablement gratuity pursuant to sub-s. (6) of s. 12 in full and final discharge of all benefits.

The controversy is how, under the Act of 1948, this gratuity is to "be taken into account". Let us call it £X. For the defendants it is contended that £X

* For particulars of the injuries suffered by the plaintiff, see p. 415, letters D and E, ante.

A must be deducted from the "loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries". It is agreed that, if that be the right view, no special damages are recoverable*. On the other hand, it is submitted on the plaintiff's behalf that what has to be taken into account is merely such sum as will bear the same proportion to £ $\frac{5}{2}$ as that part of the five years from the accident which remained unexpired when the gratuity was paid bears to the plaintiff's estimated expectation of life. It is agreed that, if that be the correct method, the plaintiff would be entitled to recover £23 special damages†.

A hypothetical example will serve to illustrate the opposing contentions. Assume that one year from the accident the plaintiff was paid a gratuity of £100 when he was fifty years old. Assume further a life expectation at that time of twenty years. On those facts, the defendants would contend that the Act of 1948 requires the court to take into account one moiety of £100, namely, £50. If the plaintiff is right the appropriate figure on those facts would be $\frac{4}{20}$ ths of £50, namely, £10.

This is not the first time that this matter has arisen but I understand that all previous decisions remain unreported. In *Meagher v. Parnall (Yate), Ltd.* (1) STABLE, J., adopted the view now presented on behalf of the plaintiff; while FINNEMORE, J., in *Watkin v. C. A. Parsons & Co., Ltd.* (2) and PAULL, J., as recently as Apr. 24, 1959, in *Roberts v. Naylor Brothers, Ltd.* (3) (ante, p. 409) accepted the defendants' argument and deducted one half of the total gratuity paid. In view of this conflict diffidence in expressing one's own views on such a controversial issue is both inevitable and seemly.

E I doubt whether the point ever occurred to the draftsman of the Act of 1948, which requires to be taken into account (it is helpful to recall)

"one half of the value of any rights which have accrued or probably will accrue to [the plaintiff] . . . in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued."

F I stress that the rights, whether already accrued or likely to accrue, that have to be taken into account are rights in respect of benefits for "the five years beginning with the time when the cause of action accrued". That, as it seems to me, is the kernel of the matter and that, with respect to FINNEMORE, J., and PAULL, J., is what the defendants' contention here appears to overlook.

G It seems to me that if one is to deduct one moiety of the whole gratuity paid one is wholly disregarding the five-year limitation. I respectfully agree with STABLE, J., when he said:

"The rights in relation to which this lump sum payment was made were not rights simply in relation to the five year period, they were rights in relation to the whole period of the possible incapacity."

H FINNEMORE, J., on the other hand, said:

" . . . I think if the plaintiff has in fact received the £180, that although it is described as being for life, it is a sum of money or a right which has accrued to him within the five years and, having actually received the money, I think one ought to regard the whole of it and not work out on a wholly arbitrary basis and a wholly arbitrary calculation what £180 means applied to an individual of the plaintiff's age and then reduce it down to the proportion of what five years would bear to the total. I do not think that anybody drafting this Act thought of any such thing as that."

* The plaintiff's loss of earnings amounted to £51 18s. 9d., and the total amount of his disablement gratuity was £140; therefore the deduction of one half of the gratuity, viz., £70, from the loss of earnings would mean that nothing was payable for special damage for loss of earnings.

† For the way in which this figure is arrived at, see p. 415, letters H and I, ante.

For my part, I repeat that I take leave to doubt that those drafting the Act A
ever had this matter in mind at all.

PAULL, J., put the matter somewhat differently (see p. 413, letters G to I,
ante), where he said:

"The plaintiff is not . . . entitled under s. 12 [of the Act of 1946] to weekly B
payments at all. He is not entitled to a weekly payment which is to be
translated into a lump sum. Parliament has chosen to divide disabilities into
those under twenty per cent. and those over twenty per cent., and has
chosen to say that, in the case where the disability is under twenty per cent.,
then the payment is not in any way a weekly payment, but is a definite lump
sum. That is what the plaintiff is entitled to, and he is entitled to nothing
more and nothing less. It is quite true that that is in respect of his dis- C
ability during the whole of his lifetime, but, nevertheless, it is a lump sum.
The subsection [sub-s. (6) of s. 12] provides that, where the disability
amounts to less than twenty per cent., he is entitled to an amount fixed
in accordance with the degree of disablement and the period to be taken
into account, and the period is life. The Minister has chosen to fix a lump
sum payment to cover that right. The plaintiff is entitled to nothing more; D
he is entitled to nothing less. So that which has accrued, or which will
accrue, is that lump sum, and nothing more will ever accrue to him during
his life."

So to hold is, in my respectful judgment, to give inadequate attention to the
point that the lump sum payment is made not merely in respect of rights to
benefits which have accrued or will accrue during the five-year period but is, E
as it were, a compounding of those benefits which would, but for the gratuity
provision, continue to be paid throughout life in respect of a disability regarded
as subsisting throughout the same period.

I am aware that there are difficulties in the plaintiff's way. It is true that
the lump sum is not arrived at by first assessing a weekly sum and then (as it
were) capitalising it; and s. 12 (6) of the Act of 1946 provides that the scale
prescribed shall be the same for all persons, so that both age and physical condi- F
tion or degree of disability, provided it be below twenty per cent., are alike
immaterial. Nevertheless, for the reasons that I have endeavoured to state, I
prefer the view advanced on the plaintiff's behalf as one which seeks to give
effect to the entire wording of s. 2 (1) of the Act of 1948 and, in particular, does
not appear to overlook the limitation to benefits "for the five years beginning G
. . . when the cause of action accrued". The fact that it appears also to lead
to a fairer conclusion than that advocated by the defendants does not detract
from its merit. If the formula urged by the plaintiff be not adopted, there seems
to me at least something to be said for the view that the Act of 1948 has made
no provision that is applicable to cases such as the present one, where a disable- H
ment gratuity is paid, and that accordingly no deduction should be made in
respect of any part of such gratuity. That argument has not, however, been
advanced on the plaintiff's behalf and its validity does not accordingly now fall
to be considered.

In the result, the sum of £23* must be added to the general damages of £650
and the plaintiff is, in my judgment, entitled to six-tenths of the combined total
of £673.

Judgment for the plaintiff for £403 16s.

Solicitors: *Evill & Coleman* (for the plaintiff); *Carpenters* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* See p. 415, letters H and I, ante.

R. & T. GLYNN EVANS AND OTHERS v.
LIVERPOOL CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, JJ.),
April 22, 23, 1959.]

B *Highway—Street—Private street works—Abandonment of proposal after objections—Whether local authority could pass new resolution—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6, s. 7, s. 8, s. 11.*

A local authority resolved in 1931 to make up a road pursuant to s. 6 of the Private Street Works Act, 1892. Objections by the frontagers were lodged, but application for their determination by a court of summary jurisdiction was not made. In 1948 another resolution was passed to make up the same road and again objections were lodged but not determined. In 1952 the local authority resolved, pursuant to s. 11, to amend the 1948 estimate of the probable expense. Objections were lodged to this resolution and on application by the local authority to the court the objections were disallowed. On the question whether, in view of the resolution of 1931 and objections thereto, the subsequent resolutions were valid,

Held: an abandoned resolution under s. 6 of the Private Street Works Act, 1892, did not prevent the local authority passing validly a new resolution under s. 6 to make up the street, and, on the facts, the resolution of 1931 had been abandoned; accordingly the resolutions of 1948 and 1952 were valid.

Judgment of WRIGHT, J., in *Southampton Corpn. v. Lord* ((1903), 67 J.P. 189) approved.

Appeal dismissed.

[As to objections by owners, see 19 HALSBURY'S LAWS (3rd Edn.) 443, para. 703; and as to hearing of objections, see *ibid.*, 445, para. 705.]

For the Private Street Works Act, 1892, s. 6, s. 7, s. 8, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 184, 186, 187, 190.]

Cases referred to:

(1) *Faulkner v. Hythe Corpn.*, [1927] 1 K.B. 532; 96 L.J.K.B. 167; 136 L.T. 329; 91 J.P. 22; Digest Supp.

(2) *Southampton Corpn. v. Lord*, (1903), 67 J.P. 189; 26 Digest 543, 2414.

Case Stated.

This was an appeal by Case Stated by the stipendiary magistrate of the City of Liverpool from his determination of objections lodged by the appellants, the frontagers, to proposals made by the respondents under the Private Street Works Act, 1892. The magistrate found the following facts. In September, 1931, the respondents resolved pursuant to s. 6 of the Private Street Works Act, 1892, to make up Leinster Road, Liverpool. The formalities in connexion with the publication of the resolution were duly complied with and within the prescribed statutory period objections were lodged on behalf of the majority of the frontagers. The respondents took no steps to have the objections determined by a court of summary jurisdiction and they did not proceed with their proposal to make up the road. On Apr. 7, 1948, the respondents resolved pursuant to the provisions of the Act to make up the road and the resolution bore no reference to the previous resolution of September, 1931. The formalities required were duly complied with and within the prescribed statutory period an objection was lodged by the appellants on behalf of some of the frontagers. No steps were taken by the respondents to have the 1948 objections determined by a court of summary jurisdiction. On Jan. 2, 1952, the respondents resolved pursuant to s. 11 of the Act to amend the estimate of the probable expenses of the work of making up the road and the provisional apportionment of such

expenses among the premises to be charged therewith. The formalities required in connexion with the publication of this amending resolution were duly complied with and within the prescribed period the objections which were the subject-matter of the application were lodged by the appellants, and came before the magistrate in May, 1958. A

It was contended for the appellants: that as the respondents had taken no steps to have the 1931 objections determined by a court of summary jurisdiction the respondents must be deemed to have abandoned their proposal so that they could no longer seek to apportion the expense of making up the road among the frontagers and that the court thereby had no jurisdiction to determine the proposal. Alternatively, if it were found that the respondents had not abandoned their 1931 proposal but had indefinitely deferred it, the respondents were under a duty to give public notice of such deferment and that their failure to do so deprived them of the right to use the provisions of the Act in 1948 and/or deprived the court of jurisdiction to determine the proposal. Moreover, that the respondents were under a duty on objections being properly lodged pursuant to the provisions of the Act to apply to a court of summary jurisdiction to appoint a time for the determination of those objections. Alternatively that if the magistrate decided against these contentions the proceedings in respect of the 1948 proposals were null and void and of no legal effect in that the 1931 proposals being still in existence at the date of the 1948 proposals, the proceedings by the respondents in 1948 should have been by way of an amending resolution and an amended estimate, in accordance with s. 11 of the Act, and further that by reason thereof the steps taken by the respondents in 1952 were also null and void and of no legal effect. Further, that in any event it was unjust, unreasonable and inequitable that the frontagers should be called on to pay any sum greater than the estimated amounts to be paid by them in 1948, for such increase in the costs as had taken place since then had only arisen by reason of the delay on the part of the respondents to have the objections lodged in that year determined. B C D E

For the respondents it was contended (a) that the respondents were in the case of each resolution entitled to apply to the court of summary jurisdiction at any time after the expiration of one month from the date of first publication of such resolutions and were under no duty to make any such application until there was reasonable anticipation of practical commencement of the work in the near future. (b) That they were entitled to abandon proposals made under the Act having regard, among other factors, to objections which had been lodged, and in particular were entitled to, and did, abandon their 1931 proposals. (c) That by such abandonment the respondents did not bar themselves thereafter from time to time when the conditions of s. 6 of the Act were satisfied from making resolutions in pursuance of the Act. (d) That they were under no duty to give notice of the abandonment or indefinite deferment of their 1931 proposal. (e) That on Apr. 7, 1948, the conditions set out in s. 6 of the Act were satisfied and the respondents' resolution of that date was valid. (f) That the appellants were less likely to be prejudiced by the respondents' resolution of Apr. 7, 1948, than by an amendment of the 1931 proposal, in view of the lapse of time, the probability of changes of ownership and the possibility of objecting on all the grounds set out in s. 7 of the Act and not merely on those set out in s. 11. (g) That the 1948 and 1952 proposals being valid by reason of the foregoing contentions and the provisions of the Act, the frontagers were bound in law to pay the cost of making up the road. F G H I

The magistrate found that the respondents' resolution dated Apr. 7, 1948, was valid and that their resolution of Jan. 2, 1952, amending the estimate and provisional apportionment referred to in their resolution of Apr. 7, 1948, was also valid. The appellants' objections accordingly failed. The question stated

A for the opinion of the High Court was whether on the foregoing facts the magistrate came to a correct decision in law.

Andrew Rankin for the appellants.

D. B. McNeill for the respondents.

B **SALMON, J.:** In this case the respondents, who are the Lord Mayor, Aldermen and Citizens of the City of Liverpool, passed a resolution on Sept. 17, 1931, pursuant to the provisions of s. 6 of the Private Street Works Act, 1892, to make up a certain roadway known as Leinster Road in the City of Liverpool. Section 6 (1) reads as follows:

C “Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works) . . . and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, D adjoining, or abutting on such street or part of a street.”

Subsection (2) provides that the surveyor shall prepare, as respects each street or part of a street, a specification of the private street works, an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises liable to be charged. Then sub-s. (2) further provides that

E “. . . such specification, plans, sections, estimate, and provisional apportionment . . . shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit.”

Subsection (3) of s. 6 provides:

F “The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in Part 2 of the Schedule to this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication.”

G The formalities of those provisions were duly complied with and an objection was made on behalf of certain of the frontagers concerned. Section 7, which deals with objections, reads as follows:

H “During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds . . .”

Then s. 7 sets out six grounds, which I need not read, on which the objection may be founded.

I The objections lodged to the 1931 proposal were that the works were unreasonable and the estimated expenses excessive. The respondents, however, took no steps to have these objections determined and nothing further occurred until Apr. 7, 1948, when the respondents passed a fresh resolution to make up Leinster Road. This resolution was silent as to the 1931 resolution. The formalities required by the Act were complied with and objections were duly lodged on behalf of the owners of the premises adjoining Leinster Road. No action was taken by the respondents to have the 1948 objections determined under s. 8 of the Act. Section 8 (1), which deals with the manner in which the objections are to be heard and determined, provides as follows:

"The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given."

The next thing that occurred was that on Jan. 2, 1952, the respondents resolved, pursuant to s. 11 of the Act, to amend the estimate of the probable expenses of making up the road and the provisional apportionment of these expenses amongst the owners of the premises adjoining the road. Section 11 deals with amendments and reads as follows:

"The urban authority may from time to time amend the specifications, plans, and sections (if any), estimates, and provisional apportionments for any private street works, but if the total amount of the estimate in respect of any street or part of a street is increased, such estimate and the provisional apportionment shall be published in the manner prescribed in Part 2 of the Schedule to this Act, and shall be open to inspection at the urban authority offices at all reasonable times, and copies thereof shall be served on the owners of the premises affected thereby; and objections may be made to the increase and apportionment, and if made shall be dealt with and determined in like manner as objections to the original estimate and apportionment."

It is to be observed that under s. 7 the objections to the original resolution may be made on one of six grounds; under s. 11 the objections to the amendments can be made only on one of two grounds. The formalities required in connexion with the publication of the amending resolution were complied with, and objections were duly lodged on behalf of most of the house owners concerned. The respondents waited until 1957 or 1958 and they then applied for the determination of those objections to the stipendiary magistrate of the City of Liverpool who ruled that the objections failed, and it is from that ruling that the appellants now appeal by way of Case Stated.

On their behalf the first point that is taken is that the respondents must be deemed to have abandoned the resolution of 1931 and that abandonment precludes them from passing any further resolution to make up the road; the abandonment takes away their rights under the Act of 1892, and it means that if they are to make up the road in future, they will have to pay for it. It is a startling proposition that if a local authority abandons a resolution for making up a road under the Private Street Works Act, 1892, it for ever loses its power in the future to pass a resolution under the Act for the purpose of making up the road. The argument seems to lead to very strange and, indeed, ridiculous results and is contrary to the plain words of the section. It is to be observed that s. 6 of the Act is an empowering section and by its express words it gives a power which the urban authority may exercise from time to time, and, indeed, the Act clearly by its language contemplates that whenever the urban authority considers that public convenience or safety demands that the road shall be made up, it shall exercise its powers. Suppose, for example, that in the year 1893 the local authority had a scheme for making up the road which on objection was abandoned, and suppose that in 1959 public convenience and safety required

- A that the local authority should exercise its right under s. 6 in respect of the road and the local authority duly passed a resolution under s. 6, then any person to be charged with the expense of making up the road under the Act could, if counsel for the appellants is right, defeat the resolution by showing that in 1893 there had been the proposal to make up this road and that the proposal had been abandoned. I cannot believe that such a strange result is right. I should not
- B give effect to that argument unless I was compelled to do so by plain authority. There is no such authority, and, accordingly, in my view the argument fails.

- The next point taken by counsel for the appellants is this. He says that as there was no abandonment of the 1931 resolution, the 1931 resolution is alive. Therefore, the respondents were wrong in passing the resolution which they purported to pass in 1948; they should then not have started de novo as the
- C resolution of 1931 was in being. All that they could do was to go by way of amendment under s. 11 of the Act, and, therefore, the resolution they did pass is void and of no effect. This argument turns on whether there was an abandonment or not. I do not pause to consider what the effect might be if there were no abandonment since I take the view that there clearly was an abandonment and the question of what might happen if there was not one is not material.
- D The argument proceeds on this basis. First of all, as I understand it, counsel for the appellants says that the resolution cannot be abandoned once it has been made and objection has been taken to it, because s. 8 of the Act is mandatory and imposes an obligation to have the objection determined by a court of summary jurisdiction. That argument involves a misconception, and I do not
- E consider that it is in any way supported by *Faulkner v. Hythe Corpn.* (1) ([1927] 1 K.B. 532) on which the appellants relied. In my judgment all that the Act lays down and all that that case states is that if the expense of making up the road is to be recovered from the frontagers, then before it can be recovered, if they have objected, those objections must be heard and determined by a court of summary jurisdiction. Moreover, the case to which I have just referred is also an authority for the proposition that it is not permissible for the local authority
- F to proceed with the works before the objections have been heard; in order to recover the local authority have got to show that the works were not proceeded with until the objection had been heard and determined.

Then it is said that a letter was written in August, 1957, to the representative of one of the objectors in which the town clerk stated as follows:

- G "Notices under the above Act were served upon the frontagers first in 1931. A majority of owners then objected to the proposal and the city council decided accordingly to defer indefinitely the proposal to carry out the work."

- It is said that there is a letter from the town clerk stating that the proposal was deferred indefinitely and that letter is quite inimical to the argument, so it is
- H said, that the proposal was abandoned. I do not agree with that contention. I do not think that there is anything which prevents the council from abandoning a scheme set out in a resolution, say, in the year 1910 and then twenty or thirty years later making a fresh scheme by a new resolution. The scheme of 1910 is abandoned, but the proposal that the road may be made up when necessary is not abandoned; that is indefinitely deferred. Indeed, the Act seems to me,
- I by stating in s. 6 that the urban authority may from time to time pass a resolution, to make it impossible for the local authority to resolve that they shall never pass any resolution in respect of making up the road. Similarly, I do not think on the words of the Act that it is possible to regard anything done by the local authority as putting it out of their power ever in the future to exercise the powers expressly conferred on it by the Act. On the facts of this case it is impossible to come to any view other than that the resolution of 1931 was abandoned. Nothing happened for seventeen years and then in 1948 a fresh resolution was passed adopting a fresh scheme.

Counsel for the appellants seeks to derive some support from *Southampton Corp'n. v. Lord* (2) ((1903), 67 J.P. 189). He relies chiefly on an obiter dicta of MATHEW, L.J., when that case reached the Court of Appeal. That case deserves to be examined in order to appreciate what MATHEW, L.J., meant by the words on which the appellants rely. It appears that on Apr. 14, 1897, a resolution was passed by the Southampton Corporation that a certain street should be sewered, levelled, paved, metalled, flagged, channelled and made good and properly lighted, and formalities were duly complied with by the preparation of the necessary specification, plans, sections, estimate and provisional apportionment. Then by resolution of July 28, 1897, those documents were duly approved without modification or addition. In October the frontagers concerned delivered what was called a memorial of objections. It was an informal document which, amongst other things, set out the reasons why they desired that the proposals of the council should not be carried into effect. As a result of that memorial the council met again in October, 1897, and introduced a new scheme and that scheme provided that the same road should have the work done to it which had been envisaged by the first scheme a few months earlier but only for about half its distance and that for the rest of its length the work should be confined to lighting the road. That new resolution was finally approved by the council and all the various specifications, plans, sections and apportionment in connexion with it. The resolution of the council of Dec. 22, 1897, was duly published and no memorial or objection of any kind was made to the second scheme. The work was carried out and the corporation sought in the action to recover the appropriate expenses from the defendant, who was one of the frontagers. The point taken on behalf of the frontager, the defendant in the action, was that there had been no abandonment of the first scheme in October, which was finally approved in July, 1897, that the memorial which had been delivered on behalf of the frontagers was an objection under s. 7 of the Act, and that since that objection had not been adjudicated on by a court of summary jurisdiction, the plaintiffs, the Southampton Corporation, could not recover from the defendant. The point taken on behalf of the corporation was that the first scheme confirmed in July had been abandoned, that no objection had been taken to the second scheme approved in December of the same year and that, therefore, the corporation could recover in the action. Alternatively, the corporation took the point that if the first scheme had not been abandoned and if the defendant was right in suggesting, as he did, that the second scheme of December must merely be regarded as an amendment of the first scheme, then the memorial was not an objection under s. 7 and there was in any event, whichever scheme was looked at as the effective scheme, a scheme to which objection had not been taken, and, therefore, the corporation were entitled to succeed.

WRIGHT, J., tried the case at first instance and he held that the scheme, which was finally confirmed in July, 1897, had been abandoned. It seems that he held that it had been abandoned on this ground: that when the second scheme was confirmed in December and had been duly advertised and notices had been served on the parties concerned, it was quite plain that the old scheme was not going forward, that the corporation had abandoned the old scheme and were putting forward a new one in its place. The case which this court is considering is, of course, a much stronger case because this is not a case where only a few months have elapsed: this is a case where seventeen years have elapsed between the two resolutions. It seems obvious that no one in 1948, except by the exercise of a good deal of ingenuity, could have been under any misapprehension whether the 1931 resolution had been abandoned. WRIGHT, J., who was a great authority on this branch of the law, came to the conclusion that the first scheme had been abandoned, and it seems from that to follow that he was of the opinion that there was power to abandon it in the way in which the corporation abandoned it in that case. He also held that in any event the memorial did not constitute an

A objection under s. 7, and on that ground also, abandonment or no abandonment, the defence failed.

When the case went to the Court of Appeal VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., expressed no opinion on the abandonment point because they were firmly of the view that in any event the memorial did not constitute an objection under the Act. MATHEW, L.J., who also came to the conclusion that
B the memorial did not constitute an objection under s. 7 of the Act, said (67 J.P. at p. 191):

"With reference to the other point, I desire to guard myself against being supposed to yield to the argument that the local authority cannot withdraw a scheme of this sort—that it cannot by public notice served upon everyone intimate that the proceedings have been abandoned. I see no reason at
C present for holding that such a course cannot be maintained, but it may be a matter which may have to be discussed hereafter, and discussed at length."

That is the passage on which counsel for the appellants relied. It has been discussed in this court, and it has been suggested that MATHEW, L.J., was saying that a scheme, if it could be abandoned at all, could only be abandoned by express notice. I do not read that passage as meaning anything of the sort.
D I consider that all MATHEW, L.J., was saying was that he was far from deciding that a scheme could not be abandoned and then he gave an example of how it could be abandoned, and one of the obvious ways in which it could be abandoned, of course, was by direct notice. It is also interesting to observe that having said that, and apparently having expressly reserved the point, he says, at the very
E end of his judgment (67 J.P. at p. 191):

"I agree that the appeal must be dismissed, and I agree throughout with the judgment of my brother WRIGHT."

Whether he meant the whole of the judgment, as he seems to say, I do not know; this is not a very extensive report, perhaps, of what MATHEW, L.J., said. The proper way of looking at it is that the point was left open in the Court of Appeal and that WRIGHT, J.'s decision is quite inimical to the contention now being put forward on behalf of the present appellants. For my part I agree with
F WRIGHT, J.

The final point is that considerable hardship has been put on these frontagers. The respondents have waited and waited during a period in which costs were steadily mounting and now the work is to be done in 1959 when it will cost the
G frontagers very much more than it would have cost them in 1931 or even in 1948 or 1952. It may very well be that that is the case, but I hardly think it lies in the mouth of these appellants to make that complaint. The respondents wished to do the work in 1931 and but for the objections of the appellants they would presumably have done it. They wanted to do the work again in 1948 and again
H the appellants objected. Then there was an amendment of the scheme in 1952 and there was a further objection by the appellants. The points they take are purely technical points because it was conceded when this matter was before the magistrate that it was necessary and desirable that this road should be made up on the facts as they existed.

The two points of law taken are in my view without any real foundation, and I would dismiss the appeal.

I DONOVAN, J.: I agree. I would only add this in deference to the argument of counsel for the appellants. On the facts it is indisputable that the 1931 scheme, by which I mean the proposal to make up the road according to a certain specification at a specified cost, was abandoned as a scheme. Counsel for the appellants says that it follows that no new scheme can ever be proposed by the local authority except one which will be executed at their own cost. I have tried to understand why that consequence should follow as a matter of law, but I have failed. It seems to conflict with the plain terms of s. 6 of the Private Street

Works Act, 1892, which empowers the local authority from time to time to resolve to do these works and to serve the specification on the frontagers with a view to recovering the cost from them.

I also think that the magistrate came to a correct conclusion in this case.

LORD PARKER, C.J.: I agree and there is nothing that I can usefully add.

Appeal dismissed.

Solicitors: *Purchase, Clark & Treadwell*, agents for *Rollo & Mills-Roberts*, Liverpool (for the appellants); *Cree, Godfrey & Wood*, agents for *Town clerk*, Liverpool (for the respondents).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

NAPIERALSKI v. CURTIS (CONTRACTORS), LTD.

[NOTTINGHAM ASSIZES (Havers, J.), February 25, 26, 27, 1959.]

Factory—Dangerous machinery—Duty to fence—Circular saw—Licensee—Injury to operator while voluntarily helping another workman on private job after clocking-off—“Person employed”—“Working”—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1), s. 60 (1), as amended by the Factories Act, 1948 (11 & 12 Geo. 6 c. 55), s. 12 (1) and Sch. 1—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), reg. 10 (c).

The plaintiff was a joiner employed by the defendants. In the course of his employment in the machine shop at the defendants' factory, he had to operate a circular saw which was not securely fenced, within the meaning of s. 14 (1)* of the Factories Act, 1937, and was not fenced in accordance with the requirements of reg. 10 (c)† of the Woodworking Machinery Regulations, 1922 (which are now deemed to be made under s. 60‡ of the Act of 1937). One evening, after finishing his day's work for the defendants and clocking-off, the plaintiff volunteered to help another workman on a private job (namely, making a table for himself) in the defendants' machine shop. While engaged on this job, the plaintiff used the circular saw. Owing to the defective condition of the saw, an accident occurred and the plaintiff's hand was seriously injured. In an action by the plaintiff for damages against the defendants for breach of their statutory duty under s. 14 (1) of the Act of 1937 and reg. 10 (c) of the Regulations of 1922,

Held: the defendants owed no duty to the plaintiff under s. 14 (1) of the Factories Act, 1937, and reg. 10 (c) of the Woodworking Machinery Regulations, 1922, at the time when the plaintiff was injured, because at the time of the accident the plaintiff (a) was not employed, but was voluntarily engaged, in manual labour and (b) was not “working” on the premises within the meaning of the phrase “person employed or working on the premises” in s. 14 (1), as he was not then working under any contract of service; and, therefore, the defendants were not liable.

[**Editorial Note.** This case may conveniently be considered with *Herbert v. Harold Shaw, Ltd.*, ante, p. 189.

As to the scope of the duty to fence securely dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 71, para. 123; and as to power to make special regulations for the safety of persons employed, see *ibid.*, 122, para. 204.

* The relevant terms of s. 14 (1) are printed at p. 432, letter B, post.

† The terms of reg. 10 (c) are printed at p. 429, letter H, post.

‡ Section 60 (1), as amended, is printed at p. 429, letter B, post.

A For the Factories Act, 1937, s. 14 (1) and s. 60 (1), as amended, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009, 1046.

For the Woodworking Machinery Regulations, 1922, reg. 10 (c), see 8 HALSBURY'S STATUTORY INSTRUMENTS 116.]

Cases referred to:

- B (1) *Mulready v. Bell (J. H. & W.)*, [1953] 2 All E.R. 215; [1953] 2 Q.B. 117; 24 Digest (Repl.) 1075, 327.
- (2) *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper*, [1956] 2 All E.R. 722; [1956] 2 Q.B. 396; 3rd Digest Supp.
- (3) *Hartley v. Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 24 Digest (Repl.) 1087, 394.
- C (4) *Stanton Ironworks Co., Ltd. v. Skipper*, [1955] 3 All E.R. 544; [1956] 1 Q.B. 255; 120 J.P. 51; 24 Digest (Repl.) 1045, 165.
- (5) *Smith v. Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 24 Digest (Repl.) 1087, 396.
- (6) *Herbert v. Harold Shaw, Ltd.*, (June 24, 1958), unreported; *affd.* C.A., ante, p. 189.
- D (7) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 24 Digest (Repl.) 1041, 140.

Action.

E The plaintiff, Felicjan Napieralski, was employed by the defendant company, Curtis (Contractors), Ltd., as a joiner and french polisher at the company's premises in Nottingham. The premises were a factory, within the meaning of the Factories Acts, 1937 and 1948, and the defendant company were the occupiers. The plaintiff, who was about forty-five years of age, was a skilled worker and had worked for a long time on woodworking machines. He fully understood the dangers of a circular saw and knew that it ought to have a guard to cover the top of the blade and that the guard should come down as far as possible to the cutting edge of the saw.

F In 1955 a circular saw in the defendant company's machine shop was in a defective and unsafe condition, in that owing to a broken nut it was impossible to lower the guard sufficiently and there was too large a gap between the bottom of the guard and the top of the saw, the fence was not sufficiently long, and the saw was not true and wobbled while in operation. The saw was used in this defective condition by the plaintiff and other employees of the defendants.

G The plaintiff was aware of all the defects and knew that the saw was unsafe. He had spoken about this to Mr. Sidney Curtis, one of the two directors of the defendant company, who was in charge of the joinery department, but nothing substantial had been done. Mr. Curtis was on friendly terms with the company's employees, and, if the employees wanted odd pieces of the company's material for their own purposes, he gave them permission to take the material and to use the company's machines for their private jobs during their luncheon hour or after working hours. On occasions employees used the company's machines for their own purposes after working hours without asking for formal permission to do so. Mr. Curtis knew of the practice and acquiesced in it.

H One or two days prior to Oct. 28, 1955, Mr. Thomson, an apprentice joiner employed by the defendant company, had obtained elsewhere some timber to make a piece of furniture for himself. At the time he was working for the company on an outside job, and on the morning of Oct. 28, 1955, he sent the timber to the company's premises through another employee with a message to the plaintiff requesting him to cut the timber into one inch strips. Mr. Thomson thought that the plaintiff would cut the timber during the luncheon break, but the plaintiff was not able to do so. At 4.30 p.m. the plaintiff finished his duty as joiner for the defendant company and could have clocked off at that time and

left the premises if he had wished to do so. After finishing his outside job at 4.30 p.m., Mr. Thomson returned to the defendant company's premises and went to collect his timber from the plaintiff, who was then in the spraying shop. Finding that the plaintiff had not been able to cut up the timber Mr. Thomson said he would do it himself and walked towards the machine shop. The plaintiff went to the office and clocked-off, and then went into the machine shop with Mr. Thomson and said that he would help him. Neither the plaintiff nor Mr. Thomson had any express authority to remain on the premises to do this private work and Mr. Curtis, who was away at the time, did not know about it. While Mr. Thomson went to work on the planer, the plaintiff started to work on the circular saw. He tried to get the guard down, but could not do so. After he had cut a few strips, the saw wobbled and threw out the timber, which came down on the plaintiff's left hand. The hand came in contact with the blade, was caught in the saw and was severely injured.

The plaintiff brought an action against the defendant company for damages for the injury suffered by him as a result of the accident. The claim was based on negligence and on breaches by the company of its statutory duty under s. 14 (1) of the Factories Act, 1937, and reg. 10 (c) of the Woodworking Machinery Regulations, 1922. The defendant company conceded that the circular saw was not securely fenced, within the meaning of s. 14 (1) of the Act of 1937, and that it was not fenced in accordance with the requirements of reg. 10 (c) of the Regulations of 1922, but, notwithstanding the breach of statutory duty, the company denied any liability towards the plaintiff in respect of his injuries, as the accident did not occur during working hours. The company alleged that the accident was caused by the plaintiff's own negligence and/or breach of statutory duty.

HAVERS, J., found that the cause of the plaintiff's injuries was that there was too large a gap between the bottom of the guard and the top of the saw. He further found (a) that the plaintiff was aware that the work on which he was engaged was a private job for Mr. Thomson; (b) that the plaintiff was a volunteer in this private job, and was not doing anything in the course of his employment by the defendant company or doing any work for the company at the time of the accident; and (c) that the plaintiff was in the machine shop and was using the circular saw with the implied consent of the defendant company, and that his position at the time of the accident was, therefore, that of a gratuitous licensee of the defendant company. Dealing with the claim based on negligence, His LORDSHIP held that, as the plaintiff was a licensee, and as he knew all the defects of the saw, the defendant company was not guilty of any breach of duty towards him at common law. The report is confined to the question whether the defendant company was liable in damages to the plaintiff in respect of his injuries by reason of the company's breach of its statutory duty under s. 14 (1) of the Act of 1937 and reg. 10 (c) of the Regulations of 1922.

R. K. Brown, Q.C., and T. R. Heald for the plaintiff.

A. E. James for the defendant company.

HAVERS, J., after stating the facts and his findings, dismissed the claim based on negligence, and continued: I now turn to s. 14 of the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922, thereunder*, and I have to consider to whom is the duty owed under the regulations and under s. 14 of the Act. Counsel for the defendant company conceded that he did not think that there was any distinction between the regulations and the Act so

* The Regulations of 1922 were made under s. 79 of the Factory and Workshop Act, 1901 (which was repealed by the Act of 1937), and are now deemed to be made under s. 60 of the Act of 1937 by virtue of s. 159 of the Act of 1937. The scope of the regulations was extended by the Woodworking (Amendment of Scope) Special Regulations, 1946, to any premises in which any woodworking machine is used and to which Part 4 of the Act of 1937 applies.

A far as persons are concerned to whom the defendant company owed a duty. I think that he is right about that. Section 60 of the Act gave the Minister power to make special regulations for safety. Section 60 (1), as amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, provides:

B "Where the Secretary of State* is satisfied that any manufacture, machinery, plant, equipment, appliance, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

C Section 12 (1) of the Act of 1948 substituted the words "the persons employed" for the words "persons employed in connexion therewith", which were in the original s. 60 (1). Section 60 (2) reads:

D "Special regulations so made may, among other things—(a) prohibit the employment of . . . all persons or any class of persons in connexion with any manufacture, machinery, plant, process, or description of manual labour; or (b) prohibit, limit, or control the use of any material, or process; or (c) modify or extend with respect to any class or description of factory any provisions of Part 1, Part 2 or this Part of this Act, being provisions imposing requirements as to health or safety; and may impose duties on owners, employed persons and other persons, as well as on occupiers."

E The Regulations of 1922 contain the usual preamble in which it is stated that the regulations were made by the Secretary of State. The preamble goes on to say:

F "Provided that if the Chief Inspector of Factories is satisfied in respect of any factory or other place to which these regulations apply that, owing to the special conditions of the work or otherwise, any of the requirements of the regulations can be suspended or relaxed without danger to the persons employed therein, he may by certificate in writing authorise such suspension or relaxation for such period and on such conditions as he may think fit."

Under the heading "Duties" it is stated:

"It shall be the duty of the occupier to observe Part 1† of these regulations. It shall be the duty of all persons employed to observe Part 2‡ of these regulations."

G Regulation 9 (b) is in these terms:

"No person shall be employed at a woodworking machine unless he has been sufficiently trained to work that class of machine or unless he works under the adequate supervision of a person who has a thorough knowledge of the working of the machine."

H Regulation 10 provides that "Every circular saw shall be fenced as follows . . ." Paragraph (c) of reg. 10, which is the one relied on in this case, reads:

I "The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw."

Rule 23, in Part 2, which is headed "Duty of persons employed", reads:

"Every person employed on a woodworking machine shall—(i) use and maintain in proper adjustment the guards provided in accordance with

* The functions of the Secretary of State under this Act have been transferred to the Minister of Labour and National Service.

† Part 1, which is headed "Duties of occupiers", contains reg. 1 to reg. 22, and Part 2, headed "Duties of persons employed", contains reg. 23.

these regulations: (ii) use the 'spikes' or push-sticks and holders provided in compliance with regs. 11, 14, 18 and 19; except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable."

There has been a number of decisions dealing with various regulations which throw some light on the matter. In *Mulready v. J. H. & W. Bell* (1) ([1953] 2 All E.R. 215) it was held that the duty under the Building (Safety, Health and Welfare) Regulations, 1948, extended to persons who were in the service of a sub-contractor. LORD GODDARD, C.J., dealt with a similar question in *Masseg-Harris-Ferguson (Manufacturing), Ltd. v. Piper* (2) ([1956] 2 All E.R. 722). It is sufficient for me to read a passage from his judgment (*ibid.*, at p. 725):

"Counsel for the appellants, who argued this point with great care, did not suggest that he could support some of the contentions, but the point which he took was that, as the deceased was not employed by the appellants, none of the regulations applied to him, and, therefore, no offence had been committed. In support of his submission, he relied especially on the decision of the Court of Appeal in *Hartley v. Mayoh & Co.* (3) ([1954] 1 All E.R. 375)."

I need not deal with that case. LORD GODDARD, C.J., distinguished it, and then he went on to say ([1956] 2 All E.R. at p. 726):

"The test is whether a person is employed in the factory, not whether he is employed by the occupier of the factory."

After dealing with *Stanton Ironworks Co., Ltd. v. Skipper* (4) ([1955] 3 All E.R. 544), LORD GODDARD, C.J., referred to *Smith v. Cammell Laird & Co., Ltd.* (5) ([1939] 4 All E.R. 381) and *Mulready v. J. H. & W. Bell* (1), and said ([1956] 2 All E.R. at p. 726):

"... both show quite clearly in my opinion that the words 'persons employed' in these cases are not limited to persons who are employed by the occupier of the factory, but apply to men doing work in the factory, it being immaterial by whom they are employed. I was a party to the decision in *Mulready v. J. H. & W. Bell* (1), and I hope that I made it clear in that judgment that that was the position. It is not without interest to note that s. 60 (1) of the Factories Act, 1937, was amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, so that the words were made to read 'is of such a nature as to cause risk of bodily injury to the persons employed', perfectly general words, although in the Act of 1937 those words were qualified to this extent, that the section before the amendment read 'cause risk of bodily injury to persons employed in connexion therewith'. The amendment made in 1948 was obviously intended to widen the scope. I think that there is no question that the regulations now are intended to protect not only the servants of the occupier of the factory but any other persons, such as the servants of contractors, who may be called on to do work in the factory; and, if one comes to think of it, those people particularly need protection."

Counsel for the defendant company referred to *Herbert v. Harold Shaw, Ltd.* (6) ((June 24, 1958), unreported*), a decision of STREATFIELD, J., which was given in this court, and in which he had to consider a point of somewhat similar character. This was whether an independent contractor himself personally came within the scope of the Building (Safety, Health and Welfare) Regulations, 1948. STREATFIELD, J., said:

"Now that was the position, and that letter, together with the question of insurance, is, I think, a pointer to Mr. Herbert [the plaintiff] being an independent contractor. Putting those facts together, it seems to me that

* The decision of STREATFIELD, J., was affirmed by the Court of Appeal on Apr. 10, 1959; see *ante*, at p. 189.

A the position in law is this. I do not think that it can be said on those facts that Mr. Herbert was a person who, being a craftsman, has entered into, or works under, a contract with an employer, that being a contract personally to execute any work or labour. That that was the hope and the expectation I have no doubt, but that it was the contract I do not think is proved. For that reason, therefore, I do not think that any contract of employment, B either for service or for services, ever came into existence, quite apart from their hope and expectation, and indeed their practice. I think that at all material times Mr. Herbert was carrying on as he preferred to carry on, namely, as an independent contractor. For those reasons, therefore, certainly the duties under reg. 4 (i) cannot possibly apply, and that rules out, therefore, reg. 5 and reg. 24."

C Counsel reminded me of the provisions of the Employers and Workmen Act, 1875, s. 10, which defines "workman" for the purposes of that Act:

"The expression 'workman' does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or D otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

E It is quite clear further that the Regulations of 1922 apply to persons employed and that their application is not limited to persons employed by the occupier; they extend to persons employed by an independent contractor.

I turn now to the Act itself, and my attention was called to s. 26. Section 26 (1) reads:

F "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The construction of this subsection was considered by the Court of Appeal in *Lavender v. Diamints, Ltd.* (7) ([1949] 1 All E.R. 532). TUCKER, L.J., who gave the leading judgment, said (*ibid.*, at p. 535):

G "A study of s. 12 to s. 40, which form Part 2 of the Act of 1937, satisfies me that this Part of the Act has not the limited application contended for by the defendants, but it is sufficient for present purposes to confine my decision to s. 26, the language of which is, I think, clearly designed to include in its protection persons working in a factory whether or not they are directly employed by the occupier."

H My attention was also called to s. 151 which contains the definition of "factory". Section 151 (1) reads:

"Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts I of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control . . ."

Counsel for the plaintiff contended that both the Regulations of 1922 and s. 14 of the Act of 1937 were wide enough to cover the case of a gratuitous licensee and he relied in particular on the wording of s. 14, which is the section under which he founds his claim, apart from the regulations. Section 14 (1) reads:

“ Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . . ”

Counsel for the plaintiff contended that, generally speaking, the plaintiff could be said to be “ employed ”, and that at the material time, even if he could not be said to be “ employed ”, he certainly was “ working on the premises ”. It is, perhaps, incongruous that if he had been operating the saw at any time before 4.30 p.m., doing work for his employers, undoubtedly they would have owed a duty to him under s. 14 and the regulations, and he would have been able to found a claim for damages if he had suffered this accident. On the other hand, if counsel for the defendant company is right, at any time after 4.30 p.m., when the plaintiff clocked-off, no duty rests on the employers under this section or these regulations. Counsel for the plaintiff contended that the words were wide enough to include any person who was employed or legitimately working on the premises. I find myself, after consideration, unable to accept that interpretation. I do not think that the word “ working ” is wide enough to cover what the plaintiff was doing at the time. Mr. Thomson was really pursuing a hobby of his own, making a table for himself, and all the plaintiff was doing was helping him to pursue his hobby. The plaintiff was a mere volunteer at the time, not employed under any contract of service or for services. He was voluntarily helping Mr. Thomson to do a private job of his own. The plaintiff was not at that time “ employed ” in manual labour, he was voluntarily engaged in manual labour. He was doing it on his own account and not in the course of his employment or for the benefit of his employers. If he could be said to be “ working ”, he was not working under an agreement with the defendant company or under any contract of service. I, therefore, hold that the defendant company owed no duty to the plaintiff under s. 14 of the Act of 1937 or under the Regulations of 1922 at the time when he was operating this saw and sustained those injuries. The action, therefore, fails.

Assuming that the plaintiff had succeeded, I should have felt bound to hold that he was guilty of very serious breach of care to look after himself, to take reasonable care for his own safety, and I should have held him two-thirds to blame and the defendant company one-third to blame.

Judgment for the defendant company.

Solicitors: *Richards & Flewitt*, Nottingham (for the plaintiff); *Brown, Jacobson & Roose*, Nottingham (for the defendant company).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

BALDWIN & FRANCIS, LTD. v. PATENTS APPEAL TRIBUNAL AND OTHERS.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning), March 16, 17, 18, 19, May 14, 1959.]

Certiorari—Error on face of record—Construction of documents—Technical scientific terms—Evidence necessary to inform court of meaning of terms—Patent specifications—Whether part of record—Whether certiorari would lie to Patents Appeal Tribunal if expert evidence needed to explain technicalities—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 9, s. 85 (10).

Patent—Appeal tribunal—Certiorari.

Claim 1 of the specification of an invention for which the appellants had been granted a patent defined the scope of the invention and contained four alternatives, referred to as (A), (B), (C) and (D). The respondents having subsequently applied for a patent for their invention, the superintending examiner ordered that the respondents' patent should be sealed with a reference to the appellants' prior patent on the ground that the respondents' invention could not be performed without substantial risk of infringing the appellants' patent (s. 9 of the Patents Act, 1949). This decision was based on risk of infringing alternative (D) of the appellants' patent. The Patents Appeal Tribunal reversed the decision of the superintending examiner and the tribunal's written decision set out an extract of the appellants' specification but made no reference to alternative (D) in the specification and referred only to alternative (B) of the claim. No appeal lay in this instance from the tribunal's decision. The appellants applied for certiorari to quash the tribunal's decision on the ground that errors of law appeared on the face of the record. The alleged errors of law included misconstruction by the tribunal of the relevant specifications which used technical scientific terms. On appeal to the House of Lords, their Lordships looked, *de bene esse*, at the specifications of the inventions, the superintending examiner's decision and the notice of appeal to the tribunal in addition to looking at the decision of the tribunal.

Held: certiorari would not be granted for the following reasons—

(i) (per LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW) no error of law in the judgment of the tribunal was apparent either on the face of the written decision of the tribunal or after examining the documents at which the House of Lords had looked on the assumption, but without deciding, that they were admissible as being part of the record for the purpose of the principle by which certiorari could issue when error of law appeared on the face of the record of an inferior court.

(ii) (per LORD DENNING) although the written decision of the Patents Appeal Tribunal appeared on its face to have taken into consideration alternative (B) and to have disregarded the vital alternative (D) of the claim in the appellants' specification, and although this was an error of law for which certiorari might issue, yet the case was not one in which certiorari should be granted because the reference entered in the respondents' patent under s. 9 (1) of the Patents Act, 1949, which would be removed therefrom by the tribunal's decision, conferred no right on the appellants and another remedy than certiorari would be open to them for any infringement of their patent.

Per LORD MORTON OF HENRYTON, LORD REID and LORD DENNING: there are other means than expert evidence by which the meaning of technical terms may be ascertained, e.g., by exercise of the power to appoint an assessor

under s. 98 of the Supreme Court of Judicature (Consolidation) Act, 1925 (see p. 438, letter I, to p. 439, letter B, p. 442, letter E, and p. 446, letters C to F, post).

Decision of the Court of Appeal ([1958] 2 All E.R. 368) affirmed.

[Editorial Note. What documents formed part of the record for the purpose of the principle that certiorari may issue for error of law on the face of the record was not determined by the House of Lords. In two of the speeches it was assumed without deciding that the documents at which the House of Lords was asked to look formed part of the record: in two other speeches it was specifically stated that the question of what documents constituted the record should be reserved for another occasion (see p. 439, letter C, p. 441, letter H, p. 443, letter F, and p. 444, letter A, post). The COURT OF APPEAL had previously held that the specifications formed part of the record (see [1958] 2 All E.R. at p. 371, letters E, F), and LORD MORTON OF HENRYTON agreed with reasoning immediately preceding this conclusion (see p. 438, letters C to G, post). LORD DENNING took the view that the decision of the superintending examiner as well as the specifications formed part of the record (see p. 445, letter H, post).

As to error on the face of the proceedings as a ground for certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 61, para. 118; and for cases on the subject, see 16 DIGEST 108-113, 79-134.

As to certiorari to quash decisions of bodies exercising judicial or quasi-judicial functions, see 11 HALSBURY'S LAWS (3rd Edn.) 128, para. 239, note (c); and for cases on the subject, see 16 DIGEST 387-389, 2282-2312.

As to appeals to the Patents Appeal Tribunal, see 24 HALSBURY'S LAWS (2nd Edn.) 573, para. 1090, note (k); and as to insufficiency of description as a ground of opposition to a patent, see *ibid.*, 565, para. 1076.

For the Patents Act, 1949, s. 9 and s. 85, see 17 HALSBURY'S STATUTES (2nd Edn.) 638, 708.]

Cases referred to:

- (1) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, 2795.
- (2) *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1951] 1 All E.R. 268; [1951] 1 K.B. 711; *affd.* C.A., [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.
- (3) *Ryslip Parish v. Hendon Parish*, (1698), Holt, K.B. 572; 90 E.R. 1216; 37 Digest 299, 995.
- (4) *Walsall Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 186, 920.
- (5) *R. v. Utoxeter (Inhabitants)*, (1733), Kel. W. 117; 2 Stra. 932; 25 E.R. 522; (1732), Cunn. 28, note (a); 94 E.R. 1041; 16 Digest 415, 2745.
- (6) *R. v. Alverston*, (1698), Holt, K.B. 508; Carth. 469; 90 E.R. 1179; sub nom. *R. v. Albertson*, 2 Salk. 483; 1 Ld. Raym. 395; 91 E.R. 416; 3 Digest 361, 30.
- (7) *R. v. Bourn (Inhabitants)*, (1735), Burr. S.C. 39.
- (8) *R. v. Upton Gray (Inhabitants)*, (1783), Cald. Mag. Cas. 308.
- (9) *R. v. Liston*, (1793), 5 Term Rep. 338; Nolan, 259; 101 E.R. 189; 16 Digest 474, 3556.
- (10) *R. v. Cashibury Hundred J.L.*, (1823), 3 Dow. & Ry. K.B. 35; 1 Dow. & Ry. M.C. 485; 16 Digest 427, 2871.
- (11) *Re Gilmore's Application*, [1957] 1 All E.R. 796; sub nom. *R. v. Medical Appeal Tribunal, Ex p. Gilmore*, [1957] 1 Q.B. 574; 3rd Digest Supp.
- (12) *R. v. Head*, [1957] 3 All E.R. 426; [1958] 1 K.B. 132; *affd.* H.L. sub nom. *Director of Public Prosecutions v. Head*, [1958] 1 All E.R. 679; [1959] A.C. 83.
- (13) *Landauer v. Asser*, [1905] 2 K.B. 184; 74 L.J.K.B. 659; 93 L.T. 20; 29 Digest 91, 493.

- A (14) *Chamsey Bhara & Co. v. Jieraj Balloo Spinning & Weaving Co., Ltd.*, [1923] A.C. 480; 92 L.J.P.C. 163; 129 L.T. 166; Digest Supp.
- (15) *Blaiber v. Newborne*, [1953] 2 Lloyd's Rep. 427.
- (16) *Mercer v. Denne*, [1905] 2 Ch. 538; 74 L.J.Ch. 723; 93 L.T. 412; 70 J.P. 65; 25 Digest 9, 55.
- B (17) *Southport Corp'n. v. Esso Petroleum Co., Ltd.*, [1953] 2 All E.R. 1204; *reversd.* C.A., [1954] 2 All E.R. 561; [1954] 2 Q.B. 182; 118 J.P. 411; *reversd. in part* H.L., sub nom. *Esso Petroleum Co., Ltd. v. Southport Corp'n.*, [1955] 3 All E.R. 864; [1956] A.C. 218; 120 J.P. 54; 3rd Digest Supp.
- (18) *R. v. London County Council, Ex p. London & Provincial Electric Theatres, Ltd.*, [1915] 2 K.B. 466; 84 L.J.K.B. 1787; 113 L.T. 118; 79 J.P. 417; 42 Digest 920, 154.
- C (19) *Board of Education v. Rice*, [1909] 2 K.B. 1045; *affid.* C.A., [1910] 2 K.B. 165; *affid.* H.L., [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.
- (20) *R. v. Pontypridd, Aberdare and Mountain Ash and Tredegar County Court Registrars, Ex p. National Amalgamated Approved Society*, [1948] 1 All E.R. 218; 2nd Digest Supp.
- D (21) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Hierowski*, [1953] 2 All E.R. 4; [1953] 2 Q.B. 147; 117 J.P. 295; 3rd Digest Supp.
- (22) *R. v. City of Liverpool JJ., Ex p. W.*, [1959] 1 All E.R. 337.
- (23) *Secredal Jhuggroo v. Central Arbitration & Control Board*, [1953] A.C. 151; 3rd Digest Supp.
- E (24) *R. v. Bolton*, (1841), 1 Q.B. 66; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest 418, 2775.
- (25) *R. v. De Ruten*, (1875), 1 Q.B.D. 55; 45 L.J.M.C. 57; sub nom. *R. v. Glamorganshire JJ.*, 33 L.T. 726; 40 J.P. 150; 30 Digest (Repl.) 73, 550.
- (26) *R. v. Bass*, (1793), 5 Term Rep. 251; Nolan, 227; 101 E.R. 141; 16 Digest 403, 2486.
- F (27) *R. v. Manchester & Leeds Ry. Co.*, (1838), 8 Ad. & El. 413; 7 L.J.Q.B. 192; 112 E.R. 895; 16 Digest 404, 2495.
- (28) *R. v. Surrey JJ.*, (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest 422, 2822.
- (29) *R. v. Manchester Legal Aid Committee, Ex p. R. A. Brand & Co., Ltd.*, [1952] 1 All E.R. 480; [1952] 2 Q.B. 413; 3rd Digest Supp.
- G (30) *R. v. Harman*, (1739), 7 Mod. Rep. 287; Andr. 343; 87 E.R. 1246; (1740). Sess. Cas. K.B. 182; 93 E.R. 184; 16 Digest 446, 3119.
- (31) *R. v. Cambridgeshire JJ.*, (1835), 4 Ad. & El. 111; 111 E.R. 729.
- (32) *Davies v. Price*, [1958] 1 All E.R. 671.
- (33) *St. Clements Parish v. St. Andrew's Holborn Parish*, (1708), 6 Mod. 287; sub nom. *St. Andrew's Holborn (Inhabitants) v. St. Clement Danes' (Inhabitants)*, (1704), 2 Salk. 606; Holt, K.B. 511; 91 E.R. 514; 33 Digest 389, 1003.
- H

Appeal.

Appeal by Baldwin & Francis, Ltd., the owners of a patent, from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.J.J.), dated May 2, 1958, and reported [1958] 2 All E.R. 368, affirming a decision of the Queen's Bench Divisional Court (LORD GODDARD, C.J., and DONOVAN, J.), dated Oct. 14, 1957. The Divisional Court refused the appellants' application for certiorari to quash a decision of the Patents Appeal Tribunal (LLOYD-JACOB, J.), dated Jan. 17, 1957, reversing an interim decision of the superintending examiner (E. T. VINCENT, Esq.), dated June 15, 1956, and a final decision dated Aug. 31, 1956, and made in pursuance of the Patents Act, 1949, s. 9. The respondents were the Patents Appeal Tribunal, the Comptroller-General of Patents, Alexander Anderson and Anderson, Boyes & Co., Ltd.

The facts appear in the opinion of LORD MORTON OF HENRYTON.

J. P. Graham, Q.C., Anthony Cripps, Q.C., and M. Heald for the appellants.
G. W. Tooke, Q.C., S. I. Leary, Q.C., and J. A. S. Hall for the third and fourth respondents.

The first and second respondents did not appear and were not represented.

Their Lordships took time for consideration.

May 14. The following opinions were read.

LORD MORTON OF HENRYTON (read by LORD SOMERVELL OF HARROW): My Lords, the question for decision in this House is whether there is or is not any error of law on the face of the record of the Patents Appeal Tribunal (LLOYD-JACOB, J.) in the present case. That tribunal reversed interim and final decisions of the superintending examiner (Mr. E. T. VINCENT acting for the Comptroller-General of Patents) whereby, in opposition proceedings under s. 14 of the Patents Act, 1949, he ordered that there should be inserted in the third and fourth respondents' letters patent No. 703,630 a specific reference to the appellants' letters patent No. 658,823. The first and second respondents were not represented at the hearing of this appeal and I shall hereafter refer to the third and fourth respondents as "the respondents".

This appeal has taken an unusual course, and, in order to state the matters to be considered by this House, it is necessary to set out the history of the case in some detail. I shall first state the relevant provisions of the Patents Act, 1949. They are as follows:

" 14. (1) At any time within three months from the date of the publication of a complete specification under this Act, any person interested may give notice to the comptroller of opposition to the grant of a patent on any of the following grounds:— . . . (g) that the complete specification does not sufficiently and fairly describe the invention or the method by which it is to be performed; . . .

" (2) Where any such notice is given, the comptroller shall give notice of the opposition to the applicant, and shall give to the applicant and the opponent an opportunity to be heard before he decides on the case.

" (4) An appeal shall lie from any decision of the comptroller under this section.

" 9. (1) If, in consequence of the investigations required by the foregoing provisions of this Act or of proceedings under s. 14 or s. 33 of this Act, it appears to the comptroller that an invention in respect of which application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, he may direct that a reference to that other patent shall be inserted in the applicant's complete specification by way of notice to the public unless within such time as may be prescribed either— (a) the applicant shows to the satisfaction of the comptroller that there are reasonable grounds for contesting the validity of the said claim of the other patent; or (b) the complete specification is amended to the satisfaction of the comptroller.

" (3) An appeal shall lie from any decision or direction of the comptroller under this section.

" 85. (1) Subject to the provisions of this Act with respect to Scottish appeals, any appeal from the comptroller under this Act shall lie to the Appeal Tribunal.

" (7) Upon any appeal under this Act the Appeal Tribunal may exercise any power which could have been exercised by the comptroller in the proceeding from which the appeal is brought.

" (9) Rules made under this section shall provide for the appointment of scientific advisers to assist the Appeal Tribunal upon appeals under this Act and for regulating the functions of such advisers; and the remuneration

A of a scientific adviser appointed in accordance with such rules shall be defrayed out of moneys provided by Parliament.

" (10) An appeal to the Appeal Tribunal under this Act shall not be deemed to be a proceeding in the High Court.

B " 87. (1) An appeal shall lie to the Court of Appeal—(a) from any decision of the Appeal Tribunal on an appeal under s. 33 or s. 42 of this Act where the effect of the decision is the revocation of a patent: (b) from any decision of the Appeal Tribunal under s. 55 of this Act: (c) with the leave of the tribunal, from any decision of the tribunal under s. 14 of this Act, where the effect of the decision is the refusal of the grant of a patent on the ground specified in para. (d) or para. (e) of sub-s. (1) of that section."

C The effect of the provisions of s. 9 (3), s. 14 (4), s. 85 and s. 87 is that no appeal lies to the Court of Appeal from the decision of the Patents Appeal Tribunal in the present proceedings, that the Appeal Tribunal is an inferior tribunal and that the only remedy of persons aggrieved by a decision of that tribunal is by way of order of certiorari.

D The appellants were and are owners of a patent No. 658,823, the complete specification of which is entitled "Improvements in and relating to Earth Leakage Protection Systems for Electric Motors, Cables and Other Apparatus". Those improvements were designed to prevent the reclosing of a circuit in which an earth fault had developed until that fault had been repaired. On Nov. 23, 1950, the respondents made application for patent No. 703,630, the complete specification of which was filed on Dec. 24, 1951, and published on Feb. 10, 1954. The specification was entitled "Improvements in or relating to Protective Systems for Polyphase Alternating Current Loads". The purpose of the invention in question was similarly to prevent the reclosing of an electrical circuit while an earth fault which had developed remained unrepaired.

E Within the statutory period, the appellants gave notice of opposition under s. 14 (1) of the Patents Act, 1949, on a number of grounds of which the only material one was, and is, that the complete specification did not sufficiently and fairly describe the invention or the method by which it was to be performed, under the terms of sub-s. (1) (g) of s. 14. The appellants' contention was that the specification could not fairly describe the invention or the method by which it was to be performed without a reference being made to their patent No. 658,823, and that such a reference should be directed under s. 9 of the Patents Act, 1949.

F The reason for such a reference being directed by the comptroller-general is that any member of the public proposing to make the apparatus described in the specification ought to be warned that in so doing he runs a substantial risk of infringing the prior patent mentioned in the reference.

G By an interim decision dated June 15, 1956, the superintending examiner, on behalf of the comptroller, decided that the respondents' invention could not be performed without substantial risk of infringement of the appellants' patent. He rejected all other grounds of opposition, and allowed the respondents one month to submit proposals for amending their specification. No such proposals were forthcoming, and, accordingly, by a final decision dated Aug. 31, 1956, he ordered that the patent applied for be sealed with a reference to the appellants' patent. The respondents appealed from this decision to the Patents Appeal Tribunal, and that tribunal reversed the order of the superintending examiner.

I The appellants thereupon applied by motion to the Divisional Court of the Queen's Bench Division for an order of certiorari to bring up and quash the order of the Patents Appeal Tribunal on the ground that errors of law appeared on the face of the record. The alleged errors of law are set out in the statement by the appellants dated June 26, 1957, and include misconstruction by the tribunal of the relevant specifications. The Divisional Court dismissed the motion. LORD GODDARD, C.J., after referring to s. 9 and s. 85 of the Patents Act, 1949, and to the rules made thereunder, said that it was obvious that

Parliament and the statutory committees who had to make rules considered that matters relating to patents should be considered by experts: it was not intended that the Divisional Court should investigate difficult scientific questions. LORD GODDARD pointed out that what the Patents Appeal Tribunal had to consider was whether there was a substantial risk that the respondents' patent infringed some other patent. The tribunal had come to the conclusion that, on the evidence, it could not find that there was such risk, and, accordingly, had allowed the appeal. Whether a patent could or could not be performed without substantial risk of infringement of some other claim was essentially a question of fact. DONOVAN, J., delivered a concurring judgment.

The appellants appealed to the Court of Appeal, and that court (JENKINS, PARKER and PEARCE, L.J.J.) dismissed the appeal. PARKER, L.J., in a judgment with which the other lords justices concurred, stated the contention of counsel for the appellants as follows ([1958] 2 All E.R. at p. 371):

" Counsel, on their behalf, puts his contention in this way. Before the tribunal can decide whether there is a substantial risk of infringement, it must construe the rival specifications. The construction of a written document is a matter of law. Reading the decision of the tribunal (so he says) it is clear that the tribunal must have misconstrued the specifications, and accordingly there is an error of law on the face of the record. Now it is clear that proceedings such as these are in no sense by way of appeal. The court can look, and look only, at the reasoned decision, and at such other documents as can fairly be said to form part of the record. If no reasoned decision is given, the error of law, if error there be, will not be detected. The face of the record (as LORD SUMNER put it in *R. v. Nat Bell Liquors, Ltd.* (1), [1922] 2 A.C. 128 at p. 159) was then* 'the inscrutable face of a sphinx'. In the ordinary case, where, as here, what is called a 'speaking order' is made, the error, if error there be, takes the form of the misconstruction or misapplication of a statute or regulation. This case, so far as I know, is the first case where it is said that the error consists of the misconstruction of some other document. Logically, however, if that document does form part of the record and the decision on its face shows that the tribunal has misconstrued it, I do not see why certiorari will not lie. It is an error of law, albeit one different from that sometimes found."

My Lords, counsel for the appellants' argument in this House was to the same effect, and I entirely agree with the passage which I have just quoted. The learned lord justice then went on to hold that the two specifications formed part of the record, but found it unnecessary to determine whether or not the decision of the superintending examiner also formed part of the record. He then pointed out that, in order to determine whether either of the specifications had been misconstrued, it was necessary for the court to decide what the right construction was. The documents dealt with technical matters of science, and technical terms were used. Where technical words were used in a document they were *prima facie* used in a technical sense and evidence could, and indeed must, be given to enable the court to understand the meaning of the language used. The lord justice was satisfied that the court could not construe the specifications without being informed by evidence and, that being so, the application failed in limine because the court in such proceedings was not entitled to look at the evidence given in the proceedings or to receive new evidence on affidavit.

My Lords, I fully appreciate the difficulty felt by the Divisional Court and the Court of Appeal, and I agree that, in cases where an order of certiorari is sought on the ground of error of law on the face of the record, the court is not entitled either to look at the evidence given in the proceedings or to receive new evidence. There are, however, other means whereby the meaning of technical

* By reason of the change in the nature of the "record" of summary convictions effected by the Summary Jurisdiction Act, 1848.

A words may be ascertained. For instance, counsel are sometimes ready to agree that well-known technical words have a particular meaning. In the present case, the House was greatly assisted by an analysis of claim 1 of the appellants' specification No. 658,823 which was prepared by the appellants for the use of the Court of Appeal and accepted as correct by counsel for the respondents. Moreover, the court has power to appoint assessors under s. 98 of the Supreme Court of Judicature (Consolidation) Act, 1925. It would indeed be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the courts were precluded from considering whether there was an error of law on the face of the record because they did not know the meaning of certain technical terms.

C Your Lordships heard considerable argument as to what documents did or did not form part of the record in the present case. Counsel for the appellants submitted that the record included at least the decision of the superintending examiner, the notice of appeal to the Appeal Tribunal, the decision of the Appeal Tribunal and the two relevant specifications and your Lordships have looked at all these documents *de bene esse*. I am content to assume that they all form part of the record, for, even on this assumption, I do not find any error of law on the face of the record.

The vital passage in the decision of the superintending examiner is as follows. Speaking of the respondents' specification No. 703,630 (they were the applicants before him) he said:

E "I am satisfied that there is resistance, be it resistance U or the resistance of winding 2, through which current is injected by secondary winding 12, and this resistance is connected, by switch 14, on the dead side of the circuit-breaker 6. The current arises at the secondary winding 12, and the fault circuit comprises the lines 7, 8, 9 and the fault to earth. Accordingly the injection of the current is achieved by all the components disposed between the winding 12 and the lines, 7, 8, 9 namely the resistance U, the winding 2 and the switch 14. I find no difficulty in reading this arrangement on to the phrase in claim 1 of specification 658,823, 'by means of a resistance' whether it be resistance U or the resistance of winding 2. As a result I find that the invention described in [respondents'] specification 703,630 cannot be performed without substantial risk of infringement of claim 1 of [appellants'] specification 658,823."

G Now the analysis of claim 1 of this specification*, to which I have already referred, states that "The claim includes four alternatives and is equivalent to four separate claims rolled into one". It then sets out the four alternative claims, identifying them by the letters (A), (B), (C), and (D), and it is said by counsel for the appellants that the reasoning of the superintending examiner applies directly to alternative claim (D). I think that this is so.

H I now turn to the decision of the Patents Appeal Tribunal. It is short and I find it necessary to set it out in full. When the tribunal refers to "the applicants" or to "the appellants" he is, of course, referring to the present respondents.

I "By this appeal the applicants for letters patent No. 703,630 seek a reversal of two decisions given by Mr. E. T. VINCENT (superintending examiner, acting for the comptroller-general) dated June 15, 1956, and Aug. 31, 1956, and ask that their patent may be sealed without either amendment or the insertion of a specific reference to letters patent No. 658,823.

"The hearing officer came to the conclusion that the performance of the applicants' invention would involve substantial risk of infringement of the cited letters patent, the material claim of which reads as follows:

* An earth leakage protective control system for electric motors, cables

* No. 658,823.

or other apparatus operating on polyphase A.C. in which the reclosing of a circuit breaker or contactor under earth fault conditions is prevented by a lock out relay energised by rectified A.C. which is, or is derived from current injected through the fault circuit by means of a neutral point inductance or resistance, or a resistance, connected on the dead side of the circuit breaker or contactor.'

'The general similarity of the applicants' construction to apparatus covered by this claim is not and cannot be disputed. It is an earth leakage protective control system for loads operating on three-phase A.C. and is designed to prevent by relay action the reclosing of a circuit breaker which has been opened on an earth fault occurring. The relay for such reclosing is electrically energised through a resistance by current derived from the mains supply. The characteristic of the opponents' claim which it is contended does not appear in the appellants' construction is that which specifies that the operation of the relay is to be by rectified A.C. passing through a resistance. It is conceded that the relay is operated by current, and that a resistance is in circuit but it is urged that the current which passes through the relay is not rectified A.C. This, on the face of it, would appear to be a simple matter of technical significance susceptible of ready proof by evidence. The decision proceeds upon the basis that the presence of rectifiers 4 in the circuit which energises the relay necessarily provides rectified current, as indeed it must, but holds that the current 'injected through the fault circuit' is provided by the secondary winding 12 and passes through a resistance, another winding 2, a switch 14, a power line through the fault to earth and so back to 12, thus specifying a circuit for the current which does not include any rectifier. The appellants' argument, as I understand it, proceeds upon the basis that if contrary to their view, any part of their apparatus can be said to inject current through the fault circuit, that can only be possible through the circuit specified by the hearing officer as just set out, and in consequence, no rectification of the alternating current is required or provided. Neither the evidence filed nor the decision contain matters which would justify me in holding that this contention may not be well founded and as the substantiality of any risk of infringement depends upon a finding that the contention is ill-founded, I find myself unable to support the decision.

"The direction that a reference in the form prescribed by r. 35 must be inserted in the application before sealing is therefore reversed."

My Lords, I must now analyse this decision to see whether it contains, on its face, an error of law, and I do so assuming that, for this purpose, I am entitled to look at all the documents which are said by counsel for the appellants to be part of the record. The tribunal first sets out the whole of claim 1 of specification No. 658,823. He then, down to the words "mains supply" makes certain observations on specification No. 703,630. These are not criticised by counsel for the appellants. The next passage, down to "is not rectified A.C.", is strongly criticised by counsel for the appellants. They say that it entirely misstates the argument presented to the tribunal. That may be so, and it is a fact that a vacation intervened between the argument and the decision, but a misstatement of counsel's argument is not an error of law. Still less is it an error of law which appears on the face of the record. The next sentence is not and could not be relied on as containing an error of law, and the same observation applies to the next sentence, which briefly describes the basis of the decision of the superintending examiner. Then follow two sentences containing one statement which does, I think, result from a consideration of the construction of the relevant specifications. That statement is that the substantiality of any risk of infringement depends on a finding that an argument addressed to the tribunal by the then appellants (the present respondents) was ill founded.

A Counsel for the appellants contends that this statement shows that the tribunal, when he wrote his decision, must have forgotten the tenor of the argument, and must have omitted to notice that claim 1 of the appellants' specification includes alternative (D). He says that the decision of the superintending examiner was based entirely on the risk of infringement of alternative (D); consequently the argument before the tribunal was directed entirely to the question whether performance of the respondents' invention would or would not infringe alternative (D); the argument has twice been misstated by the tribunal, who makes no reference to alternative (D); and the concluding statement by the tribunal reveals an error of law, for the substantiality of the risk of infringement does not depend on the matters mentioned by the tribunal. The tribunal must have misconstrued specification No. 658,823 by omitting to notice that alternative (D) was included in claim 1. My Lords, I cannot draw this conclusion from anything that appears on the face of the record. It is true that the decision of the tribunal contains no reference to alternative (D), and that I should have expected the argument before the tribunal to concentrate on the risk of infringing alternative (D); but it does not appear *on the face of the record* that the tribunal ever heard any argument on this point, and the omission of any reference to alternative (D) may be due to the fact that the tribunal did not consider that there was any substantial risk of infringement of that alternative, and, therefore, directed his attention to other possibilities of infringement. If the present proceedings had been an appeal from the tribunal's decision, it would have been the duty of this House to hear argument and evidence directed to the question whether there would or would not have been any substantial risk of infringement of alternative (D) if the respondents' invention were put into operation; but the legislature has not thought fit to give a right of appeal in this case, and the tribunal's omission to deal with the question just stated does not amount to an error of law on the face of the record, whether or not the record includes the documents already mentioned.

For these reasons, I would dismiss the appeal with costs.

F LORD REID: My Lords, I agree that this appeal should be dismissed, and I only add some observations because I would base my decision on reasons different from those adopted by the Court of Appeal. Procedure by way of certiorari is available both where there has been "excess of jurisdiction" (which is not a very adequate description) and where error of law appears on the face of the record. But there is this difference between these classes of case: in the former the court can be informed of the whole circumstances, in the latter it cannot, and this case admittedly belongs to the latter class. The appellants can only succeed if it appears on the face of the record that the tribunal has erred in law. The question what constitutes the record, and whether or how far it is permissible to look beyond the order under review, is one of great importance, but one on which I find it unnecessary to express any opinion. H In this case, I shall, therefore, assume, without deciding, that this record includes all the documents which the appellants maintain that it does include—not only the decision of the tribunal, but also the decisions of the superintending examiner and the specifications Nos. 658,823 and 703,630.

I The question which the examiner and the tribunal had to decide was whether the invention described in the latter specification could be performed without substantial risk of infringement of claim 1 of the former specification. That is in itself a question of fact, but it cannot be answered until the meaning of the relevant parts of the two specifications has been determined, and the construction of documents is a matter of law. If the record showed that the tribunal had wrongly construed the former specification, I should regard that as an error of law appearing on the face of the record and, therefore, I think it necessary to examine the documents said to form the record.

Before doing so, I must deal with an important matter. With what knowledge or equipment is a court entitled to examine a document? A judge is supposed to know the law, the English language and such facts as are common knowledge. If he refers to authorities or dictionaries or other works dealing with these matters, he can safely do so because his general knowledge enables him to check and appreciate them. But if, without assistance, he attempts to handle highly technical matters, he may easily go astray. Some fairly simple technical matters can nowadays be considered to be common knowledge, and I would not attempt to draw the line—it may alter from time to time. In this case, some of the terms used are simple enough, but some are certainly not. So what is a court to do if, on the face of a record, there are technical terms which cannot be understood without expert assistance? There may be cases where a very little assistance is all that is necessary, and I would think it unfortunate if such a strict rule were laid down that the mere presence of some technicality is enough to prevent a court from proceeding further in the absence of evidence to explain it. Technicalities crop up in a great variety of cases and, when the parties are not in dispute about them, they are often explained without evidence. Counsel give explanations and by doing so they are not giving anything away; if they were not in agreement evidence would be led. But in a case where it is not competent to lead evidence, counsel could not, in my view, properly be asked to help in this way unless there is some other way for the court to get the necessary information. If his client's interests might suffer by his giving such explanation, counsel is quite entitled to withhold it, and the court could not proceed on information given by one side only. But there do appear to be methods by which a court can go some way in acquiring technical information without evidence, e.g., by means of an assessor.

If the court finds that there is genuine dispute and real doubt about any technical matter then I do not think that it can proceed further without evidence. But the relevant technicalities in this case are not in dispute—I mean relevant for the purpose of examining those parts of the tribunal's decision which are said to exhibit an error of law. So I think that I must make that examination in light of the explanations which have been given by counsel.

Claim 1 of the appellants' specification contains four alternatives. That is apparent from the language and structure of the claim. The error in law alleged is that the tribunal misconstrued the claim and left out of account the fourth alternative. This is the alternative on which the examiner based his decision, and which a fairly simple explanation aided by the diagrams in the specifications shows to be the only one at all closely resembling the respondents' invention. Of course I express no opinion whether or not full examination would disclose any real resemblance.

Parts of the decision are not very easy to follow, but there seems to be no doubt that, in his decision, the learned judge who was the tribunal did not mention or allude to this fourth alternative. He dealt chiefly with another of the alternatives. In the end, the point for decision appears to me to be this: can it properly be inferred from the terms of his decision that the learned judge misconstrued claim 1? He set out the claim in full in his decision and, if there had been any obligation on him to set out all his reasons, silence as to this alternative might have afforded ground for such an inference. But he was not bound to set out his reasons in full, and all the indications are that he was well aware of this fourth alternative. It had been dealt with by the examiner and had been, we were informed, the main subject of argument before him. There is nothing to indicate that he had decided in his own mind that he ought not to or would not consider it. In these circumstances, it does not seem to me to be likely, far less to be clear, that his failure to deal with this alternative in his decision was caused by any error of law on his part. And that is sufficient to dispose of this case.

A **LORD TUCKER:** My Lords, in this case the appellants sought to quash by certiorari a judgment of the Patents Appeal Tribunal dated Jan. 17, 1957. The application to the Divisional Court was on the ground that the Patents Appeal Tribunal

B “was acting in excess of jurisdiction and without jurisdiction and its judgment and decision was wrong in law and bad on the face of the said decision.”

It was clear from the outset that there was no excess or lack of jurisdiction, and there can be no doubt that, the statute having given no right of appeal, it is of no avail to allege that the decision was wrong in law. The sole remaining ground, therefore, was that the decision was bad on its face, and this at once presents the problem of what is the face of the decision. The appellants sought to refer, in addition to the written judgment of the tribunal, to their patent specification No. 658,823, the respondents' patent specification No. 703,630 and the decision of the superintending examiner from which appeal had been brought to the Patents Appeal Tribunal on the ground that these documents formed part of the “record” of the tribunal and could, therefore, be looked at. Your Lordships decided to look at these documents *de bene esse* before giving any decision as to their admissibility. Your Lordships also heard from counsel for the appellants a detailed explanation of the meaning of the specifications and of the questions at issue on the appeal. These explanations counsel for the respondents was unable to accept as he was quite properly standing on his submission that nothing could be looked at outside the judgment or, in the alternative, that these documents did not form part of the record of the tribunal.

My Lords, I agree with those of your Lordships who, having looked at these documents, have come to the conclusion that there is nothing to be found therein to show that the judgment contains an error of law. It accordingly became unnecessary for your Lordships to decide whether it would have been permissible to act on these documents if they had disclosed that the judgment was erroneous in law, and I, therefore, desire to emphasise that there is nothing in your Lordships' decision in the present case that can be quoted as any authority as to the meaning of the word “record” in this context, or whether the court can or will look beyond the actual order or decision in the case of a “speaking order” to discover whether error in law exists or not, or what documents constitute “the record” if the court orders the record to be brought before it. These questions may require decision at some future date. When that time arrives, it may be necessary to consider whether the word “record” in relation to certiorari to quash for error on the face means anything more than the order or decision as recorded. It is well settled that, in the case of a non-speaking order or judgment, it is not permissible to look beyond the record which, in the language of LORD SUMNER, in *R. v. Nat Bell Liquors, Ltd.* (1) ([1922] 2 A.C. 128 at p. 159) is “the inscrutable face of a sphinx”. Is there a difference when the order speaks but speaks with the ambiguous voice of the oracle? This may some day call for decision.

In this connexion I desire particularly to reserve for future consideration certain obiter dicta on this subject made in the Court of Appeal in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (2) ([1952] 1 All E.R. 122). I am not to be taken as casting any doubt on the actual decision in that case, which I think was clearly right. Nor are my reservations to be read as applying to certiorari in general. They are confined solely to certiorari to quash on the ground of error in law on the face of the recorded order or decision. Cases of excess or lack of jurisdiction properly understood as explained by LORD SUMNER in *R. v. Nat Bell Liquors, Ltd.* (1) are clearly distinguishable, although much confusion has arisen from failure to observe the distinction.

My Lords, subject to these reservations, I agree that this appeal should be dismissed.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend, LORD TUCKER. The present case shows how important the issue as to what constitutes the face, on which error must be found, may be. I have looked at a number of ancient and modern cases on certiorari, and am satisfied that the point is a difficult one which should be left to be decided after full argument if and when it arises. A

LORD DENNING: My Lords, in the case for the appellants, an order for certiorari is sought on the ground that there is an error of law on the face of the record. When certiorari is sought on such a ground, evidence is not as a rule admissible. The error must appear on the face of the proceedings without the aid of extrinsic evidence. But what is the "record" for this purpose? It is not confined to the formal record of the proceedings such as is kept by a superior court of record, which used to be enrolled on parchment in Blackstone's day and is filed at the Central Office in our day. Certiorari goes to all inferior tribunals, not only to those which are courts of record but also to those which are not; and not only to those which keep a formal record, but also to those which do not. When certiorari issues to any of these tribunals, there must be brought before the Queen's Bench not only the formal order of the tribunal but also, as the old writ said, "all things touching the same": and this includes the reasons for the decision when the tribunal gives them. This goes back as far as the time of HOLT, C.J. In 1702 in a case [*Ryslip Parish v. Hendon Parish* (3) ((1698), Holt, K.B. 572)] where justices had ordered a poor man to be removed from Ryslip to Hendon, he said (*ibid.*): B

"Where the justices of peace do give a special reason for their settlement, and the conclusion which they make in point of law will not warrant the premises, there we will rectify their judgment: but if they have given no reason at all, then we will not ravel into the fact." E

The court would not compel a tribunal to give its reasons if it did not wish to do so; but, if it did so, it became part of the record then, just as it does today under s. 12 (3) of the Tribunals and Inquiries Act, 1958. F

Your Lordships have been invited now to determine what documents are to be brought up in the case of certiorari to an appellate tribunal. Do they include the decision at first instance? To answer this question I have done as EARL CAIRNS, L.C., did in *Walsall Overseers v. London & North Western Ry. Co.* (4) ((1878), 4 App. Cas. 30). I have gone back to the old days when quarter sessions sat as an appellate tribunal on appeal from justices in civil matters. When the King's Bench issued a certiorari to quarter sessions, it was the invariable practice for the documents to include, not only the order of quarter sessions who had heard the appeal but also the order of the justices who had heard the case at first instance, and also any other document which was recited or referred to by quarter sessions in terms which showed that it was the basis of the decision. The principle was well stated in a case in 1732 concerning a poor rate which had *not* been made part of the order of quarter sessions but had been sent back to the parish officers. LORD HARDWICKE, C.J., said: G

"A certiorari goes to remove the order, and for what? Why to see whether it be good or not, and how can we judge whether the rate be good or not, unless we see it. I have been for some time of opinion, that when a certiorari goes to remove orders *cum omnibus ea tangen*l, everything ought to be removed that may set the thing in a true light. I do not mean every matter of fact, for that is impossible; but how can we know whether this rate be good, unless it be returned." H

And PROBYNS, J., made the pertinent comment: "To what end is a certiorari granted, if it can only remove the order, and that on which it is grounded cannot appear": see *R. v. Uxeter (Inhabitants)* (5) ((1732), Cunn. 28, note (a)). That on which it is grounded always included the decision at first instance. I

A This rule was not confined to cases where quarter sessions stated the facts specially for the opinion of the court. It extended to all cases where they gave their reasons, even without stating a Case. There are many cases to be found where on certiorari the Court of King's Bench had before them the reasons given by the justices at first instance as well as the reasons given by quarter sessions on the appeal; and the King's Bench considered the two together

B so as to see whether an error of law was disclosed on the face of them. So it was in the days of HOLT, C.J. (see *R. v. Alceston* (6) (1698), Holt, K.B. 508), and of LORD HARDWICKE (see *R. v. Bourn (Inhabitants)* (7) (1735), Burr. S.C. 39) and LORD MANSFIELD (see *R. v. Upton Gray (Inhabitants)* (8) (1783), Cald. Mag. Cas. 308). I am here speaking only of orders made by quarter sessions on appeals in civil matters. I am not speaking of convictions by justices in criminal matters at

C first instance; for they always were on a special footing. Before Jervis's Act the conviction itself had to contain everything. It had to set out the information, the evidence and the adjudication, as I explained in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (2) ([1952] 1 All E.R. 122 at p. 128). And in such cases, of course, the King's Bench would not look at anything outside the conviction: see *R. v. Liston* (9) ((1793), 5 Term Rep. 338), not even at the

D information itself to show a variance: see *R. v. Cashibury Hundred J.J.* (10) ((1823), 3 Dow. & Ry. K.B. 35). But in orders on appeals it was different. The court always looked at the decision at first instance to see if there was a variance, as LORD HARDWICKE did in *R. v. Bourn (Inhabitants)* (7) ((1735), Burr. S.C. at p. 40 (3rd Exception)).

Now, turning to modern cases, it will be seen that, in our day too, the courts

E have proceeded on the footing that there should be included in the record, not only the formal order, but all those documents which appear therefrom to be the basis of the decision—that on which it is grounded. Such as the claim for compensation in the *Northumberland* case (2), the report of the medical specialist in *Re Gilmore's Application* (11) ([1957] 1 All E.R. 796), and the medical certificates in *R. v. Heal* (12) ([1957] 3 All E.R. 426 at p. 428). Is

F it really to be supposed that the Crown in those cases made concessions which it was not bound to make and could have successfully resisted the issue of certiorari? None of the counsel before your Lordships suggested it. Nor did they refer to the arbitration cases which are very different, because certiorari does not lie to arbitrators. There is no "record" to be considered. Only the award. There is no reference to "all things touching the same". But

G even there the courts will look at documents which appear from the award to be the basis of the decision: see *Landauer v. Asser* (13) ([1905] 2 K.B. 184 at p. 191), as explained in *Champsey Bhara & Co. v. Jieraj Balloo Spinning & Weaving Co., Ltd.* (14) ([1923] A.C. 480 at p. 487) and *Blaiber v. Newborne* (15) ([1953] 2 Lloyd's Rep. 427 at p. 429).

Applying these principles, I think that the decision of the superintending

H examiner should be treated as part of the record. It seems to me plain that, in order to know the ground of the decision of the Patents Appeal Tribunal, it is necessary for the court to have before it the decision of the superintending examiner. I can think of no document more closely "touching the same". Furthermore, the Patents Appeal Tribunal itself recites the decision of the superintending examiner and refers to it in terms which show that it is the very

I basis of the tribunal's decision, in that it is the basis from which all the reasoning of the tribunal stems. It is true that the tribunal does not confirm the examiner's decision. It reverses it. But that can make no difference. Whether confirmed or reversed, the decision is part of the record. So, also, with the specifications. They are the very basis of the decision. But when your Lordships turn to consider the documents which thus form the record, there is an initial difficulty. They are full of electrical technicalities. When counsel offered to explain them, the High Court rejected his offer, saying: "We do not go into the technical details because, if we did, we should not

understand them." When the case reached the Court of Appeal, counsel did embark on an explanation, but the court seem to have regarded his efforts as evidence which, on an application of this kind, it was not permissible for them to receive. They said ([1958] 2 All E.R. at p. 373):

" . . . we cannot construe the specifications without being informed by evidence, and, that being so, the application for an order of certiorari must fail in limine."

My Lords, whenever the meaning of words arises, however technical or obscure, then, unless there is some dispute about it, it is common practice for the court to inform itself by any means that is reliable and ready to hand. Counsel usually give any necessary explanation; or reference may be made to a dictionary, which may be a general dictionary or even a technical one. If the subject-matter is too difficult to be resolved by such means, the court can always call in aid an assessor specially qualified to explain it (see s. 98 of the Supreme Court of Judicature (Consolidation) Act, 1925), and this has been done from time to time: see, for instance, *Mercer v. Deane* (16) ([1905] 2 Ch. 538 at p. 544) and *Southport Corpn. v. Esso Petroleum Co., Ltd.* (17) ([1953] 2 All E.R. 1204 at p. 1206). The one thing that the court ought not to do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else; and the court must possess itself of whatever information is necessary for the purpose. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time. But in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

In the present case your Lordships did have the benefit of explanations by counsel, and the point at issue appeared clearly enough. The appellants own a patent for an electrical device. It is numbered 658,823. The specification contains a claim defining the scope of the invention claimed by them. It includes four alternatives and is equivalent to four separate claims rolled into one which were conveniently identified as alternatives (A), (B), (C) and (D). The respondents seek to obtain a patent for a similar electrical device. Their application is numbered 703,630. The appellants objected to this patent being granted to the respondents because they said that, if it was performed, there was a substantial risk of it infringing their patent No. 658,823. The matter came before the superintending examiner at the Patent Office. He held that, if the respondents' invention No. 703,630 were performed, there was a substantial risk that it would infringe No. 658,823 by infringing alternative (D), but no risk of it infringing alternatives (A), (B) or (C). So he directed that there should be inserted in the respondents' patent a special reference which was to be in these words:

" Reference has been directed in pursuance of s. 9 (1) of the Patents Act, 1949, to patent No. 658,823."

The respondents appealed from this decision to the Patents Appeal Tribunal. The tribunal reversed the decision of the superintending examiner, and held that no special reference should be inserted. The judgment makes no reference to alternative (D) at all. It speaks as if the only alternative in question was alternative (B). It takes alternative (B) as "the characteristic" in dispute; and finds that, as there is no substantial risk of infringing alternative (B), the decision of the superintending examiner must be reversed.

I believe that this was apparent to some of your Lordships as soon as you had studied the decision of the tribunal in conjunction with the decision of the

A superintending examiner; and when you pressed Mr. Tookey for the respondents on it, he was constrained to admit the force of it. He, thereupon, to use his own words, lifted the veil and felt the better for it. "The judge has taken the wrong alternative," he said.

B He has taken alternative (B) whereas he should have taken alternative (D). Our contentions were never based on alternative (B) but on alternative (D). The only explanation we can suggest is that, at the end of the argument, the judge was in our favour, but that owing to the time which elapsed before he came to write his judgment he took the wrong alternative."

C Mr. Levy, who followed Mr. Tookey on the same side, made it doubly clear that the argument before the tribunal was based on alternative (D) and not on alternative (B) at all. No one suggested that there was any risk of alternative (B) being infringed. But Mr. Tookey declared that the decision itself was correct. It was inconceivable, he said, that the judge had overlooked alternative (D). The judge must have considered it and found that there was no substantial risk of it being infringed. But he failed to mention it in his written reasons. If it were permissible to speculate on what the judge had in mind, I would agree that that is the probable explanation of what happened, but where I differ is that I do not think it is permissible to surmise or speculate on it. We have only the written reasons of the judge to go on, and we cannot presume that he went by any other. It has long been decided that "where a reason is assigned as the foundation of a judgment, all presumption or intention that the court went upon better grounds is excluded": see *BURN'S JUSTICE OF THE PEACE* (30th Edn.), Vol. V, p. 374. That statement rests on the authority of LORD MANSFIELD himself, supported by WILLES and BULLER, J.J., who sat beside him: see *R. v. Upton Gray (Inhabitants)* (8); and if it is correct, as I think it is, it forbids us from presuming that the judge took alternative (D) into account.

F Excluding, therefore, all presumption or intendment, it appears to me that the written decision of the tribunal is based on what was, in the circumstances, an extraneous consideration (namely, that there was no substantial risk of infringing alternative (B)), and fails to take into account a very relevant and, indeed, vital consideration (namely, whether there was any substantial risk of infringing alternative (D)). Is that an error of law? I have no doubt that it is; and it is an error of such a kind as to entitle the Queen's Bench to interfere. There are many cases in the books which show that, if a tribunal bases its decision on extraneous considerations which it ought not to have taken into account, or fails to take into account a vital consideration which it ought to have taken into account, then its decision may be quashed on certiorari and a mandamus issued for it to hear the case afresh. The cases on mandamus are clear enough; and if mandamus will go to a tribunal for such a cause, then it must follow that certiorari will go also; for when a mandamus is issued to the tribunal, it must hear and determine the case afresh, and it cannot well do this if its previous order is still standing. The previous order must either be quashed on certiorari or ignored; and it is better for it to be quashed.

I need not, I think, refer to the cases on mandamus, except perhaps to mention the judgment of LORD READING, C.J., in *R. v. London County Council, Ex p. London & Provincial Electric Theatres, Ltd.* (18) ([1915] 2 K.B. 466 at p. 475). But I must prove the point about certiorari. I can do it by several cases. In *Board of Education v. Rice* (19) ([1909] 2 K.B. 1045, [1910] 2 K.B. 165, [1911] A.C. 179), the Board of Education, in coming to their decision (that the local authority had not failed in their duty), took into consideration the wrong question and failed to take into consideration the questions which had been raised for their determination. In *R. v. Pontypridd, Aberdare and Mountain Ash and Tredegar County Court Registrars, Ex p. National Amalgamated Approved Society* (20) ([1948] 1 All E.R. 218), the registrars regarded £400 as the maximum compensation and failed to consider whether it was adequate. In *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (2), the tribunal, in

assessing compensation for loss of employment, took into account only Shaw's service with the hospital board and failed to take into account his whole service in local government. In *R. v. Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Hierowski* (21) ([1953] 2 All E.R. 4 at p. 6), the tribunal, in reducing the rent, took into account afresh the reasonableness of the amount charged, which was an extraneous consideration, as they should only have had regard to the change of circumstances. In *Re Gilmore's Application* (11) the tribunal, in assessing compensation for industrial injury, took into consideration only the injury to the left eye and failed to take into account the prior injury to the right eye. In *R. v. Head* (12) ([1957] 3 All E.R. at p. 428), the Secretary of State, in ordering the girl to be detained, failed to consider whether it was required for the protection of others. In *R. v. City of Liverpool JJ., Ex p. W.* (22) ([1959] 1 All E.R. 337), the justices, in making the adoption order, failed to consider whether there were special circumstances justifying it. In all those several cases it was held or accepted that certiorari lay to quash the decisions. In a case in the Privy Council, *Serecelal Jhuggroo v. Central Arbitration & Control Board* (23) ([1953] A.C. 151 at p. 161), the principle was accepted, but certiorari was refused because the Board were held not to have taken extraneous matter into account.

In some of those cases it has been said that the tribunal, in falling into an error of this particular kind, has exceeded its jurisdiction. No tribunal, it is said, has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. This is good sense and enables the Court of Queen's Bench to receive evidence to prove the error. But an excess of jurisdiction in this sense is very different from want of jurisdiction altogether which is, of course, "determinable on the commencement, not at the conclusion, of the inquiry" (see *R. v. Bolton* (24) (1841), 1 Q.B. 66 at p. 74). Whereas an excess of jurisdiction is determinable in the course of or at the end of the inquiry. But allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction, as I am prepared to do, nevertheless I am quite clear that, at the same time, it falls into an error of law too; for the simple reason that it has "not determined according to law". That is, indeed, how BLACKBURN, J., put it in *R. v. De Rutzen* (25) ((1875), 1 Q.B.D. 55 at p. 57). And the decision in the *Northumberland* case (2) itself shows that, even though no evidence is given, nevertheless if such an error appears from the documents properly before the court, or by legitimate inference therefrom, then certiorari may be granted to quash the decision; and the certiorari can properly be said to be for error of law on the face of the proceedings. It may be excess of jurisdiction as well, but it is certainly error of law.

In the present case, it is, I think, a legitimate inference, from the documents properly before the court, that the tribunal, when it came to give its written and only decision, failed to take into consideration alternative (D) which was a vital matter for consideration. It was the sole ground on which the superintending examiner had decided the case; and, before reversing his decision, the tribunal ought to have considered it. The failure to take it into consideration is, I think, a ground on which certiorari may be granted. But should it be? The general rule is undoubted that the issue of certiorari is matter of discretion for the High Court. This was distinctly stated by the Court of King's Bench in 1793 in *R. v. Bass* (26) ((1793), 5 Term Rep. 251) and again in 1838 in *R. v. Manchester & Leeds Ry. Co.* (27) ((1838), 8 Ad. & El. 413 at p. 428). Since that time, a subsidiary rule has been laid down to the effect that, where the applicant is a party grieved, who has no other remedy, the court will grant it *ex debito iustitiæ*: see *R. v. Sarge J.J.* (28) ((1870), L.R. 5 Q.B. 466); *R. v. Manchester Legal Aid Committee, Ex p. R. A. Brand & Co., Ltd.* (29) ([1952] 1 All E.R. 480). But if he is not a party grieved, or if, being a party grieved, he has another remedy, as, for instance, by appeal, then the discretion of the court remains intact to grant or refuse the order: see *R. v. Harman* (30) ((1739), 7 Mod. Rep.

A 287); *R. v. Cambridgeshire JJ.* (31) ((1835), 4 Ad. & El. 111 at pp. 123, 124, 125); and this is the ground on which I would uphold the decision in *Davies v. Price* (32) ([1958] 1 All E.R. 671 at p. 677).

B My Lords, I have come to the conclusion that this is not a case in which certiorari should issue. The effect of a special reference under s. 9 (1) of the Patents Act, 1949, is very limited. It is interlocutory in its nature. Even when made, it does not give the appellants any greater rights than they had before. It is more a detriment to the respondents than a benefit to the appellants. It serves as a notice to the public that there is a substantial risk of infringement. But it decides nothing as to whether there is, in fact, an infringement. That must still be decided in an action brought for the purpose. This was, I expect, the reason why Parliament did not think it a proper case in which to give a right of appeal to one side or the other. It left a person aggrieved to his other remedy—the new patentees could make the article and the old patentees could sue for infringement—and only then would they know for certain where they stood. And this, I must say, seems to me to be the proper remedy rather than to apply for a certiorari. I am prepared to assume that the appellants are persons aggrieved, but, as they have another remedy open to them, the court in its discretion should refuse a certiorari. I would add this too. When the appellants saw that the tribunal had overlooked alternative (D), they might well have gone back and pointed out the error. I have no doubt that the tribunal would then have dealt with alternative (D). It might, indeed, have made a different order, if it thought fit to do so. It used to be competent for quarter sessions to do this if the error was brought to their notice during the same sessions: see *St. Clements Parish v. St. Andrew's Holborn Parish* (33) ((1708), 6 Mod. 287; (1704), 2 Salk. 606). So, also, it might have been done by this tribunal if brought promptly to its notice. No more could be achieved by certiorari and mandamus. I do not know why the appellants did not do this, except, perhaps, that they did not think of it. At any rate, having regard to those courses which were open to the appellants, it is not, in my opinion, a case in which certiorari should issue. On this ground, therefore, I would dismiss the appeal.

One word more. It was suggested that certiorari should be limited in view of the statutory facilities which now exist for appeals on law. But I would remark that it was only last year, by s. 9 of the Tribunals and Inquiries Act, 1958, that these new statutory facilities were introduced, and they only apply to a limited number of tribunals. There still remain a considerable number of tribunals and inquiries where there is no appeal; and in most of these cases Parliament has expressly provided that reasons shall be given with the very object that they should be subject to control by certiorari. Hence the reference to "the record" in s. 12 (3) of the Act. In any case, the Act does nothing to limit the scope of certiorari, and I should be sorry to see so beneficial a remedy cut down or limited at this point of time. There is nothing more important to my mind than that the vast number of tribunals now in being should be subject to the supervision of the Queen's Courts. This can only be done if the remedy by certiorari is maintained in the full scope which the great judges of the past gave to it. Any anxiety about an undue extension of the remedy is fully met by the knowledge that, in cases where there is a right of appeal, the courts may in their discretion refuse the order. When there is no right of appeal, this historic remedy has still a valuable part to play; or at any rate, it should have, if we wish any longer to ensure that the rights of the people are determined according to law.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.*, agents for *Benson, Burdakin & Co.*, Sheffield (for the appellants); *Bristows, Cooke & Carpmael* (for the third and fourth respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re TATE'S WILL TRUSTS. PUBLIC TRUSTEE *v.* TATE AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), May 5, 1959.]

Practice—Carrying on proceedings—Jurisdiction to grant leave after judgment at the trial—R.S.C., Ord. 17, r. 4.

On Apr. 19, 1955, the High Court, on application to it by originating summons to which T. and his daughter and only child, G., were defendants, declared that on the true construction of a testator's will T. was absolutely entitled to settled property. G., who, on another construction of the will, would have been absolutely entitled to the property after the death of her father, did not appeal, because she understood from her father that he would arrange for the property to be hers after his death. In 1956 G. became aware that her father no longer intended to give effect to their understanding. Having tried unsuccessfully to persuade him to keep to the understanding, she took steps to obtain legal advice, but had not obtained it when he died in June, 1957. She now applied under R.S.C., Ord. 17, r. 4, for an order to carry on proceedings, with a view to applying subsequently, if the order were made, for leave to appeal against the decision of Apr. 19, 1955.

Held: although the action by originating summons had been worked out, there was jurisdiction to make an order to carry on the proceedings if special circumstances were shown; on the facts, special circumstances were established and the order to carry on would be made.

Fussell v. Dowding ((1884), 27 Ch.D. 237) followed.

Arnison v. Smith ((1889), 40 Ch.D. 567) considered.

[As to obtaining an order to carry on proceedings, see 26 HALSBURY'S LAWS (2nd Edn.) 21, para. 19; and for cases on the subject, see DIGEST (Practice) 464-468, 1489-1508.]

Cases referred to:

- (1) *Shelley's Case*, *Wolfe v. Shelley*, (1581), 1 Co. Rep. 93; Moore K.B. 136; 3 Dyer, 373 b; 1 And. 69; Jenk. 249; 76 E.R. 199; 38 Digest 705, 497.
- (2) *Fussell v. Dowding*, (1872), L.R. 14 Eq. 421; 41 L.J.Ch. 716; 27 L.T. 406; *subsequent proceedings*, (1884), 27 Ch.D. 237; 27 Digest (Repl.) 107, 790.
- (3) *Curtis v. Sheffield*, (1882), 21 Ch.D. 1; 51 L.J.Ch. 535; 46 L.T. 177; 30 Digest (Repl.) 167, 189.
- (4) *Walmsley v. Fochall*, (1863), 1 De G.J. & Sm. 451; 32 L.J.Ch. 672; 8 L.T. 559; 46 E.R. 179; 30 Digest (Repl.) 166, 184.
- (5) *Arnison v. Smith*, (1889), 40 Ch.D. 567; 58 L.J.Ch. 335; 60 L.T. 206; *subsequent proceedings*, 41 Ch.D. 98, 348; 9 Digest (Repl.) 138, 790.
- (6) *Booth v. Briscoe*, (1877), 2 Q.B.D. 496; 32 Digest 13, 39.
- (7) *Salt v. Cooper*, (1880), 16 Ch.D. 544; 50 L.J.Ch. 529; 43 L.T. 682; 39 Digest 15, 134.

Adjourned Summons.

This was a procedure summons, dated Feb. 26, 1959, issued in an action commenced by originating summons, dated Dec. 13, 1954, for an order that proceedings in the action might be carried on between the plaintiff and defendants named in the procedure summons. The application was made by the second defendant in the action, Mrs. Gaythorpe, initially *ex parte* on affidavit, but by direction of the master a summons was issued which was adjourned into court.

The originating summons asked for the determination of a question of construction of the will, dated Jan. 7, 1910, of the testator, John Tate, who died on Nov. 17, 1910, the substantial question being whether hereditaments and capital moneys constituting the testator's Bank House Estate, Northumberland, ought to be held in trust for the first defendant (the father of Mrs. Gaythorpe).

A absolutely or for him for life with remainder to her absolutely. Mrs. Gaythorpe was her father's only child. On Apr. 19, 1955, VAISEY, J., determined the questions raised by the summons and declared that Mrs. Gaythorpe's father was absolutely entitled to the property. In the circumstances stated in the judgment at p. 452, letters B to F, post, there was no appeal. The Bank House Estate was subsequently sold by Mrs. Gaythorpe's father. He died on
B June 4, 1957, having bequeathed his residuary estate in trust for his widow for life, after her death for Mrs. Gaythorpe for life, after her death on trust for her children, and in the event of her death without children, on trust for a daughter of a nephew of his. The widow died in June, 1957. Mrs. Gaythorpe had no children. She now desired to apply to the Court of Appeal for leave to appeal against the order of Apr. 19, 1955, and accordingly made this application
C for an order that proceedings in the action should be carried on pursuant to the provisions of R.S.C., Ord. 17, r. 4.

E. J. A. Freeman for the applicant, Mrs. Gaythorpe.

A. L. Stott for the respondents, the trustees of the wills of the testator and of the applicant's father.

D **WYNN-PARRY, J.:** This is a summons taken out in proceedings by way of originating summons, which proceedings were started in December, 1954, for the purpose of construing the will of the testator, John Tate. The summons before me today is for an order that the proceedings in the action may be carried on between the parties specified in the summons. The necessity for bringing this summons before the court arises in these circumstances. The language of
E the will of the testator raised considerable doubt as to the correct devolution of an estate known as the Bank House Estate in Northumberland, which had been in the Tate family for some considerable time. I need not pause to go into the details of the provisions of the will which gave rise to the difficulty. First of all an effort was made to arrive at a family arrangement. That effort failed because the elder brother of the first defendant was adamant in insisting
F that in any family arrangement a life interest only in the Bank House Estate should be reserved to Mrs. Gaythorpe, who is the daughter of the first defendant and was the second defendant to the originating summons. During the course of the negotiations, the first defendant made clear to his daughter, not only orally but in letters which are in evidence and have been read to me, that on the assumption that he should find himself able to dispose of the whole of the
G estate, he would provide by his will that she should have the whole of his interest.

Following the failure to arrive at a family arrangement, it was decided that a summons should be taken out in order to make clear beyond doubt what was the true devolution of the estate, and an originating summons was taken out in December, 1954, for the construction of the will. The summons came before
H VAISEY, J., in April, 1955, and the main dispute on the substantial question was between the first defendant and his daughter, who is the applicant before me today. The whole question turned on whether the rule in *Shelley's Case*, *Wolfe v. Shelley* (1) (1581), 1 Co. Rep. 93 applied to the provisions dealing with the devolution of the Bank House Estate. I do not pause to advert to the reasoning of VAISEY, J., because it is not relevant for the purposes of the present summons.
I but I do observe that in his judgment he expressed the view that the case was a difficult one. He came to the conclusion (with, as he put it, no little reluctance) that the rule in *Shelley's Case* (1) did apply, though he said that he thought that there was a great deal to be said for the other view. He regarded the matter as one of some doubt. Mrs. Gaythorpe was advised that she had a right to appeal and also that she had a chance of having the decision of VAISEY, J., reversed if she did appeal; but, as I am satisfied from a consideration of the evidence, she decided not to lodge an appeal against a decision in her father's favour on the faith of what he had said and continued to say, namely, that his

will would be on the basis of leaving her such interest as he had in the estate, which, as a result of the decision of VAISEY, J., amounted to an absolute interest. A

So matters continued for some time, and I am satisfied that down to May, 1956, Mrs. Gaythorpe had every ground for thinking that the understanding—I can call it no more than an understanding; it was in no way a binding or enforceable agreement—would be honoured by her father, with one variation to which Mrs. Gaythorpe had no objection, namely, the interposition of a life estate in favour of her mother. In May, 1956, however, Mrs. Gaythorpe became aware that her father was intending to resile from the understanding. Some degree of estrangement had arisen between the first defendant and Mrs. Gaythorpe, for what reason she is unable to explain, but evidently the first defendant became less well disposed towards his daughter and intimated his intention to alter his testamentary dispositions so as to provide only a life estate in favour of her. I am quite satisfied that it would have required an alteration in his testamentary dispositions, because at May, 1956, they were so arranged as to provide that the whole of his interest in the Bank House Estate should go to her. It may be asked why Mrs. Gaythorpe did not thereupon take some categorical step to deal with the matter, particularly why she did not at once go to solicitors. She did in fact make an effort to persuade her father to honour the understanding. I regard that as a perfectly natural and proper course for a daughter to have taken. When, however, she found that her father's mind was apparently made up, she sought legal advice; and, according to the evidence before me, she failed to obtain that advice through delay and dilatoriness on the part of her then solicitors, so that no advice had been obtained on her behalf before the death of her father in June, 1957. Before his death, she could clearly have applied to the Court of Appeal for leave to appeal out of time. With the death of her father, a further difficulty stood in her way; and it was not until some time in 1958 that she was advised that she could take the step which she has now taken, namely, to apply to this court to make an order that the proceedings should be carried on with a view to her being able to take the second step, namely, of applying to the Court of Appeal for leave to appeal out of time. B C D E F

The evidence is not specific in showing when Mrs. Gaythorpe consulted her solicitors. The evidence, as it stands before me, is unchallenged, and that evidence shows that the period between Mrs. Gaythorpe learning in May, 1956, that her father was changing his intentions and his death in June, 1957, is to be explained first by her endeavours to persuade him and secondly by the delay on the part of her solicitors. I think I am entitled, and indeed bound, in the absence of any challenge to the evidence before me, to accept that explanation. Those are all the relevant facts which I need have before me in considering this question. Two main points have been debated. The first is whether or not there is any jurisdiction, apart from the existence of any special reasons, for making such an order as is asked; and the second is, assuming that there is such jurisdiction, do the facts which I have recited constitute sufficiently special circumstances to justify the making of the order that is asked? G H I

So far as the question of jurisdiction is concerned, the matter must be based on R.S.C., Ord. 17, r. 4, which says:

"Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties,

A may be obtained ex parte on application to the court or judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence."

B Counsel for the respondents submitted that one need not go further than a consideration of the language of that rule to enable one to come to a conclusion that where an action has been worked out all jurisdiction to direct that the proceedings should be carried on has gone. I think that the matter is not capable of decision by such a short cut. In *Fussell v. Dowling* (2) ((1884), 27 Ch.D. 237), CHITTY, J., had before him an application for an order to revive a suit or to carry on the proceedings for the mere purpose of appealing against a decree in 1872, the application being made to him in the year 1884. The facts are succinctly stated in the headnote:

C "By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the wife's own kindred as she should by will appoint, and in default of appointment for such persons as would be entitled under the Statutes of Distribution, in case she had died intestate and unmarried. The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881, in the lifetime of her late husband:—Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872."

F The first step in this matter was an application by way of motion to the Court of Appeal for leave to appeal from the decree dated July 12, 1872, and on the hearing of that motion the court directed it to stand over in order to enable the applicant to make such application as she might be advised to revive the suit. It was in those circumstances that the motion to revive the suit was launched and brought before CHITTY, J. Counsel for the surviving trustee of the settlement, in the course of his argument, said (27 Ch.D. at p. 239):

G "The decree in this suit has been fully worked out, and there remains nothing more to be done in the suit. The court will not allow a suit to be revived for the mere purpose of an appeal."

In the course of his judgment, CHITTY, J., said (*ibid.*, at p. 240):

H "Now the applicant avowedly asks for an order to revive simply for the purpose of appealing; when I say 'revive', I mean to carry on the proceedings. The rule under which the present application is necessarily made is r. 4 of Ord. 17, and, passing by the introductory matter, I refer to the rule for the purpose of reading these words only, 'where . . . it becomes necessary or desirable that any person not already a party should be made a party', an order may be obtained. It seems to me that the court has a discretion in making the order, and the applicant is bound to show that it is either necessary or desirable for the purpose of working out the decree. In this case the decree admittedly has been worked out, and a transfer of the funds has been made years ago. The only object, therefore, is that there may be an appeal from the decree. It appears to me, having regard to the observations which fell from the late Master of the Rolls in *Curtis v. Sheffield* (3) ((1882), 21 Ch.D. 1), that in cases of this kind, where the only object of a party asking for an order is to appeal, and where there are no

special circumstances in the case, where, for instance, there is no suggestion of collusion or fraud, or the like, and where there is no irregularity, as there was in the case of *Walmsley v. Forchall* (4) ((1863), 1 De G.J. & Sm. 451), where the decree had erroneously dealt with future rights, the right rule to be observed is this, that such an order should not be made after the expiration of the time which is limited now for an appeal, namely, one year . . . I think that the application ought not to succeed, that it certainly is not 'necessary' nor, in my opinion, 'desirable' that such an order should be made."

Now, as I read CHITTY, J.'s judgment, it proceeded on the basis that the circumstance that a suit had been fully worked out and nothing more remained to be done in the suit was not of itself a good ground for refusing to make an order to carry on the proceedings, and that if special circumstances could be shown to exist, then the court, in the exercise of its discretion, could make an order to carry on. In other words, the judgment of CHITTY, J., must be taken to proceed on the basis that the mere fact that the suit has been worked out does not take away all jurisdiction from the court.

The difficulty with which one is at first confronted is the observations of the members of the Court of Appeal in *Arnison v. Smith* (5) ((1889), 40 Ch.D. 567). This was a case in which fifty-four shareholders having separate causes of action brought an action against the directors of a waterworks company, claiming damages for misrepresentation in the prospectus of the company. The action came on for trial before KEKEWICH, J., on Aug. 3, 1888, but the solicitor for the plaintiffs was not aware until after the trial that two of the plaintiffs had died before the trial. No application was made to put off the trial, and judgment was given for the defendants and the action was dismissed. Later, the executors of the two deceased plaintiffs applied to KEKEWICH, J., under R.S.C., Ord., 17, r. 2 and r. 4, that the executors might be made parties and the action might be carried on between them and the defendants. That was refused by his Lordship, and the matter was taken to appeal. COTTON, L.J., stated that the difficulty in the case was that the action was at an end and there were no proceedings pending to which the two plaintiffs were parties before their deaths. He pointed out, in reference to the decision of BRAMWELL, L.J., in *Booth v. Brisson* (6) ((1877), 2 Q.B.D. 496), which had been relied on, that the judgment, rightly understood, had no bearing on the present question. COTTON, L.J., said (40 Ch.D. at p. 569):

"As a matter of fact, there were not separate actions in that case, but the plaintiffs had separate causes of action, and the new rules gave power to persons having separate causes of action to join in one action. LORD BRAMWELL nowhere said in his judgment that there were eight separate actions, but that there were eight separate causes of action, and that the plaintiffs might have brought eight separate actions. But they did, in fact, bring one action, and in that action took a judgment for all the plaintiffs for 40s. damages. If they had properly considered their position, they would have remembered that though there was one action there were eight separate causes of action, and have had the damages severally assessed. Therefore that case does not affect this question, whether there can be an order to revive after final judgment has been given. In my opinion the action could not be continued after final judgment. It would be giving the executors of the plaintiffs power to go on with proceedings which would be entirely different from the action which was pending at their death. That cannot be done under r. 4. All that can be done under that rule is to carry on the action, but that is the action [referring to the case before him] of the fifty-four plaintiffs. It does not mean that after final judgment has been given the representatives of deceased plaintiffs can maintain a separate action against the defendants. The effect would be to put the defendants in peril

A again at the suit of those who did not appear at the trial . . . If any question were to arise respecting the Statute of Limitations, we should have to consider what ought to be done, but in this case that question does not arise."

B He recognised that the position was such that a new action could be brought by the representatives of the two plaintiffs, and that may in itself be a ground for explaining the course which was taken and may be itself a ground for distinguishing that case from *Fussell v. Dowding* (2). Indeed, in the current edition of the ANNUAL PRACTICE, in the notes to Ord. 17, r. 4, this is said:

C "Where, as in *Salt v. Cooper* (7) ((1880), 16 Ch.D. 544), it can properly be said that even after judgment there is a cause or matter pending, an order to continue proceedings might possibly be made, but not in such cases as *Arnison v. Smith* (5), where, two of several plaintiffs with separate causes of action having died before trial, the action was dismissed in ignorance of their deaths, and an order by the executors of the deceased to carry on proceedings was refused on the ground that a fresh action might be brought."

D Further, LINDLEY, L.J., said (40 Ch.D. at p. 570):

E "I am not prepared to go quite so far as COTTON, L.J., in saying that the court has no power to do what it is now asked to do. But the question here is whether there is anything in the circumstances of this case to render it necessary or desirable."

He decided against the application on the ground that it was neither necessary nor desirable that the application should be granted. LOPES, L.J., said (*ibid.*, at p. 571):

F "Having regard to the language of r. 4 of Ord. 17, I doubt if the rule applies after judgment, when the action is at an end, and there is nothing more to be done under it. But assuming that we have jurisdiction I am not satisfied that this is a case in which it is necessary or desirable to exercise it."

G Now, speaking for myself, as a judge of first instance, I come to the conclusion, as I think I am bound to come, that I am bound by what I conceive to be the ratio decidendi of CHITTY, J., in *Fussell v. Dowding* (2), namely, that even though an action has been worked out, there is jurisdiction to accede to an application to revive it or to carry on proceedings if the necessary special circumstances are shown. The sole question on the law, therefore, is whether or not I am to treat what was said by the Court of Appeal in *Arnison v. Smith* (5) as in effect overruling the ratio decidendi in *Fussell v. Dowding* (2). I have come to the conclusion that it would not be right for me, sitting at first instance, to give that reading to the observations, particularly of COTTON, L.J., in *Arnison v. Smith* (5), and I think that if the clear ratio underlying the judgment of CHITTY, J., in *Fussell v. Dowding* (2), is to be regarded as no longer sound in law, that is a matter on which, on a proper application, the Court of Appeal should pronounce. I, therefore, proceed on the basis that I have the necessary jurisdiction to accede to this application if I should conclude, in the exercise of my discretion, that it is proper to do so.

I That brings me back to the question of the facts and to the short question whether those facts can properly be regarded as "special circumstances" in the sense in which those words are used by CHITTY, J. In considering the effect of that evidence, it is desirable to bear in mind a phrase in the judgment of

JESSEL, M.R., in *Curtis v. Sheffield* (3) ((1882), 21 Ch.D. 1 at p. 5):

"The recent decisions as to special circumstances excepting the appellant from the obligation to appeal within one year, have been very stringent; I need not refer to them, because everybody knows them, and they all lay down this principle, that as a general rule an appeal after the time will not be allowed unless the respondent has done something to give a sort of equity to the appellant to go beyond the period."

Those words, true, would primarily be a matter for consideration by the Court of Appeal if I were to accede to the application; but they are, I think, relevant to be taken into consideration on this application, because it is an application which is made for the purpose of placing the applicant in a position to make the necessary application to the Court of Appeal for leave to appeal out of time.

I have, I hope with sufficient care, stated the relevant facts, and I have given such careful consideration as I have been able during the adjournment today on the question whether they can be regarded as special facts. It is true that it is my duty to pronounce one way or the other on that question, but I cannot shut my mind to this, that if I were to accede to this application the respondents, apart from any question of costs which can be dealt with by a proper order, can hardly be prejudiced. That, of course, is not of itself a matter of any relevance on the question whether special circumstances exist, but I point out that if I were to refuse this application, then I shut out the applicant in limine.

I have come to the conclusion, not without a little hesitation, that in this case the evidence which I have reviewed can properly be regarded as special circumstances. Having said that, I think the less I say the better, because it will be, so far as the future course of this matter is concerned, for the Court of Appeal to decide whether or not the matter should go further. I intend to deal only with the matter before me, namely, should this preliminary step be allowed; and, for the reasons which I have given, I propose to make an order on the summons in the sense that is asked for.

Leave to proceed granted.

Solicitors: *Slaughter & May* (for the applicant); *Robinson & Bradley*, agents for *Charles Percy & Son*, Alnwick (for the respondents).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A R. v. HIS HONOUR JUDGE SIR SHIRLEY WORTHINGTON
EVANS, CLERKENWELL COUNTY COURT. *Ex parte* MADAN
AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.),
B April 30, May 12, 1959.]

*County Court—New trial—Repeated application—Judgment in A. County Court
in absence of defendant—New trial granted by judge on terms under C.C.R.,
Ord. 37, r. 2—Terms not complied with—Judgment summons in, and
proceedings transferred to, B. County Court—Application to judge of B.
County Court to order new trial under C.C.R., Ord. 37, r. 1—Jurisdiction—
C.C.R., Ord. 37, r. 1, r. 2.*

Once an application for a new trial under either C.C.R., Ord. 37, r. 1, or C.C.R., Ord. 37, r. 2, is allowed or refused no further application can be entertained under the same rule, but an exercise of the limited jurisdiction under r. 2 does not extinguish the more general power under r. 1 (see p. 461, letter I to p. 462, letter A, post).

A plaintiff obtained judgment against the defendant in a county court. The defendant did not appear at the trial and the judgment was given in his absence. He applied to the judge for a new trial under C.C.R., Ord. 37, r. 2*, and his application was granted on terms that he paid a sum of money into the court within a limited time. The defendant failed to comply with these terms and, the defendant having moved to the district of another county court, the plaintiff applied for a judgment summons in that county court and proceedings were accordingly transferred to that county court pursuant to C.C.R., Ord. 25, r. 48 (3) (a)†. The defendant then applied to the judge of the second county court for a new trial under C.C.R., Ord. 37, r. 1‡, alleging that the plaintiff was guilty of fraud.

Held: the second county court had jurisdiction to order a new trial, because jurisdiction was transferred to it by virtue of C.C.R., Ord. 25, r. 48, and the second order, having been made under C.C.R., Ord. 37, r. 1, was valid, notwithstanding the first order, because the first order had been made under Ord. 37, r. 2.

Moran & Wife v. London Tramways Co. ((1888), 57 L.J.Q.B. 447) considered.
Great Northern Ry. Co. v. Mossop ((1855), 17 C.B. 130) distinguished.

[As to the granting of a new trial in county court proceedings, see 9 HALSBURY'S LAWS (3rd Edn.) 266-268, paras. 628-630; and for cases on the subject, see 13 DIGEST (Repl.) 447, 448, 706-718.

As to certiorari to county courts, see 9 HALSBURY'S LAWS (3rd Edn.) 331, para. 799; and as to certiorari to quash to civil courts generally, see 11 HALSBURY'S LAWS (3rd Edn.) 128, para. 239; and for cases on the subject, see 16 DIGEST 400-402, 2438-2466.]

Cases referred to:

(1) *Kemp v. Balne*, (1844), 1 Dow. & L. 885; 13 L.J.Q.B. 149; 8 J.P. 506; sub nom. *Ex p. Balne*, 2 L.T.O.S. 354; 16 Digest 435, 2990.

(2) *Colonial Bank of Australasia v. Willan*, (1874), L.R. 5 P.C. 417; 43 L.J.P.C. 39; 30 L.T. 237; 16 Digest 440, 3060.

(3) *Great Northern Ry. Co. v. Mossop*, (1855), 17 C.B. 130; 25 L.J.C.P. 22; 139 E.R. 1018; sub nom. *Mossop v. Great Northern Ry. Co.*, 26 L.T.O.S. 91; 19 J.P. 761; 13 Digest (Repl.) 447, 707.

(4) *Moran & Wife v. London Tramways Co.*, (1888), 57 L.J.Q.B. 447.

* The relevant part of this rule is printed at p. 459, letter I, post.

† The relevant part of this rule is printed at p. 459, letter G, post.

‡ The relevant part of this rule is printed at p. 460, letter A, post.

Motions for Certiorari and Prohibition.

The plaintiffs in two county court actions between the same parties moved, pursuant to leave given by the Queen's Bench Divisional Court on Mar. 6, 1959, for an order of certiorari to remove into the Queen's Bench Division and quash two orders (one in respect of each action) setting aside the judgments given in favour of the plaintiffs and ordering new trials made by His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS at the instance of the defendant in the Clerkenwell County Court on Dec. 18, 1958, and for an order of prohibition directed to His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS and to the defendant prohibiting them from further proceeding in and from hearing both actions. The facts are fully stated in the judgment.

A. J. Balcombe for the applicants, the plaintiffs in the county court.

R. J. Trott for the respondent, the defendant in the county court.

Cur. adv. vult.

May 12. **LORD PARKER, C.J.:** DONOVAN, J., will give the judgment of the court.

DONOVAN, J., read the following judgment: Counsel moves for an order of certiorari to bring up and quash two orders dated Dec. 18, 1958, made by His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS in Clerkenwell County Court in two actions between counsel's clients, the present applicants, as plaintiffs, and one Shastri Sharma as defendant, commenced in the Bloomsbury County Court by Plaints Nos. 0745 and 0746, whereby the learned judge ordered that the judgments in the said actions and all subsequent proceedings thereon be set aside and that new trials be had between the parties on Mar. 9, 1959. To avoid confusion I will call the present applicants for the order "the plaintiffs" and the present respondent "the defendant".

Plaint No. 0745 was for recovery of possession of some premises at 137, Whitefield Street, London, of which the plaintiffs had given a tenancy to the defendant, which the plaintiffs claimed had been duly determined by notice: there was also a claim for mesne profits. Plaint No. 0746 was for £20 damages for alleged conversion by the defendant to his own use of goods belonging to the plaintiffs at the same premises. After the defendant had unsuccessfully sought an injunction in the Chancery Division against being excluded from the premises by the plaintiffs, the two actions came on for hearing in the Bloomsbury County Court on July 8, 1958, before His Honour JUDGE ALUN PUGH. No defence had been put in by the defendant and he did not appear and was not represented. After hearing evidence the judge gave judgments for the plaintiffs, in the first action for £130 mesne profits, the defendant having quit the premises on May 25, 1958, and for £20 damages in the second action. He awarded costs to the plaintiffs.

On July 24, 1958, the defendant applied to the same county court judge for orders that the two judgments of July 8, 1958, be set aside and that new trials be ordered. The application was made on the ground that the defendant was not represented at the hearing on July 8 owing to a mistake as to the date of the hearing. The judge granted the application on terms that the defendant pay into court the sum of £90 in the first action and the sum of £10 in the second action. It was a further term that the defendant also paid into court the amount of the plaintiffs' taxed costs to date. These payments were to be made on or before Oct. 1, 1958. The defendant failed to do this. None of these sums were paid into court by that date or at any time thereafter.

Two judgment summonses were thereupon issued in the Clerkenwell County Court (this being the court having jurisdiction for the defendant's current address), and after one adjournment these summonses were due to be heard on Dec. 18, 1958. On Dec. 10 the defendant gave to the plaintiffs notice in each action that he intended to apply to the court for an order that

A "in pursuance of the inherent jurisdiction of this court to grant each and every form of relief necessary to defeat fraud, a stay of execution upon the judgment dated July 8, 1958, herein be granted."

B This application was heard by His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS on Dec. 18, 1958, when the defendant was represented by counsel, who read an affidavit sworn by the defendant to the effect that he had been defrauded by the plaintiffs in that, as they well knew, they had no right or title to grant him the tenancy of the premises in question and that they had therefore obtained an advance payment of rent from him amounting to £104 by fraud. The judge, with both parties before him, made orders that the judgments in the said actions and in all subsequent proceedings thereon be set aside and that a new trial be had between the parties on Mar. 9, 1959. These are the orders which counsel on behalf of the plaintiffs moves to quash. Counsel says that his Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS was without jurisdiction to make them. Alternatively, he argues that if there were any such jurisdiction it resided solely in His Honour JUDGE ALUN PUGH being the county court judge at Bloomsbury who tried the actions originally.

D I am satisfied that in a proper case this court has power by order of certiorari to bring up and quash the order of the county court judge made without jurisdiction in that behalf (see *Kemp v. Balne* (1) (1844), 1 Dow. & L. 885; and *Colonial Bank of Australasia v. Willan* (2) (1874), L.R. 5 P.C. 417 at pp. 442 and 450).

E I am also satisfied that it is irrelevant that the original action was tried by the county court judge at Bloomsbury and that the order now under consideration for a new trial was made by the county court judge at Clerkenwell. County Court Rules, Ord. 37, r. 1 (1), does say that "the judge" shall have power to order a new trial; and r. 2 (3) of the same order speaks (inter alia) of an application for a new trial under that rule being made "to the judge if the judgment or order was given or made by the judge and in any other case to the registrar". In my view, however, these provisions are not designating the individual judge who tried the case as the only judge with power to order a new trial. The difficulty which would arise on such a construction in the event that the trial judge died before a new trial was applied for is at once apparent. C.C.R., Ord. 25, r. 48, dealing with the case of a judgment summons issued in a court other than the court in which the judgment was given (which is the present case) says among other things this:

G "(2) The judgment creditor may make an ex parte application in writing to the court in which the judgment or order was given or made for the transfer of the proceedings to a court having jurisdiction to issue the judgment summons and to be named in the application. (3) On receipt of the application the registrar shall—(a) make an order transferring the proceedings to the named court."

H This is sufficient to give the judge of the court to which the proceedings have been so transferred jurisdiction in a proper case to order a new trial. It may be that the grounds for ordering a new trial will have emerged only after such transfer; and there is nothing in the language of the rules to compel the conclusion that any application for a new trial must be referred back to the court where the original trial was held.

I The first order for a new trial in this case, which was made on terms by His Honour JUDGE ALUN PUGH, was made under C.C.R., Ord. 37, r. 2 (1). This provides:

"Where a defendant to an action or matter or a defendant to a counter claim does not appear at the hearing and a judgment or order is given or made against him in his absence, the judgment or order and any execution thereon may on application be set aside and a new trial may be granted."

The second application for a new trial was granted by His Honour JUDGE SIR SHIRLEY WORTHINGTON-EVANS under r. 1 (1) of the same order, which reads thus:

"The judge shall in every case have the power to order a new trial to be had upon such terms as he thinks reasonable, and in the meantime to stay the proceedings."

The problem in this case is whether this second order for a new trial could be granted at all, i.e., whether *any* county court judge would have the necessary jurisdiction to do so. It is not really material in this case that the first application was granted on terms which were not fulfilled or that the second application was made to the judge of the county court to which the proceedings were transferred. The question would be the same if His Honour JUDGE ALUN PUGH had refused the first application altogether and had granted the second.

The argument of counsel for the plaintiffs is that, when once the first application was granted but the terms imposed had not been complied with, no application for a new trial could be granted by another county court judge, the jurisdiction to do so having been exhausted. In other words, under these rules once a new trial has been granted or refused there is an end of the matter. The county court judge (whether it be the original one or not) has become *functus officio* and is without jurisdiction to grant a second application.

For this proposition reliance is placed first on the County Courts Act, 1934, s. 95, which provides that

"Every judgment and order of a county court shall, except as provided by this or any other Act or county court rules, be final and conclusive between the parties."

It is then pointed out that C.C.R., Ord. 37, r. 1 and r. 2, have their origin in s. 89 and s. 80 respectively of the County Courts Act, 1846. Section 80, after conferring power to proceed to trial in the absence of a defendant, went on by the proviso to enact that the

"judge in any such case, at the same or any subsequent court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause, upon such terms . . . as he may think fit . . ."

Section 89 provided:

"Every order and judgment of any court holden under this Act, except as herein provided, shall be final and conclusive between the parties, but the judge . . . shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

It will be seen that s. 80 was intended to cover the case where the defendant did not appear. The trial might proceed to judgment in his absence, but if that absence was later found to be, for some reason or another, excusable, a new trial might be granted. Section 89, on the other hand, was quite general in its terms and indeed its concluding words may be wide enough to cover the case contemplated by s. 80. The proviso to s. 80 was possibly inserted *ex majore cantata*, and to allay a fear that the defendant who had unavoidably been prevented from attending the court on the day of the trial would never be able thereafter to put his case. However that may be, the position in 1846 was that power to order a new trial was given to the county court judge under two sections of the Act, one dealing with the specific case of judgment given in the absence of the defendant and the other in "every case whatever". The effect of these sections is now reproduced in current legislation by s. 95 of the Act of 1934 and by Ord. 37, r. 1 and r. 2.

In *Great Northern Ry. Co. v. Mossop* (3) (1855), 17 C.B. 130, it was held that once a county court judge in the exercise of his discretion under s. 89 had refused

A to grant a new trial, he could not thereafter change his mind on a fresh application under the same section. WILLES, J., after quoting s. 89 of the Act of 1846, said this (*ibid.*, at p. 141):

B "That is a power to be exercised, not with reference to interlocutory matters, but with reference to the final judgment, which, unless a new trial is granted, must be considered a settled matter. Immediately that the judge has exercised his discretion to grant or to refuse a new trial, the exception to the general rule is exhausted, and the general rule must prevail. The decision once pronounced, there ought to be an end of the matter; especially where the decision has been acted upon, and the fruits of the judgment reaped."

C "This case was distinguished in *Moran & Wife v. London Tramways Co.* (4) (1888), 57 L.J.Q.B. 447). Section 89 of the Act of 1846 was again in point and it was there held on the facts that the first refusal of the judge to grant a new trial was provisional only, and subject to the right which the judge gave to the applicant to renew the same application on a fresh ground. WILLS, J., said this (*ibid.*, at p. 448):

D "He [the county court judge] reserved to himself a discretion. The time was also in his control, and he gave leave to the plaintiffs to apply again. *Great Northern Ry. Co. v. Mossop* (3) was decided on the ground that the county court judge had on the second occasion reversed his original decision on the same grounds, that is, he went back on his own judgment. The judgments of the learned judges in that case show that when a judge has fully exercised his jurisdiction and discretion in a matter, then the cause is at an end. But that is not so here; and the effect of *Mossop's* case (3) must be confined to a similar state of facts."

In other words, it was held in that case that the judge had not finally determined the matter.

F In the case now before the court the county court judge at Bloomsbury granted a new trial on terms which were not complied with. The grant, therefore, lapsed and the resulting position for practical purposes is the same as if the application had been refused. The application was made under r. 2 of Ord. 37, which corresponds with s. 80 of the Act of 1846. It seems clear on the authorities which I have quoted that no second application for a new trial could be entertained under the same r. 2. The application before the county court judge at Clerkenwell was made and granted under C.C.R., Ord. 37, r. 1, which corresponds to s. 89 of the Act of 1846. There was no previous application under this rule for a new trial in this case. The question, therefore, becomes this: if an application for a new trial is refused, or is granted but becomes inoperative owing to the non-fulfilment of the terms imposed, does that deprive a county court judge of jurisdiction to grant an application for a new trial under r. 1? As to this, it has to be remembered that r. 2 deals with the specific case of a judgment given in the absence of a defendant and with that case alone. It is difficult to understand on what principle the exercise of jurisdiction in this limited field should extinguish the general power given to the county court judge under r. 1. There is no authority which compels me to this conclusion, the decided cases being authority for this proposition only, namely, that once an application for a new trial is allowed or refused under a particular provision, no further application can be entertained under the same provision. Furthermore, it would be a surprising result and one which Parliament could hardly have intended, namely, that if a defendant in the county court discovers that a judgment had been obtained against him by fraud he is nevertheless debarred from asking for a new trial simply on the ground that a previous application had been made under a different rule dealing with an entirely different situation. The anomaly would all the more be marked where, as seems to be the case here, the application

under r. 2 succeeded, but the applicant was unable to comply with the condition as to payment of money into court. In my judgment there is no ground for holding that the exercise of jurisdiction under r. 2 is exhaustive of the jurisdiction not only under that rule but also under r. 1 as well, and accordingly I would refuse the order asked for.

The application for a writ of prohibition fails for the same reasons.

R. J. Trott applied for costs.

A. J. Balcombe: Under the various applications we have had orders for costs against the defendant but those costs although taxed have not been paid. If this action is to go on, in my submission it would be most desirable that the defendant should not be able to proceed to judgment on these costs of today.

Applications dismissed with costs: stay of execution until the determination of the county court proceedings.

Solicitors: *David Schagek & Co.* (for the plaintiffs); *Probyn, Dighton & Park-house* (for the defendant).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

CLIFFORD SABEY (CONTRACTORS), LTD. v. LONG AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., O'Mnerod and Willmer, L.J.J.), April 30, May 1, 6, 1959.]

Rent Restriction—Decontrol—Suspension of execution of order for possession—Landlords' proposal for grant of new tenancy not accepted by tenants—Tenants actuated by hope of future legislation more favourable to them—Reasonableness of refusal—Landlord and Tenant (Temporary Provisions) Act, 1958 (6 & 7 Eliz. 2 c. 68), s. 3 (1) (a).

A dwelling-house which was subject to the Rent Restrictions Acts was removed from the control of those Acts by s. 11 (1) of the Rent Act, 1957, which came into effect on July 6, 1957. On July 10, 1957, the landlords served on the tenants a notice determining their statutory tenancy on Oct. 6, 1958, and offering to grant them a new lease for five years. The offer was conditional on acceptance within one month. Although the new tenancy would be at an enhanced rent and would include full repairing covenants by the tenants, the terms as to rent and repairs were reasonable. The offer, which remained open for a month, was not accepted by the tenants, mainly because they thought that, owing to the criticism which the Act of 1957 had aroused, there was a likelihood of fresh legislation which would be more favourable to tenants. On Aug. 1, 1958, the Landlord and Tenant (Temporary Provisions) Act, 1958, came into force. On appeal by the tenants against refusal to suspend under s. 3* of the Act of 1958, execution of an order for possession,

Held: the tenants were not entitled, under s. 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, to the suspension of the execution of the order for possession for the following reasons:

(a) the relevant date for considering whether the tenants had "not unreasonably . . . failed to accept" the landlords' proposal for the grant of a new tenancy, within s. 3 (1) (a) of the Act of 1958, was Aug. 10, 1957, the latest date on which the offer could have been accepted.

(b) in considering whether the refusal of the proposal for the new tenancy

* The relevant terms of s. 3 are printed at p. 464, letter H, and p. 465, letters A to G, post.

was reasonable, the mere possibility of some change of legislation in the near future was irrelevant, though if amending legislation had been pending, or even probable, at the relevant date, it might be that that fact should be taken into account: and, on the facts, the tenants had unreasonably refused the landlords' offer of a new tenancy.

Appeal dismissed.

[**Editorial Note.** On the question whether the court will take into account pending legislation this case may be compared with the decision in *Willow Ware Canal Carrying Co., Ltd. v. British Transport Commission* ([1956] 1 All E.R. 567).

For the Landlord and Tenant (Temporary Provisions) Act, 1958, s. 3, see 38 HALSBURY'S STATUTES (2nd Edn.) 599, and for the Rent Act, 1957, s. 11 and Sch. 4, see 37 HALSBURY'S STATUTES (2nd Edn.) 561 and 587.]

Case referred to:

(1) *Cumming v. Danson*, [1942] 2 All E. R. 653; 112 L.J.K.B. 145; sub nom. *Cumming v. Dawson*, 168 L.T. 35; 31 Digest (Repl.) 697, 7879.

Appeal.

This was an appeal by the defendants from a judgment of His Honour JUDGE LEON, given at Willesden County Court on Dec. 1, 1958. The defendants, a husband and wife, had been the statutory tenants of a dwelling-house which was decontrolled by s. 11 (1) of the Rent Act, 1957. On July 10, 1957, the plaintiffs, the defendants' landlords, gave notice to the defendants, in accordance with Sch. 4, para. 2 (2), to the Act of 1957, that on Oct. 6, 1958, their right to retain the premises would cease. At the same time the plaintiffs offered to the defendants a new tenancy for five years commencing on Sept. 29, 1957, at a rent of £150 a year exclusive of rates. Under the new lease, the defendants were to be responsible for all internal repairs and for keeping the fences in proper repair. The offer remained open for a month, and, as it had not been accepted during that time, it was withdrawn on Aug. 13, 1957. On Oct. 14, 1958, the plaintiffs commenced proceedings in the county court to recover possession of the premises. The defendants denied that the plaintiffs were entitled to possession and alternatively asked for suspension, under s. 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, of the execution of the order for possession. At the trial the plaintiffs' claim for possession was admitted and the question before the county court judge (His Honour JUDGE LEON) was whether the defendants were entitled to suspension of execution. The county court judge was satisfied that the terms of the proposal for a new tenancy were reasonable and he found that the defendants' main reason for not accepting the offer was because the first defendant (the husband) thought that the government might yield to pressure and pass further legislation more favourable to tenants. The judge held that that was not a matter which he was entitled to take into account in considering, under s. 3 (1) (a) of the Act of 1958, whether the defendants had "not unreasonably refused" the proposal for the grant of a new tenancy, and he dismissed the defendants' application for the suspension of the execution of the order for possession.

After hearing argument, the Court of Appeal intimated that the appeal would be dismissed and that the reasons for the dismissal would be put into writing and announced later.

B. A. Marder and *Miss J. J. Bisschop* for the defendants, the tenants.

D. P. F. Wheatley for the plaintiffs, the landlords.

Cur. adv. vult.

May 6. LORD EVERSHERD, M.R., read the following judgment: The defendants in this case have been for many years tenants of premises known as 233, Carlton Avenue East, Wembley, being premises which were subject to the rent restriction legislation. The question which has arisen is whether they

should now obtain, under s. 3 of the most recent Act, the Landlord and Tenant (Temporary Provisions) Act, 1958, a suspension of the right of the plaintiffs, their landlords, to an order for possession to which otherwise the plaintiffs are entitled by virtue of the effect of the Rent Act, 1957. I will refer presently to the necessary statutory provisions, but, so far as the facts are concerned, it suffices for me to say that, on July 10, 1957, which was very shortly after the Rent Act, 1957, had come into operation and decontrolled these premises, the plaintiffs made an offer in writing, by letter, for the grant of a new lease of the premises for a period of five years from Sept. 29, 1957, at a rent of £150 per annum exclusive of rates and on terms that there should be a full repairing covenant on the part of the defendants. The sole question is whether the defendants were justified in not accepting that offer within the period of one month given by the letter in which the offer was made.

Section 11 (1) of the Rent Act, 1957, which is the provision which "decontrolled" — for that is the word generally used — these premises provides:

"The Rent Acts shall not apply to any dwelling-house the rateable value of which on Nov. 7, 1956, exceeded . . ."

a certain figure, and that applied to these premises. Section 11 (7) made applicable the transitional provisions contained in Sch. 4 to the Act. I need not refer in detail to these provisions but the effect is this. The Act came into operation* one month from the date of the royal assent being given to it, namely, on July 6, 1957. By virtue of these transitional provisions, a person in the position of the defendants was entitled (provided, of course, that he complied with obligations as to paying rent and performance of covenants and so on) to remain in possession until Oct. 6, 1958†. The transitional provisions also contained a further provision to the effect that the landlord in such a case could make an offer of the grant of a new lease for not less than three years at a rent which would not include a premium‡, and, if that offer were accepted, then the tenant would thenceforth hold under the terms of the lease offered, and the other provisions of Sch. 4 would then be suspended. It will be observed that the terms of s. 11 (1) contemplated in law that, when the proper time came, a landlord might eject a tenant whose premises had been decontrolled, without having to go to the court for an order, a proceeding well established by the common law in matters of this kind. The Landlord and Tenant (Temporary Provisions) Act, 1958§, somewhat assisted tenants, like the defendants, whose premises had been decontrolled by the Act of 1957. By s. 1 of the Act of 1958 it was enacted that a landlord could not get possession against an unwilling tenant save by order of the court.

For present purposes, the important section of the Act of 1958 is s. 3, which in certain circumstances suspends the execution of an order for possession. Section 3 (1) reads:

"Without prejudice to the power of any court apart from this section to postpone the operation or suspend the execution of an order for possession, if in proceedings by the owner against the occupier for the recovery of possession of a dwelling-house to which this Act applies the occupier satisfies the court (a) that he has not unreasonably refused or failed to accept any proposal made by the owner for the grant of a new tenancy of the premises or part of the premises, being a tenancy for a term of not less than three years and not being a tenancy to be granted at a premium or requiring the payment of increased rent in respect of any period before the date on which the proposal was made . . ."

* Under s. 27 (2) of the Act; the royal assent was given on June 6, 1957.

† See para. 2 (1) and (2) of Sch. 4 to the Act of 1957.

‡ See para. 4 of Sch. 4 to and s. 13 of the Act of 1957.

§ This Act came into force on receiving^a the royal assent on Aug. 1, 1958.

- A There follow three other paragraphs referring to conditions which the occupier must also satisfy but which raise no question for the present purpose. Section 3 (1) then proceeds:

B "... subject to the provisions of this section, the court shall suspend the execution of any order for possession made in the proceedings for such period, not being less than three nor more than nine months from the date of the order, as the court thinks fit."

Section 3 (3) is in these terms:

- C "In considering whether any of the conditions specified in para. (a) or para. (b) of sub-s. (1) of this section are fulfilled, regard shall be had, among other things, to the means of the occupier, to his age, and to any disability to which he may be subject, and (without prejudice to the generality of the foregoing provision) in considering whether a refusal or failure to accept any such proposal as is referred to in the said para. (a) was reasonable, regard shall be had in particular to the terms of that proposal relating to repairs, improvements or maintenance."

- D Two grounds were suggested for the view put forward by the defendants that they had not unreasonably failed or refused to accept the offer of July 10, 1957, and had fully satisfied para. (a). The first was because of the figure inserted in the offer for rent and perhaps also because of the suggested full repairing covenants. This ground was rejected by the learned county court judge and was but faintly argued before us. I am satisfied that there is no substance in this point and that the judge was entitled to hold, as he did, that the terms as to rent and repairs were reasonable and that, in the circumstances, including the means and age of the defendants and so forth, the defendants do not show a case on this ground under para (a).

- E I pass, therefore, to the second ground put forward by the defendants. It was said that because of current public feeling—that is, current at the time of the offer being made—and criticism of the government's policy on the Rent Acts, which the defendants thought might result in some change in the legislation, they were entitled to play for time. This ground was stated by the learned judge (and it is not suggested that it was wrongly stated) thus:

- G "He [the first defendant] felt that owing to the considerable agitation which the passing of the Rent Act, 1957 . . . has produced politically and publicly, there was a good chance that the law would be altered in his favour and he wanted to wait to see if it would be before he accepted the offer."

- H On this ground, the argument was substantially confined before us, and, although we intimated our view last Friday, May 1, we thought, having regard to the novelty of the point and the nature of the legislation, that we should put our conclusions into writing.

The learned judge's view on it is as follows:

- I "With regard to the second ground, I appreciated that in one sense it may be reasonable for a person to consider the political situation and whether there is going to be a general election, whether the government is likely to introduce fresh legislation and kindred matters, before coming to a conclusion as to a particular course of conduct. Business men do this regularly and no one can say that they are unreasonable in so doing. The Act of 1957 was new at the time of the plaintiffs' offer, and counsel for the defendants pressed on me the submission that it must have been reasonable for the [first] defendant, in view of the strong political reaction which the passing of the Act of 1957 has provoked, to consider whether this would have any effect before accepting the plaintiff's offer. He urged on me too in support of this argument that the passing of the Act of 1958 did mitigate the law from tenants' point of view and that in consequence it

must have been reasonable for the [first] defendant to wait to see if such legislation took place. I held that in spite of the above considerations the expression 'not unreasonably' in the Act of 1958 did not entitle the tenant to consider the political situation, the possibility of further legislation and such matters. I said that the only matters which the tenant was entitled to consider were (i) the nature of the offer itself, i.e., the rent and other terms, and the fair value of the tenancy and the like; (ii) his own means and his situation generally, present and future, including, of course, that of his family and similar matters. If every tenant were entitled to say that he refused an offer because he thought there might be a general election or further legislation, such an argument might successfully be raised by almost every tenant who had refused an offer. I did not consider that the fact that the Act of 1957 was new at the time of the plaintiffs' offer made any difference. Either the argument was valid or it was not, and, having regard to the object of the Act of 1958 and the matters with which it was dealing, I held that it was not. I held that the [first] defendant did, in fact, have in mind the possibility of further legislation when he rejected the offer, and, if I was entitled to take that into consideration in considering whether he acted unreasonably or not, I should have suspended execution of the order for six months. Holding as I did that that was not a matter which I was entitled to take into consideration, I held that the [first] defendant had been unreasonable in refusing the offer and dismissed his application under the Act of 1958."

The argument of counsel for the defendants was that the question of reasonableness or unreasonableness is one of fact throughout, and that the political prospects in July and August, 1957, whatever their weight, character or effect, were facts at that date and should not have been wholly excluded from consideration. In other words, counsel contended that the learned judge was wrong in saying as a matter of law that these political prospects were irrelevant for his consideration, and he drew attention particularly to the statement at the end of the judgment that, if the judge could have taken them into account, he would have suspended the execution of the order for six months.

I venture to make two preliminary observations. First, in considering the question of reasonableness or unreasonableness in connexion with this legislation, I cite, as I have many times done before, the language used by my predecessor, LORD GREENE, M.R., in *Cumming v. Danson* (1) ([1942] 2 All E.R. 653 at p. 655);

"... the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive ..."

In this case, the relevant date is the date of the refusal rather than the date of the hearing, but the words which I emphasise are: "That he must do in ... a broad, common-sense way as a man of the world ...". The conclusion must be arrived at as on Aug. 10, 1957, the latest date when the offer could have been accepted.

Secondly, I observe that (apart from the introduction to the requirements by s. 1 of the Act of 1958 that an order for possession must be obtained, which is not, I think, of significance for present purposes) the law, as it appeared in the Act of 1957 and so far as is relevant for present purposes, has not changed at all in fact. The defendants in August, 1957, had a choice of two alternatives to remain on until Oct. 6, 1958, under the existing statutory tenancy, or to accept the offer made for a five year tenancy from Sept. 29, 1957, at the rent

A and on the terms suggested. The character and incidents of neither of those alternatives have since been changed by the subsequent legislation.

Applying, therefore, what I conceive to be the proper test in saying whether a tenant's refusal is unreasonable, I should not wish to lay it down, nor is it necessary to do so, that no circumstances existing at the relevant time which could properly be comprehended by the formula which I have for convenience
B used, namely, "political prospects", would be relevant for consideration. If it were proved that at the relevant date amending legislation were pending or even probable, which legislation would be likely to affect later agreements containing terms such as those in the proffered agreement, it may be that a court would for that reason hold it not unreasonable for a tenant to decline to bind himself and to play for time. But those are not the facts in the present
C case. At most, on the evidence, there was some political agitation. As the learned judge said,

"What the [first] defendant really wanted was a much longer time to see if the government yielded to pressure and passed legislation to ameliorate the position from tenants' point of view."

D On the facts of the present case I agree with the judge that these "political prospects" were irrelevant for his consideration. I agree with him that it is not relevant for the court to take into account the mere possibility of some change of legislation in the near or foreseeable future—a possibility which is at all times present. I further agree with counsel for the plaintiffs that, if the answer were otherwise, the inquiry involved, if not impossible, would be foreign to the
E normal judicial function, since the court would have to inquire into and form its own estimate on the political temper and pressures of the day. I add, too, that the question in any case is not whether the defendants' hopes and wishes were reasonable, but whether, judged objectively, they unreasonably refused the offer which the plaintiffs made.

Counsel for the plaintiffs also invoked the terms of s. 3 (3) of the Act of 1958. He said that, without seeking to restrict the guidance indicated by the subsection to the instances which it contained, the subsection plainly inferred that the
F circumstances relevant for consideration fell broadly under two heads, namely, (i) those personal to the tenant, his finances, health, age and so on; and (ii) those related to the terms of the landlord's offer but particularly in regard to repairs; and that "political prospects" of the kind present in this case were far removed from
G either head. For reasons already given, it might be otherwise if it were proved that amending legislation was actually in prospect, which would affect, for instance, the terms of the landlords' offer relating to repairs, etc., but, subject to this proviso, and without attempting any further exposition of the intent and effect of s. 3 (3), I think that its terms lend support to the view which I have expressed. I would therefore dismiss the appeal.

H I should add that **ORMEROD, L.J.**, has authorised me to say that he agrees with the judgment which I have delivered.

WILLMER, L.J.: I also agree and have nothing to add to what my Lord has said.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co* (for the defendants); *Curwen, Carter & Evans* (for the plaintiffs).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

E. LTD. v. C. AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), May 4, 1959.]

Writ—Renewal—Jurisdiction—Principles on which renewal granted—Writ issued to prevent statute of limitations running—Writ not served on defendants—Application for renewal after expiry of writ—R.S.C., Ord. 8, r. 1, Ord. 64, r. 7.

On Aug. 29, 1957, a company issued a writ against two defendants claiming a declaration that the defendants were "guilty of misfeasances and breaches of trust in relation to the plaintiff company as directors thereof in that they wrongfully occupied the company's freehold premises . . . as private residences free of rent and expended the moneys . . . in the improvement repair or maintenance or otherwise in respect thereof" and that they were liable to account for the benefits so obtained and money expended. The writ was issued for the purpose of avoiding the operation of the Limitation Act, 1939, in respect of the company's claim. It was produced and shown to the defendants' advisers, but was not served, service being withheld pursuant to arrangement made with them on Sept. 10, 1957. Negotiations were in progress between the parties and it was considered that service of the writ would prejudice those negotiations. On Aug. 26, 1958, the writ was renewed, pursuant to the fiat of a master, for six months, expiring on Feb. 26, 1959. On Apr. 16, 1959, the company applied, under R.S.C., Ord. 8, r. 1* and Ord. 64, r. 7*, for a further renewal of the writ, its expiry on Feb. 26, 1959, having been inadvertently overlooked.

Held: the court had jurisdiction to renew the writ in its discretion, but a renewal would not be granted in the circumstances of this case because—

(i) whether a writ should be renewed was a question for the court, not the parties, to decide, and on the facts there had never been difficulty in effecting service and no good reason had been established for delaying service.

(ii) a main reason for the renewal of the writ being needed was the purpose of avoiding the running of time under the Limitation Act, 1939, but renewal should be granted only where defences existing at the time of renewal would not be prejudiced by the writ being renewed.

Battersby v. Anglo-American Oil Co., Ltd. ([1944] 2 All E.R. 387) applied.

[**Editorial Note.** If there had been an undertaking by the defendants' solicitors to accept service of the writ, the position might have been different; see p. 472, letter F, post.

As to renewal of writ, see 26 HALSBURY'S LAWS (2nd Edn.) 26, para. 35; and for cases on the subject, see DIGEST (Practice) 311, 312, 358-368.]

Cases referred to:

- (1) *Battersby v. Anglo-American Oil Co., Ltd.*, [1944] 2 All E.R. 387; [1945] K.B. 23; 114 L.J.K.B. 49; 171 L.T. 300; 2nd Digest Supp.
- (2) *Sheldon v. Brown Bagley's Steelworks, Ltd.*, [1953] 2 All E.R. 894; [1953] 2 Q.B. 393; 3rd Digest Supp.
- (3) *Holman v. Elliott (George) & Co., Ltd.*, [1944] 1 All E.R. 639; [1944] K.B. 591; 113 L.J.K.B. 459; 170 L.T. 373; 2nd Digest Supp.
- (4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affl.* H.L., [1946] 1 All E.R. 98, [1946] A.C. 163; 30 Digest (Repl.) 225, 691.

Adjourned Summons.

By this summons the plaintiff applied *ex parte* for the renewal of the writ

* The relevant terms of R.S.C., Ord. 8, r. 1, and of Ord. 64, r. 7, are printed at p. 469, letters F and I, post.

A of summons which had never been served on the defendants. The facts appear in the judgment.

HIS LORDSHIP gave judgment in open court.

T. M. Shelford for the plaintiff.

B **ROXBURGH, J.:** The writ in this action was issued on Aug. 29, 1957, by a company which I will call E. against two defendants, whom I will call M.W.C. and G.J.C., the first being a widow, and the second a spinster. The plaintiff company claims a declaration that G.E.W.C. deceased, and his widow, the defendant M.W.C. and the defendant G.J.C., his daughter,

C "were respectively guilty of misfeasances and breaches of trust in relation to the plaintiff company as directors thereof in that they wrongfully occupied the company's freehold premises . . . as private residences free of rent and expended the moneys of the company in the improvement repair or maintenance or otherwise in respect thereof and that the estate of the said G.E.W.C. deceased and the defendants are jointly and severally liable to account to the company (a) for the benefits which the said G.E.W.C. deceased and the defendants or any of them thereby obtained during such time as D they were respectively in occupation of the said premises and directors of the plaintiff company, and (b) for the money expended as aforesaid."

E It will be observed that that is an allegation of misfeasance, and no date is stated as to when the misfeasances began, and a fortiori no date on which they ended. There was an amendment of the writ, on which nothing turns, on Apr. 28, 1958. An application was made to a master, since retired, for an extension, and a renewal for six months was granted, and that expired on Feb. 26, 1959. The plaintiff did nothing then or previously, but as recently as Apr. 16, 1959, it applied for a further renewal. The matter depends on two rules, and I am not myself going to enter into the rather disputable legal question whether the application is wholly under one, or partly under one and partly under the other. F R.S.C., Ord. 8, r. 1, provides:

G "No original writ of sunmons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if H satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . ."

I It is clear that any application under Ord. 8, r. 1, has to be made before the expiration of the relevant period, and in this case it is common ground that no such application was made; and accordingly reliance has to be placed on R.S.C., Ord. 64, r. 7, which is a general rule which provides:

"A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed . . ."

In my judgment there is no lack of jurisdiction in me to grant this application under the two rules in combination, if in my discretion I think fit; and the only relevance of the question whether the application is to be treated as a whole under Ord. 64, r. 7, or whether it is partly under Ord. 8, r. 1, is that in Ord. 8, r. 1, the discretion is qualified by the words "if satisfied that reasonable efforts

have been made to serve such defendant, or for other good reasons", and Ord. 64, r. 7, is not so qualified. But as the words "or for other good reasons" are in themselves very wide, I doubt if it makes much difference whether I proceed under the one rule, or partly under one and partly under the other; and as there is some rather difficult authority on that point, I do not propose to embark on the question.

Although *Battersby v. Anglo-American Oil Co., Ltd.* (1) ([1944] 2 All E.R. 387) has in one important respect been criticised in a subsequent decision of the Court of Appeal (see *Sheldon v. Brown Bayley's Steelworks, Ltd.* (2), [1953] 2 All E.R. 894), it seems to me that the last word so far about these matters has been spoken by the Court of Appeal in the former case. In that case the judgment of the court was read by LORD GODDARD. First of all, it appears to me that that case shows that a previous decision of the Court of Appeal in *Holman v. George Elliott & Co., Ltd.* (3) ([1944] 1 All E.R. 639) ought not to be followed because in *Battersby v. Anglo-American Oil Co., Ltd.* (1) the court said ([1944] 2 All E.R. at p. 391):

"[*Holman's case* (3)] is a decision of this court, but, in our opinion, it is in conflict with the earlier cases also decided in the Court of Appeal. Accordingly, in conformity with the decision of the full court in the recent case of *Young v. Bristol Aeroplane Co., Ltd.* (4) ([1944] 2 All E.R. 293), we are at liberty to disregard it, and, in our opinion, we ought to follow the earlier decisions."

Battersby v. Anglo-American Oil Co., Ltd. (1) first lays down a proposition which has some relevance to the present case, though it does not in my judgment conclude it. In that case Mr. Battersby was killed by an explosion on Oct. 20, 1941, so that it was easy to see when the relevant statutory period of limitation would expire, i.e., Oct. 20, 1942. The writ was issued on Oct. 19, 1942, but was not served before the expiration of the statutory period on Oct. 20, 1942. The Court of Appeal held, in effect, that the court would not allow a writ to be renewed when the renewal would deprive a defendant of a statutory defence based on a limitation which had accrued before the date of the renewal. The case also lays down certain principles which may be a guide to me. I read again from the judgment of the court ([1944] 2 All E.R. at p. 391):

"We conclude by saying that even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction... ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development."

Those are very material words in the present case. The judgment continues (*ibid.*):

"It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served."

The curious thing in the present case, as will appear, is that not only are the defendants here to be served, but the writ has been brought to the notice of their solicitors and yet it has not been served.

A *Battersby v. Anglo-American Oil Co., Ltd.* (1) has been criticised in one respect by a subsequent decision of the same court in *Sheldon v. Brown Bagley's Steel-works, Ltd.* (2) ([1953] 2 All E.R. 894), but I should show lack of respect if I entered into that controversy which is between two Courts of Appeal, and in any case it is not really germane to the matter which I have to decide. There never has been any criticism from any court of the propositions to which I have referred as being found in *Battersby v. Anglo-American Oil Co., Ltd.* (1).

B In the present case the first application for renewal was supported by an affidavit in these terms:

C "The writ of summons herein was issued on Aug. 29, 1957, and was then issued inter alia for the purpose of avoiding the operation of the Limitation Act, 1939, in respect of the subject-matter of the company's claim."

That was one of the purposes for which the writ was issued. Later on the solicitor making the affidavit says:

D "The matters said to constitute those misfeasances and breaches of trust arose, according to my instructions, wholly or in part sufficiently long ago as to make it prudent to issue the said writ and indeed counsel advised that unless the proceedings were instituted the new directors might themselves be guilty of breach of trust. (5) Both prior to and since the issue of the said writ negotiations have been taking place between the company and the defendants' advisers with respect to numerous matters arising in connexion with the affairs of the company including the shareholdings of the defendants coupled with the liabilities of the company. (6) In these circumstances the service of the said writ has not been effected although the defendants' advisers are fully aware that the proceedings have been issued. In my respectful opinion service of the writ would be prejudicial to the negotiations above referred to and, moreover, to the interests of the company's creditors, provision for whose satisfaction is an integral part of those negotiations, and it is desired therefore that service of the writ should be deferred in the hope that a satisfactory result will emerge from the said negotiations. (7) Under the circumstances aforesaid I respectfully request that leave be given for the writ to be renewed so as to keep alive the cause of action dealt with by the indorsement thereon until such time, if ever, as it becomes necessary to serve the same and proceed with the company's claim."

G The master granted a renewal on that affidavit, but in my view he ought not to have done so. It appears to me that that is just the sort of course which is not allowed to be pursued, and I think that is reasonably plain from the passage in the judgment of the court in *Battersby v. Anglo-American Oil Co., Ltd.* (1) which I have read. The object was to stop the statute running. That is made absolutely plain. That is a very suspicious circumstance on any view having regard to the law. No explanation is given when the misfeasances are supposed to have begun, how long they continued or what particular limitation was feared, or anything else. Then again when the defendants were there to be served, what was the point of telling the defendants' solicitors that a writ was issued, and then not serving it? To suggest that ladies are sensitive is no explanation, because if ladies become directors of companies they should not be as sensitive as all that in their capacity of directors of the company. Very little information is given on this application, and in my view that extension should never have been granted.

I On Apr. 16, 1959—i.e., too late, and without making any sort of explanation why he was too late—the same solicitor made a further affidavit in which he says:

"It is desired further to renew the writ for the same reasons as those mentioned in paras. 5, 6 and 7 of my said affidavit. The negotiations there—

referred to have not yet been concluded, though they are expected to fructify shortly. Service of the writ has still been withheld."

It will be noticed that there is not there a word of explanation why the application was not made within due time. This morning, however—that is, after the matter was adjourned into court—a further affidavit was filed by the same solicitor in which he says:

"(3) The primary object in issuing the writ in this action was to protect the interests of the company's creditors having regard to the possibility that the statute of limitations might apply. Moreover the present directors (who had been appointed to the board in 1956 on the resignation from the board of the company [of certain persons]) were advised that failure to institute the present action might involve them in personal liability at the instance of the creditors of the company. (4) Negotiations with a view to the adjustment of the position between the company and the defendants were entered into over a year before these proceedings were begun and the same negotiations have been and still are actively proceeding. They are complex and in many respects delicate, particularly as it seems from knowledge which I have acquired while acting for the company that the late Mr. C., who was until his death the governing and sole managing director (holding with the defendants seventy-eight per cent. of the issued share capital) tended to run the company without always a strict regard for legal formalities as though its assets belonged to him and his family. A great deal of progress has been made towards concluding a final arrangement between the company and the defendants and there is a distinct possibility of a conclusion being reached in the near future. (5) During the course of a meeting, at which I was present, with the defendants' solicitors at their offices on Sept. 10, 1957, the writ in this action was produced and shown to them. It was by arrangement then made that service of the writ has been withheld, the existence of the proceedings being regarded by both sides as no more than a protection in respect of the matters referred to in para. 3 hereof in the event of its proving impossible after all to bring negotiations to a successful conclusion."

I point out there that it was not an undertaking to accept service or anything of that sort, which might have made all the difference. This was an attempt by the two parties to do the one thing which the Court of Appeal said did not lie in their power. It is not for them to decide whether writs should be renewed, but for the court to decide. The affidavit continues:

"Moreover, the defendants in meetings with the present directors at which I have been present have shown themselves to be sensitive of any criticism of the late Mr. C. so that for this reason also it has been considered inadvisable to serve the writ. It has been made clear to the defendants, through their solicitors, that, if it should become necessary to prosecute this action, the present directors as shareholders would not accept any personal benefit from any judgment which might eventually be obtained. (6) It is my respectful view that, by refraining from serving the writ and acting as in the previous paragraph mentioned, the negotiations with the defendants have been materially assisted. To go back on the arrangement made with the defendants' solicitors, would, in my respectful opinion, have had an unsettling and prejudicial effect on the negotiations and might have given rise to a risk of their failure."

Then at long last two lines of explanation are given of the failure to make application within due time: "(7) The fact that the writ had expired was inadvertently overlooked due to a faulty diary entry."

Having regard to all those facts it seems to me that this quite clearly is a case in which I ought not to exercise my discretion in favour of a renewal of the writ.

A I need not analyse the facts because the proper course is to look at all the facts together, and to see what is the general weight of them. In my view the general weight of these facts is to show that these parties have been trying to use these two rules for the very purpose for which they are not intended; and it is because nothing of this sort—unless the case gets to the Court of Appeal—normally emerges in open court, and because apparently (to judge by the previous history of this case) there has been some latitude in the administration of this rule, that I have given permission for this judgment, without the names of the parties, to be made public. I dismiss the application. No question of costs arises.

Order accordingly.

Solicitors: *Warren & Warren* (for the plaintiff).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BOLTON'S (HOUSE FURNISHERS) LTD. v. OPPENHEIM.

[CHANCERY DIVISION (Danckwerts, J.), May 8, 1959.]

Landlord and Tenant—Business premises—Opposition by landlord—Intention to demolish and carry out substantial work of construction—Notice stating ground of opposition—Notice did not state that landlord could not reasonably do the work without obtaining possession of the holding—Whether notice valid—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (1), s. 30 (1) (f).

A landlord served on his tenants a notice to terminate a business tenancy under s. 25 of the Landlord and Tenant Act, 1954. He gave as his grounds of opposition to an application to the court for the grant of a new tenancy that “on the termination of the current tenancy I intend to demolish the premises comprised in the holding and thereafter to carry out substantial work of construction on the holding”. Of the seven alternative grounds of objection set out in s. 30 (1) of the Act of 1954, para. (f) is as follows: “that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding”. On the question whether the notice given by the landlord was valid as sufficiently stating the ground specified in para. (f) of s. 30 (1), although it did not refer expressly to the need of obtaining possession,

Held: the notice was sufficient to enable the landlord to oppose under s. 30 (1) (f) the grant of a new tenancy, because the court was entitled to import into the notice reference to inability reasonably to demolish and carry out substantial work of construction without obtaining possession of the holding.

Biles v. Caesar ([1957] 1 All E.R. 151) applied.

[As to a landlord's notice to terminate a business tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 889, para. 1711.]

For the Landlord and Tenant Act, 1954, s. 25, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 414.]

Cases referred to:

(1) *Re Hawkins, King v. Hawkins*, [1943] 1 All E.R. 39; [1943] Ch. 67; 112 L.J.Ch. 43; 168 L.T. 55; 2nd Digest Supp.

- (2) *Hankey v. Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 A.L.J.K.B. 711; 167 L.T. 193; 31 Digest (Repl.) 599, 7170.
- (3) *Biles v. Caesar*, [1957] 1 All E.R. 151; 3rd Digest Supp.
- (4) *Sidney Bolsom Investment Trust, Ltd. v. E. Karmios & Co. (London), Ltd.*, [1956] 1 All E.R. 536; [1956] 1 Q.B. 529; 3rd Digest Supp.

Adjourned Summons.

This was an application by Bolton's (House Furnishers) Ltd., the tenants of a shop and premises, 395, Brixton Road, London, by originating summons dated Nov. 11, 1958, for the grant of a new tenancy of those premises by the landlord, Abraham Louis Oppenheim. The original tenancy was for a term commencing Dec. 25, 1945 and expiring on Mar. 24, 1959. The landlord had served on the tenants a notice of termination under s. 25 of the Landlord and Tenant Act, 1954, dated July 15, 1958, specifying as the date at which the tenancy was to end, Mar. 25, 1959, and stating that he would oppose an application to the court under Part 2 of the Act for the grant of a new tenancy on the ground that

"on the termination of the current tenancy I intend to demolish the premises comprised in the holding and thereafter to carry out substantial work of construction on the holding."

Section 25 (6) of the Act of 1954 provides that a notice under s. 25 shall not have effect unless it states whether the landlord would oppose an application to the court for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in s. 30 of the Act he would do so. Section 30 (1) gives seven grounds for opposition, lettered (a) to (g). Paragraph (f) reads:

"that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

It was contended by the tenants that this notice was invalid because the ground of opposition under s. 30 (1) (f) was not sufficiently stated inasmuch as there was no reference to the landlord not being able reasonably to carry out the work without obtaining possession. For the landlord it was contended that it was enough for a notice under s. 25 to indicate, with sufficient clarity to be understood, on which ground he was asking for possession, and that in this case it was clear that he was relying on para. (f). The matter was brought before the court for decision as a preliminary point.

R. E. Megarry, Q.C., and *S. N. Bernstein* for the applicants, the tenants.
L. A. Blundell, Q.C., for the respondent, the landlord.

DANCKWERTS, J.: This is a matter which arises under the Landlord and Tenant Act, 1954, between the tenants, Bolton's (House Furnishers) Ltd., who are the applicants by originating summons in this matter, and their landlord, Abraham Louis Oppenheim. The landlord has served on the applicants a notice of termination under s. 25 of the Landlord and Tenant Act, 1954, and the question which is before me is whether that notice is in such a form that the landlord is entitled to object to the grant of a new tenancy under the terms of the Act. The matter has come to me on the footing that this whole point is referred to me for decision as a preliminary matter, which I suppose in a certain event will dispose of the whole question at present between the parties. It is certainly a convenient way of dealing with a point of law on the construction of the terms of the landlord's notice of termination. I think, however, that while it is convenient practice, it would be preferable that a pro forma summons should be taken out in the proceedings started by originating summons in such a case, asking, for instance, for a declaration on the point which it is desired to have decided.

A The matter turns simply on the terms of the landlord's notice. That is on the statutory form, and the landlord says:

" I would oppose an application to the court under Part 2 of the Act for the grant of a new tenancy on the ground that on the termination of the current tenancy I intend to demolish the premises comprised in the holding and thereafter to carry out substantial work of construction on the holding."

B The earlier part of the statutory form gives to the tenants notice to determine their tenancy on Mar. 25, 1959. The question is whether that notice states sufficiently the grounds on which the landlord is entitled to oppose the grant of a new tenancy.

C The grounds on which he may oppose the grant of a new tenancy are stated in s. 30 (1) of the Act. Subsection (1) says:

" The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act . . ."

D There are grounds for opposition to a new tenancy lettered (a) to (g). Of these para. (f) is no doubt the one to which the landlord intended to refer, and is in these terms:

E " that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

The notice refers to an earlier part of that paragraph but makes no reference to the concluding words " and that he could not reasonably do so without obtaining possession of the holding."

F It is quite plain, in my view, that the concluding words are an essential condition of the grounds which are provided for by that paragraph. In any case it must be necessary for the landlord to obtain possession of the holding in order to carry out the works which he intends to do. It is not quite clear why it should be a necessary statutory condition of that provision, but that is not for me to say. It is there.

G The argument of counsel for the respondent that the final provision only applies to part of the paragraph and that it is only for carrying out substantial work of construction on the holding, and not for demolition that the landlord must require possession of the holding, does not seem sound. The condition in question does apply to the whole of the paragraph in question.

H One further point should be noticed. On the back of the statutory form* on which notice has to be given there are notes which indicate that the landlord may oppose and indicate what is to be done in pursuance of the Act. Under the provisions of s. 24, when the Act applies the tenancy is to continue until it is determined in accordance with the provisions of the Act. The landlord therefore cannot give the ordinary notice to quit, but the tenant can give the ordinary notice to quit because he is given that right by the provisions of s. 24 (2). If the landlord wants to determine the tenancy then he has to proceed in accordance with the procedure which has been adopted, or attempted to be adopted, in the present case, by the landlord, that is to say, by giving a notice to determine. In these notes, after prescribing the various matters, these paragraphs of s. 30 (1) are reproduced. It is curious that they are not reproduced word for word, because throughout the notes instead of referring to " the holding ", which has a statutory definition in the Act, the draftsman of the form has chosen to use the

* See the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157); 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 159.

word "premises". For instance, in para. (f), which is the one with which we have to deal, it reads: A

"that on the termination of the current tenancy the landlord intends to demolish or reconstruct the whole or a substantial part of the premises or to carry out substantial work of construction on the whole or part of them and that he could not reasonably do so without obtaining possession of the premises." B

Counsel for the respondent suggested that that indicated that the matter was not one of precision and therefore that the landlord ought not to be tied too much to the precise terms of the provisions of the Act. I do not think that that argument has any substance.

It is fairly plain what the Act strictly requires the landlord to do: he is to state "such of the following grounds as may be stated". Therefore, it would seem at first sight that everything that is necessary must be stated in the notice, and to leave a thing to be discovered by reference to the Act or some other process of that kind would *prima facie* appear not to be in compliance with the requirements of the Act. C

Counsel for the applicants referred me to a case on rather a different provision showing that "stated" is not equivalent to "ascertainable", but must be expressed. That was *Re Hawkins, King v. Hawkins* (1) ([1943] 1 All E.R. 39) which was decided on the construction of s. 25 of the Finance Act, 1941. The case is a good long way from the present and perhaps it does not really help; but there is much force in the arguments which have been put before me by counsel for the applicants that as this is the method under the Act which enables a landlord to determine a tenancy in place of the notice to quit which, under the terms of the original lease, might provide for the determination of the tenancy, the same rule of strictness ought to be applied as in the case of a notice to quit under the general law. There is no doubt that in the case of the general law notices to quit have to be in precise terms, and a mistake (even though it is quite easy to see what the landlord intended and it may be purely a mistake in drafting) is sufficient to render a notice to quit invalid; see *Hankey v. Clavering* (2) ([1942] 2 All E.R. 311). D

If I had not authority of the Court of Appeal which is of some relevance with regard to the matter, it would seem to me clear that the landlord must state in his notice exactly the grounds under which the landlord is permitted to resist the grant of the new tenancy, and he does not fulfil those requirements if he merely refers to one of the two necessary conditions on which he may resist the grant of a new tenancy, in one of which he has a choice under the terms of para. (f), that is to say demolition or the carrying out of substantial work of construction on the holding or part of it, and the other necessary condition being that he cannot do the work without obtaining possession of the holding. But in *Biles v. Caesar* (3) ([1957] 1 All E.R. 151) the Court of Appeal have considered the provisions of this section in the Act and this paragraph and have made certain observations to which it is necessary to refer. In *Biles v. Caesar* (3) the notice referred to the grounds in these terms: "to demolish and reconstruct the whole of the premises comprised in your holding". No question arose about the requirement of possession being necessary, which is the point before me now, because apparently the notice did go on to refer to the need for possession, and consequently that point had not to be considered by the court. The actual point in *Biles v. Caesar* (3) was that the landlord did not in fact propose to demolish and reconstruct the whole of the premises comprised in the holding but only a substantial part thereof, and it was argued that therefore his notice was not sufficiently precise to comply with the terms of the Act. Although the point that I have to decide was not before the court, there are these observations by the learned judges of the Court of Appeal to which I must pay attention. DENNING, L.J., says (*ibid.*, at p. 153): E

G

H

I

A " Counsel for the tenant says that they ought not to be allowed to avail themselves of the subsection because in their notice of opposition and in their answer they relied on 'the whole' of the premises; and they ought not to be allowed, he says, to rely on 'a substantial part'. In my judgment, the tenant's argument on this point is not correct. It is sufficient for the landlords in their notice of opposition to specify the particular paragraph—
B (a), (b), (c), (d), (e), (f) or (g) of s. 30 (1) on which they rely. It is not necessary for them to specify any of the subsidiary portions of a paragraph, so long as they make clear which is the paragraph on which they rely. It seems to me quite plain that the landlords in their notice and in their answer were relying on para. (f)."

HODSON, L.J., said (*ibid.*, at p. 154):

C " All that they had to do was to indicate the ground—that is, para. (f)—and that they have done. The fact that they did not go the whole way and prove the widest extent to which para. (f) went does not mean that they failed because they only succeeded in proving the 'substantial part', which means that they travelled a lesser distance than the distance which they would cover by their notice."

MORRIS, L.J., said (*ibid.*, at p. 155):

E " By the notice of termination and by the answer, which was amended to accord with the notice of termination, the landlords were clearly referring to para. (f) of s. 30 (1). I think that para. (f) of s. 30 (1) constitutes one ground of opposition that may be satisfied in a variety of ways. Counsel for the tenant submits that a landlord may discard something, but may not add to what he has asserted. It does not seem to me that the landlord is adding anything in this case. It seems to me that the greater includes the less, and that the landlord here has proved enough to bring him within para. (f) of s. 30 (1)."

F It is also plain from the decision in *Sidney Bolson Investment Trust, Ltd. v. E. Karmios & Co. (London), Ltd.* (4) ([1956] 1 All E.R. 536) that matters of inference may be admissible. There the tenant was making a request for a new lease, and the Act requires him to state the terms. The request has to be given by notice in a prescribed form, and set out the tenant's proposal as to the property to be comprised in the tenancy and for the rent to be payable under the new tenancy and as to other terms in the new tenancy. The tenant in fact required a new tenancy at a new stated rent, and as to the other terms of the new tenancy on the terms of the current tenancy set out in the original lease. It appeared when the case came to hearing that what he was hoping to get was a term of fourteen years, but in fact his previous tenancy had only been one for seven years, and there was a good deal of discussion about the admissibility of evidence to show that what he really wanted was a fourteen-year term. That is nothing to do with the point which I have to decide now; but what is material is that the Court of Appeal held that the reference to "terms" was sufficient by inference to import a period of seven years into the request for a new tenancy. As HARMAN, J., said (*ibid.*, at p. 542):

I "... I agree with my Lords that 'terms' here includes the length of the term. I cannot help thinking, however, that it would be well if hereafter those who make these requests should express the term of years which they want and should not leave it to be gathered by implication, as it was left in this case. I agree, nevertheless, that it is a necessary implication from the notice which was sent that a term of seven years was being asked for. Actually the tenant did not want seven years; he wanted fourteen, and, by giving evidence of that sought to say that what appeared to have been a notice giving his proposals did not really give them and was therefore no effective request. I must protest against that method of construing a document."

It is clear from that case that a notice under the other provisions at any rate may be sufficient if a material part of it is merely imported by implication. Section 30 certainly requires the grounds to be stated, and the question is how far it can be said that they are stated when they are not expressed but are to be implied. A

It seems quite clear that the Court of Appeal in *Biles v. Caesar* (3) would have regarded it quite sufficient for the landlord to have given the notice saying: "I rely upon the grounds stated in para. (f) of s. 30 (1)". If he had done that, the conclusion of the Court of Appeal would have been quite plain; but the Court of Appeal went further than that, as it seems to me, and the question is: How far is one entitled to import things into a notice which is given? B

The point does not seem to me to be one which is free from difficulty; but on the whole I think that I am bound to treat the decision of the Court of Appeal in *Biles v. Caesar* (3) as showing that I must not import into the provisions of the Act concerning the landlord's notice to determine the complete strictness of a notice to quit under the ordinary law of landlord and tenant. As it is a necessary condition of reliance on para. (f) of s. 30 (1) of the Act of 1954 that possession should be essential for the carrying out of work, I am entitled to infer that when a landlord states the grounds, which are demolition and so on, he must by inference also be importing a reference to the condition that the work cannot be carried out reasonably without obtaining possession of the holding. It seems to me that it is not, as HARMAN, J., said in the *Bolsom* case (4), a very admirable way of doing business matters, and the old rule that when you have to comply with the terms of a statute you should be careful to use the same words which the statute uses might well hold good in this case as in many others; but on the whole I have come to the conclusion that in the present case, as was said by HOPSON, L.J., the notice given by the landlord does indicate fairly to the tenant the grounds on which his application will be resisted, and it is sufficient to comply with the provisions of the Act. C D E F

Declaration on pro forma summons to be taken out by tenants that the landlord's notice is sufficient to enable him to oppose the application on the grounds set out in para. (f) of s. 30 (1) of the Landlord and Tenant Act, 1954.

Solicitors: *Harold Benjamin & Collins* (for the applicants, the tenants); *Harris, Chetham & Co.* (for the respondent, the landlord).

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law.*]

Re APEX FILM DISTRIBUTORS, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), April 29, May 7, 1959.]

Company—Winding-up—Contributory—B contributories—Calls on shares—Call made—Debts subsequently bought up for B contributories—Reduction of liability—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 212, s. 214.

The issued capital of a company consisted of forty-two thousand redeemable preference shares of £1 each, on which 10s. per share had been paid up, forty-two thousand preferred ordinary shares of 5s. each, on which 2s. 6d. per share had been paid up, and one hundred and fifty deferred shares of £1 each, fully paid up. On July 23, 1953, W. acquired all the redeemable preference shares and the preferred ordinary shares not already held by him. On Mar. 23, 1954, the company was ordered to be wound up compulsorily. On Dec. 14, 1955, the committee of inspection resolved on a call of 10s. per share on the redeemable preference shares and 2s. 6d. per share on the preferred ordinary shares. It proved impossible to obtain any contribution from W. and on May 3, 1957, the liquidator accordingly made calls on the B contributories, the transferors of the shares to W. On June 21, 1957, the liquidator issued a summons for a four day order against the B contributories in respect of the calls made on them. On Feb. 25, 1959, the registrar made an order for a total payment by the B contributories of £22,504 in respect of the debts incurred prior to July 23, 1953, but the order was not drawn up. Subsequently F.F. Ltd. purchased the debts, amounting to £13,853 18s. 11d., of two creditors, and by a deed dated Mar. 2, 1959, F.F. Ltd. released the company, the liquidator and the contributories from all liability for those debts. On Mar. 18, 1959, B contributories applied to the registrar asking him to recall his order of Feb. 25, 1959, and to reduce the amounts to be paid by the B contributories by taking into account the deed of release.

Held: the call having been made on the B contributories, it was not open to them to reduce their liability by buying or obtaining the release of debts due from the company before they transferred their shares, because, when once the liquidator had quantified the liability of B contributories under s. 212 of the Companies Act, 1948, and then had made a call on them under s. 214, a debt in the nature of a specialty became payable by the B contributories and that debt could be extinguished only by payment.

Re Greening & Co., Marsh's Case ((1871), L.R. 13 Eq. 388) not followed.

Brett's Case ((1871), 6 Ch. App. 800) and *Brett's Case* ((1873), 8 Ch. App. 800) explained.

Per CURIAM: on an analysis of both the *Brett Cases* they are authority only for the proposition that a release of a debt in respect of which a B contributory is liable to be placed on the B list will be effective if it is brought about before a call is made on that B contributory (see p. 484, letter G, post).

[As to the liability of past members of a company to contribute in a liquidation, see 6 HALSBURY'S LAWS (3rd Edn.) 632, 633, para. 1244; and for cases on the subject, see 10 DIGEST (Repl.) 930, 931, 6367-6372.]

Cases referred to:

(1) *Re Accidental & Marine Insurance Corpn., Ex p. Briton Medical & General Life Asscn.*, (1870), 5 Ch. App. 428; *affd.* H.L. sub nom. *Webb v. Whiffin*, (1872), L.R. 5 H.L. 711; 42 L.J.Ch. 161; 10 Digest (Repl.) 930, 6367.

(2) *Re Blakely Ordnance Co., Brett's Case*, (1871), 6 Ch. App. 800.

(3) *Re Blakely Ordnance Co., Brett's Case, Re Oriental Commercial Bank, Morris' Case*, (1873), 8 Ch. App. 800; 43 L.J.Ch. 47; 29 L.T. 256; 37 J.P. 612; 10 Digest (Repl.) 931, 6371.

- (4) *Re Greening & Co., Marsh's Case*, (1871), L.R. 13 Eq. 388; 41 L.J.Ch. 111; 25 L.T. 651; 10 Digest (Repl.) 956, 6578. A
- (5) *Re City of London Insurance Co., Ltd.*, [1931] All E.R. Rep. 519; [1932] 1 Ch. 226; 101 L.J.Ch. 124; 146 L.T. 296; 10 Digest (Repl.) 964, 6643.

Motion.

This was a motion by eight of the respondents to a liquidator's summons for a four day order against them in respect of calls made on them as B contributories in the compulsory winding-up of Apex Film Distributors, Ltd. Those respondents moved the court for a declaration that their liability as such contributories had been reduced by the release of two debts. B

J. G. Strangman, Q.C., and *G. B. H. Dillon* for the respondents (eight of the B contributories). C

K. W. Mackinnon, Q.C., and *M. M. Wheeler* for the liquidator.

Martin Roth for the other respondents.

Cur. adv. vult.

May 7. **WYNN-PARRY, J.**, read the following judgment: By an order dated Mar. 23, 1954, the company was ordered to be wound up compulsorily on a petition presented on Feb. 26, 1954. At all material times the issued capital of the company consisted of forty-two thousand redeemable preference shares of £1 each, on which 10s. per share had been paid, forty-two thousand preferred ordinary shares of 5s. each, on which 2s. 6d. per share had been paid, and one hundred and fifty deferred shares of £1 each, all of which were fully paid up. On July 23, 1953, the holders of 41,600 of the redeemable preference shares and 41,600 of the preferred ordinary shares transferred their respective holdings of these shares to a Mr. Williams who held the balance of each class of share. At the commencement of the winding-up, therefore, Mr. Williams was the only A contributory, the B contributories being the transferors of the shares transferred on July 23, 1953, as above mentioned. D

On Dec. 14, 1955, the committee of inspection resolved that a call of 10s. per share on the redeemable preference shares and a call of 2s. 6d. per share on the preferred ordinary shares should be made by the liquidator on all the contributories of the company. On Dec. 20, 1955, the liquidator gave notice to Mr. Williams to pay in respect of the call £26,250 on or before Jan. 3, 1956. At the same time he sent a letter to each of the B contributories, enclosing a copy of the resolution of the committee of inspection and intimating that if the A contributory should fail to pay the call or should only pay part of it, a claim would be made accordingly on each of the B contributories. In the event it proved impossible to obtain any contribution from the A contributory, and on May 3, 1957, the liquidator made calls on the B contributories according to their respective holdings, requiring payment to be made on or before May 18, 1957. On June 21, 1957, the liquidator issued a summons for a four day order against the B contributories in respect of the calls made on them. In the course of preparing the evidence the liquidator reduced from £24,289 1s. 9d. to £22,472 17s. 8d. the amount of the debts, which I will call "the old debts" incurred by the company prior to July 23, 1953. E

On Feb. 25, 1959, the registrar made an order for a payment by the B contributories of £22,504, allowing in addition a margin of just over £1,000 in respect of the costs of the liquidation. This order, however, was not drawn up. The next event was that the debts of two creditors who had proved in the liquidation, which debts amounted to £13,853 18s. 11d., were purchased and transferred into the name of Film Finances, Ltd., which company by a deed dated Mar. 2, 1959, released the company, the liquidator and the contributories from all liability for those debts. If that release is effective for the purpose for which it was executed, the result would be that the liability of the B contributories would be pro tanto reduced. On Mar. 18, 1959, an application by eight of the F

- A B contributories was made to the registrar, asking him to recall his order of Feb. 25, 1959, and to reduce the amounts to be paid by the B contributories by taking into account the deed of release. The registrar refused this application and made an order on the B contributories for the payment of calls calculated to produce a total of £23,504. This order was dated Mar. 18, 1959, and was duly completed. The matter now comes before me on a motion for a declaration that
- B the liability of the B contributories to contribute has been reduced by £13,853 18s. 11d. by the release of the two debts which I have mentioned

The case raises an interesting point, particularly when the state of the authorities is appreciated. It is conceded on behalf of the liquidator that such a transaction as took place in this case can be effective to reduce the liability of B contributories, provided that it is done in time. The contention on behalf of the

C liquidator is that if such transaction is to be effective it must be done before any call is made on the B contributories. On the other hand, the case for the respondents is that the transaction can be performed effectively at any time during the liquidation, or at any rate prior to distribution.

- The first authority to which I was referred was *Re Accidental & Marine Insurance Corpn., Ex p. Briton Medical & General Life Assn.* (1) (1870) (5
- D Ch. App. 428) in which GIFFARD, L.J., affirming the decision of STUART, V.-C., held that in the winding-up of a limited company the contributions of B contributories ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors. In the course of his judgment GIFFARD, L.J., said (*ibid.*, at p. 432):

- E “On the other hand, supposing there was any such right as is now insisted upon by the appellants, the difficulties that would arise would be endless, because each creditor, according to the date at which the members of the company might happen to retire, would have separate and distinct rights. That alone would be reason enough for me to say that, unless you find something in the Act of Parliament which clearly, in the event of a winding-up, gives that right to a creditor, no such right exists. Looking at s. 98 and
- F s. 133 of the [Companies Act, 1862] and seeing that s. 38 has reference only to the liability of members, that partnerships of this description, which may be more properly termed quasi corporations, are entirely artificial in their construction, and that, in point of fact, the past members’ liability is entirely an artificial liability, and introduced much more for
- G the purpose of preventing persons quite at the last moment leaving a company, and thereby getting rid of their liability, than for any other purpose, I think I should be putting a construction on the Act which was not intended, which the words would not warrant, which would lead to great inconvenience, and which would be contrary to the whole spirit of the Act, if I were to decide in favour of the appellants.”

- H In *Re Blakely Ordnance Co., Brett’s Case* (2) ((1871), 6 Ch. App. 800) (to which I will refer as the first *Brett Case* (2)) it was held that where a B contributory bought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder and which remained due at the commencement of the winding-up, then, notwithstanding that the money
- I raisable from the A contributories would be insufficient to pay the debts of the company, no call could be made on the B contributory. LORD HATHERLEY, L.C., made it clear in his judgment that he did not approve of the judgment of GIFFARD, L.J., in *Re Accidental & Marine Insurance Corpn.* (1). At the start of his judgment LORD HATHERLEY, L.C., said (*ibid.*, at p. 802):

“It was most desirable that this case should be fully argued, regard being had to the decision of GIFFARD, L.J., in the matter of the *Accidental & Marine Insurance Corpn.* (1). The point in that case was not exactly the same as that which we have now before us, but the observations made by the

lord justice in his judgment, and the reasoning on which he relied, would be such as certainly to render a decision in this case, affirming the decision of the Master of the Rolls, inconsistent with that of GIFFARD, L.J."

With all respect to LORD HATHERLEY, I find difficulty in seeing how the decision in *Re Accidental & Marine Insurance Corpn.* (1) can be said to be relevant to the decision of the question before the court in the first *Brett Case* (2). LORD HATHERLEY, L.C., posed the question thus (*ibid.*, at p. 803):

"The question is, whether the call can be enforced against Mr. Brett, a shareholder, there being, at the time the call was made no debt which had accrued antecedently to the time of his ceasing to be such shareholder."

Later in his judgment he said (*ibid.*, at p. 805):

"One state of things must arise, of course, upon any construction of this subsection of s. 38 of the [Companies Act, 1862]. It cannot be contended now, that if at the date of the winding-up there was no old debt existing, the past member would be liable. What difference can it make to the company that the debt has afterwards ceased to exist? We have in vain asked for an answer calculated to satisfy the demands of the case. Is it reasonable that the partners in the company, or the creditors of the company, should have no rights whatsoever against past members in the event of all the old debts being cleared off at the time of the winding-up, but that if there should happen to be an old debt of £1,000 at the date of the winding-up, they should have such a right that it would be impossible before the call was made for the shareholders who are so liable for this £1,000 among themselves to club together the sums it might be necessary to raise, and pay off that liability? Who can be reasonably said to be wronged by those persons paying off the debt which they have contracted, liberating the company from the debt altogether, and discharging themselves from all further trouble or concern with the company? They would, in fact, be doing more than they were obliged to do, because they had a right to call on all the existing members of the company to help in paying off all the debts."

As I read that judgment, it proceeds on the basis that the B contributory has a right to buy and release a debt before a call is made on him. It is true that in that case the debt was released before the call was made and it was urged on behalf of the respondents that, that being so, the court did not need to consider whether a release effected after a call had been made would be effective. Nevertheless the ratio decidendi of that case is that the release is effective, if it is effected prior to a call being made.

The next relevant authority in point of time is *Webb v. Whiffin* (1) (1872), L.R. 5 H.L. 711). In this case the House of Lords approved the decision of GIFFARD, L.J., in *Re Accidental & Marine Insurance Corpn.* (1), but a number of their Lordships cast doubt on the correctness of the decision in the first *Brett Case* (2). It is to that extent only that it is relevant to refer to *Webb v. Whiffin* (1) for the purposes of this judgment. Views were expressed that the liability of B contributories crystallised at the commencement of the winding-up and no subsequent dealing with debts in respect of which they were placed on the B list could affect the quantum of their liability.

Following the delivery of the opinions in *Webb v. Whiffin* (1), the first *Brett Case* (2) was re-heard on a petition of re-hearing (to which re-hearing I will refer as the second *Brett Case* (3) (1873), 8 Ch. App. 800)). LORD SELBORNE, L.C., posed the relevant question thus (*ibid.*, at p. 807):

"... whether calls can be made upon past members in respect of any debt or liability of the company contracted before they ceased to be members, which has been released or extinguished between the date of the winding-up order and the time of making such calls, and which, therefore,

A cannot participate in any dividend which may be made out of the proceeds of such calls."

He continued (*ibid.*):

B "Neither of these questions came before the House of Lords for decision in *Webb v. Whiffin* (1), but observations bearing more or less upon them were made by four of the noble and learned Lords who then advised the House, and some variety of opinion may be traced in those observations. Certain passages in the speeches of LORD CHELMSFORD and LORD CAIRNS have been relied upon before us, as favouring the view, that the measure of the liability of a past member under s. 38 [of the Companies Act, 1862], so far as it depends upon the existence of debts of the company contracted before he ceased to be a member, ought to be determined solely by the amount of such debts as they stood at the commencement of the winding-up, without reference to any subsequent event by which that amount may have been reduced or even wholly extinguished."

Later there occurs this very relevant passage (*ibid.*, at p. 809):

D "To swell the amount of that indebtedness, by the fictitious process of treating as then due and unpaid any part of the original amount of those debts and liabilities which might have been previously satisfied by dividends out of the property in hand, or by the contributions of present members, or any part thereof which might have been previously released or extinguished—to do this (as it necessarily would be done in such a case as *Brett's*) for the sole purpose of increasing the dividends of those other creditors whose debts were contracted after these past members had left the company, would, as it seems to me, be a violation both of the letter and of the spirit of sub-s. (2). It would be introducing, for the benefit of the subsequent creditors and to the prejudice of the past members, that very principle of marshalling which (when proposed to be introduced for the benefit of the prior creditors) was excluded by the decision of the House of Lords in *Webb v. Whiffin* (1). In this section, and in s. 74, s. 75, 'liability to contribute to the assets of the company in the event of the same being wound up' appears to me to be merely another expression for liability to calls under s. 102; and those calls are to be made, to the extent of the liability of the several contributories, for payment of all or any sums which the court deems necessary to satisfy the debts and liabilities of the company—that is to say, in the case of past members—debts and liabilities contracted before they ceased to be members, and still constituting part of the indebtedness of the company when the calls are made. This, with such costs and adjustment moneys (if any) as may be properly incident thereto or consequent thereon, is, in my opinion, the extreme measure and limit of the liability of past members to contribute to the assets of the company under s. 38. To enlarge that limit, because the fund, when contributed, will be divisible pro rata among all the creditors of the company, at whatever time their debts may have been contracted, would, as it seems to me, be at least as much against the express words and the real meaning of s. 38 (2), as the appropriation of the fund contributed by past members to the payment of the particular class of creditors in respect of whose debts they are called upon to contribute could possibly be against the letter or spirit of s. 98 and s. 133. The time when the call is made must necessarily be looked to, and the payments of present members after the commencement of the winding-up must necessarily be taken into account, for the purpose of giving effect (in the case of a limited company) to another material qualification of the liability of past members, contained in s. 38, viz.:—that 'no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or

past member'. Why, then, are not the payments made after the commencement of the winding-up equally to be regarded, when the question has reference to the amount of the debts and liabilities of the company, in respect of which a past member is required to contribute?"

Pausing there, it is, I think, clear that LORD SELBORNE is considering only the case of a release of a debt prior to a call being made on the B contributory concerned. He is not envisaging a release at any later stage of the liquidation. Then follows a passage on which counsel for the respondents strongly relied (*ibid.*, at p. 811):

"Let it be supposed, that, after a winding-up order, all the debts due when the latest transfer by a past member was executed were absolutely released by the creditors, or voluntarily paid off by a stranger in exoneration of the whole company, before the payment of a dividend by the company upon any part of them. How could a call on past members 'in respect of' these debts—a call the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under such circumstances by the statute? What would be true in that case of all the prior debts seems to be equally true of any prior debt, or any part of a prior debt, in any lawful manner released, paid off, or extinguished; and, as the property in hand at the date of the winding-up, and the contributions of all the present members, were primarily and justly liable to pay all the debts of the company rateably and equally, as far as they would extend, before any liability of past members could arise, I am unable to perceive any sound distinction between the effect of a part payment so made, and a reduction to the same extent of the same debts by any other means."

I am unable to see how that passage helps the respondents' case. True, LORD SELBORNE uses the phrase, "before the payment of a dividend by the company", but, having stated the hypothetical example, he then poses the question,

"How could a call on past members 'in respect of' these debts—a call the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under such circumstances by the statute?"

It appears to me that the inescapable effect of that passage is to demonstrate that LORD SELBORNE is proceeding on the basis that the release precedes the call. I conclude, therefore, on an analysis of both the *Brett Cases* (2) (3) that they are authority only for the proposition that a release of a debt in respect of which a B contributory is liable to be placed on the B list will be effective if it is brought about before a call is made on that B contributory.

In between the hearings of the first *Brett Case* (2) and the second *Brett Case* (3), *Re Greening & Co.*, *Marsh's Case* (4) ((1871), L.R. 13 Eq. 388) came before BACON, V.-C. The headnote is as follows:

"Past members of a company settled upon the B list of contributories having bought up the debts to which they were liable, held liable to pay the costs of settling the B list, unless the liquidator had money in his hands sufficient to pay them."

The statement of facts shows that the debts in question were bought up after the call had been made on the B contributories concerned. In the report of the argument of Mr. Amphlett, Q.C., this appears (*ibid.*, at p. 389):

"As soon as the debts existing when the B contributories retired have been satisfied, and it is immaterial whether payment has been made before or after the call—*Brett's Case* (2), overruling the judgment of GIFFARD, L.J., in *Re Accidental & Marine Insurance Corp.* (1)—their liability ceases."

Although, therefore, the question before the court was really one relating to costs, it cannot be said that the point was not mentioned that the release could

A be effective even if made after call. At the end of his judgment BACON, V.-C., said (*ibid.*, at p. 392):

B “Nor can I give the B contributory any costs, and for this reason, that although he has since satisfied the court that he is under no obligation to pay any money in respect of debts for which he was liable, he has not until lately—the present moment almost—acquitted himself of that obligation. He had a right to reduce the amount of call; he had a right to pay off the debts, as he has done, as effectually as in *Brett’s Case* (2). But I can give him no costs of that proceeding, because his acquitting himself of the obligation came too late in the day. I give no costs against him.”

C It is clear from that passage that BACON, V.-C., for the purpose of coming to a decision as to the incidence of costs, proceeded on the basis that a buying up of an old debt and a release in respect thereof was effective even if made after call. If I can properly treat *Marsh’s Case* (4) as an authority on the point before me, then I apprehend that I ought to treat myself as bound by it, in which event the case would be concluded in favour of the respondents. On consideration, however, I do not think that I should follow that course. There does not appear to have been any substantial debate on the question whether a release after call is effective. It appears really to have been assumed that that was the case. Here I have the question directly raised and I think that I ought to examine it and express my own view on it.

D I think that the answer turns on two sections of the Companies Act, 1948, viz., s. 212 and s. 214. Section 212 provides how the liability of a contributory is to be measured. Thus the first duty of the liquidator in the case of B contributories is to quantify their liability by applying the relevant provisions of s. 212. No doubt an element of estimation will enter into his calculation, but that does not affect the matter, because any necessary adjustment can be made later: see *Re City of London Insurance Co., Ltd.* (5) ([1931] All E.R. Rep. 519). When the liquidator has quantified the liability of the B contributories he makes a call on them, assuming of course that default is made in whole or in part by the A contributories. By s. 214 the liability of the contributory, which came into existence when he first became a member, creates a debt which in England is in the nature of a specialty. That debt becomes payable when a call is made. That result is brought about by the express terms of s. 214. It follows, to my mind, that once that debt becomes payable the only way in which it can be extinguished is by payment, and that once the debt becomes payable it is not open to a B contributory to reduce his liability by buying up any of the debts owed by the company before he transferred his shares, because the result of so doing would be to reduce the amount of the debt which the statute clearly says that he owes.

H On this reasoning there is no room for extending the rule laid down in the two *Brett Cases* (2) (3). If it were to be extended, I can foresee grave administrative difficulties arising in liquidations where B contributories are involved. It is true that my conclusion is contrary to the view accepted by BACON, V.-C., in *Marsh’s Case* (4), but for the reasons I have given I have felt it necessary to come to my own conclusion on the matter and I feel free to give effect to that conclusion. In the result the motion will be dismissed.

Order accordingly.

Solicitors: *Allen & Overy* (for the respondents (eight of the B contributories)); *Liquidators & Paines* (for the liquidator); *Stanley Jarrett & Co.* (for the other respondents).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD.
AND OTHERS *v.* ULSTER FARMERS' MART CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avenholm and Lord Somervell of Harrow). April 20, 21, 22, 23, 27, May 14, 1959.]

Market—Disturbance—Levying of rival market—Market rights extending to live pigs for slaughter of bacon weight and pig carcasses—Establishment of abattoir and live pig collecting centre outside market—Withdrawal of bacon pig market from market.

In 1947 the respondents became possessed of the exclusive right in fee simple by letters patent to hold markets and fairs in or at E., and to exercise all the rights set forth in the letters patent. At all material times they held a market twice a week. The market rights extended to numerous commodities which included live pigs for slaughter of bacon weight and pig carcasses. Prior to 1948, under the Pig Sales (Northern Ireland) Order, 1940, the Ministry of Agriculture for Northern Ireland had a monopoly of purchasing live pigs for slaughter and of buying pig carcasses. The appellants, the Scottish Co-operative Wholesale Society, Ltd. (hereinafter called "the society"), were bacon curers licensed by the Ministry to buy pig carcasses for themselves, which they did at that time at the market at E. The Livestock (Restriction on Slaughtering) (Northern Ireland) Order, 1947, forbade any person to slaughter a pig for manufacture into bacon except for sale to a licensed curer. Before July, 1948, the society (which then had no abattoir) brought live pigs to the abattoir of the owner of the market at E. for slaughter, but the abattoir was closed down in that year and was not purchased by the respondents when they acquired the market rights. In July, 1948, after negotiations with the Ministry of Agriculture for Northern Ireland, an abattoir and enlarged storage space with refrigeration and modern machinery were constructed at the society's premises, and the Ministry transferred its live pig collecting centre there. Cheap transport facilities to the centre were made available to pig producers. The result of this was that no sale of live pigs for slaughter was possible in the market for there were no competent buyers, and the sale of dead pigs in the market stopped for the same reason. The society and the Ministry ceased to pay the respondents any sum for or in lieu of tolls, and the effect of the new project, as it was operated, was to make most producers in the area sell their bacon pigs alive instead of dead, and to withdraw the bacon pig trade from the market. On appeal and cross-appeal in an action brought by the respondents against the society and the Ministry for disturbance of the respondents' market,

Held: there was no disturbance of the respondents' market either by levying a rival market or by other acts whereby the market owner was deprived wholly or in part of the benefits of his franchise, because

(i) the essential feature of levying a rival market was the provision of facilities for a concourse of buyers and sellers and the society and the Ministry had made no provision for such a concourse (see p. 491, letter D, post), or (per LORD SOMERVELL OF HARROW) a market was a place to which sellers who had not found buyers took their goods and to which buyers resorted in the hope of finding goods, and in the present case the sellers had found their buyers outside the market and had no need to take goods to market (see p. 495, letters H and I, post).

(ii) (by VISCOUNT SIMONDS, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW) a sale outside the market was not an actionable disturbance, although it deprived the owner of the market of tolls or some other advantage, unless the persons selling took or sought to take the benefit

A of the market (see p. 492, letter I, to p. 493, letter C, post); and in the present case the society and the Ministry had not sought to get the benefit of the respondents' market.

Appeal allowed; cross-appeal dismissed.

[As to an action for disturbance of market rights, see 25 HALSBURY'S LAWS (3rd Edn.) 404, para. 791; and for cases on the subject, see 33 DIGEST 548-553, 299-352.]

B Cases referred to:

- (1) *Goldsmid v. Great Eastern Ry. Co.*, (1883), 25 Ch.D. 511; 53 L.J.Ch. 371; 49 L.T. 717; *affd.* H.L. sub nom. *Great Eastern Ry. Co. v. Goldsmid*, (1884), 9 App. Cas. 927; 54 L.J.Ch. 162; 52 L.T. 270; 49 J.P. 260; 33 Digest 524, 18.
- C (2) *London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.*, [1935] All E.R. Rep. 540; [1936] Ch. 78; 105 L.J.Ch. 1; 153 L.T. 344; Digest Supp.
- (3) *Dorchester Corpn. v. Ensor*, (1869), L.R. 4 Exch. 335; 39 L.J.Ex. 11; 21 L.T. 145; 34 J.P. 167; 33 Digest 532, 94.
- (4) *Elves v. Payne*, (1879), 12 Ch.D. 468, 475; 48 L.J.Ch. 831; 41 L.T. 118; 33 Digest 558, 406.
- D (5) *Wilcor v. Steel*, [1904] 1 Ch. 212; 73 L.J.Ch. 217; 89 L.T. 640; 68 J.P. 146; 33 Digest 550, 322.
- (6) *Downshire (Marquis) v. O'Brien*, (1887), 19 L.R.Ir. 380; 33 Digest 550, 330.
- (7) *Macclesfield Corpn. v. Chapman*, (1843), 12 M. & W. 18; 13 L.J.Ch. 32; 2 L.T.O.S. 103; 7 J.P. 707; 152 E.R. 1093; 33 Digest 551, 338.
- E (8) *Bridgland v. Shapter*, (1839), 5 M. & W. 375; 8 L.J.Ex. 246; 151 E.R. 159; 33 Digest 530, 73.
- (9) *Tewkesbury Corpn. v. Bricknell*, (1809), 2 Taunt. 120; 127 E.R. 1022; 33 Digest 547, 297.
- (10) *Turner v. Sterling*, (1672), Freem. K.B. 15; 3 Keb. 26; 2 Vent. 25; 89 E.R. 13; sub nom. *Sterling v. Turner*, 1 Vent. 206; sub nom. *Starling v. Turner*, 2 Lev. 50; 34 Digest 577, 12.
- F (11) *Loughrey v. Doherty*, [1928] I.R. 103; Digest Supp.

Appeal.

Appeal by the Scottish Co-operative Wholesale Society, Ltd., the Right Honourable Reverend Robert Moore (Minister of Agriculture for Northern Ireland) and the Ministry of Agriculture for Northern Ireland from an order of the Court of Appeal in Northern Ireland (LORD MACDERMOTT, C.J., BLACK, L.J., and SHEIL, J.), dated May 15, 1958, reversing an order of CURRAN, L.J., dated Feb. 22, 1957, in an action by the respondents, Ulster Farmers' Mart Co., Ltd., against the appellants and the Ulster Transport Authority, Thomas M. Noble, William Robert Thompson and Desmond Donnelly. The respondents had claimed a declaration in respect of their market rights in Enniskillen in the county of Fermanagh, a declaration that the appellants had disturbed them in their rights by the levying of a rival market and otherwise, damages for such disturbance and injunctions and damages for conspiracy. The Ulster Transport Authority, Thomas M. Noble and William Robert Thompson did not appeal from the order of the Court of Appeal. Desmond Donnelly died before the commencement of the action and his name was deleted by order of the Court of Appeal from the action. The respondents cross-appealed from the order of the Court of Appeal. The facts are set out in the opinion of VISCOUNT SIMONDS.

C. Nicholson, Q.C., E. W. Jones, Q.C., R. L. E. Lowry, Q.C., and J. C. MacDermott (all of the Bar of Northern Ireland) for the appellants.

W. F. Patton, Q.C., James A. Brown, Q.C., and Basil Kelly, Q.C. (all of the Bar of Northern Ireland), for the respondents.

Their Lordships took time for consideration.

May 14. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in June, 1947, the respondents, A
Ulster Farmers' Mart Co., Ltd., whom I will call "the respondents", became
possessed of the exclusive right in fee simple by letters patent dated respectively
May 28 in the 10th year of the reign of King James I and Feb. 20 in the 53rd
year of the reign of King George III to hold markets and fairs in or at Enniskillen
in the county of Fermanagh and to exercise all the rights set forth in the said
letters patent. And they have at all material times held twelve fairs in every B
year and a market each Tuesday and Thursday in every week in exercise of the
rights conferred by the said letters patent and of rights exercised by them and
their predecessors in title from time immemorial or conferred by letters patent
which have been lost or destroyed by accident. This statement of relevant fact
I take from an agreed statement of facts in the action, out of which this appeal
arises, and I do not think it necessary to examine further the origin or nature of C
the franchise except in one respect with which I will deal hereafter. It is,
however, proper to mention that in the original grant there appeared a provision
which the lord chief justice (LORD MACDERMOTT) called "the prohibition".
It is a peculiar provision such as I do not remember to have seen before either
in the grant of a franchise of market or elsewhere and it was at one time thought
to have some importance, but at the hearing of this appeal it faded out and I will D
say no more about it.

Such being their market rights, on Dec. 19, 1949, the respondents, being
aggrieved by the transactions to which I will presently refer, issued a writ against
the Scottish Co-operative Wholesale Society, Ltd., the Right Honourable
Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland
(whom I will call respectively "the society", "the Minister" and "the E
Ministry") and certain other persons and bodies, who are not parties to this
appeal, claiming a declaration in respect of their market rights, a declaration
that the appellants had disturbed them in their said rights by the levying of a
rival market and otherwise, damages for such disturbance and the appropriate
injunctions and, in addition, damages for conspiracy.

Before I come to the circumstance which immediately gave rise to the action,
namely, the opening of a new modern abattoir and the establishment of a live pig
collecting centre at the society's factory in Enniskillen on July 19, 1948, I must
state a few facts which are not in dispute. The respondents' market rights
extended to numerous commodities, but this case is concerned with only two
of them, live pigs for slaughter of bacon weight and pig carcasses. The first G
of these was not sold in the market or, it was said, anywhere in Northern Ireland
before 1934, and it was suggested that it was not a commodity to which market
rights extended. This view was not accepted by CURRAN, L.J., who tried the
case, or by the Court of Appeal, and I see no reason to differ from them. Up to
1934, therefore, the market (so far as relevant) was a dead pig or carcase market
and was held every week on Tuesdays only. Live pigs were sold as stores at
the monthly fairs. In the year 1933 an organisation called "the Pigs Marketing H
Board" was established under the provisions of the Agricultural Marketing
Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers.
It had a monopoly of the purchase of live pigs of bacon weight in Northern
Ireland and it distributed them to bacon curers throughout that area. On
Jan. 15, 1940, the Ministry, as agent for the Ministry of Food under and by
virtue of the provisions of the Pig (Sales) (Northern Ireland) Order (being I
S.R. & O. 1940 No. 39, made under the authority of reg. 55 of the Defence
(General) Regulations, 1939), became the only person authorised to purchase
live pigs for slaughter in Northern Ireland, thus succeeding to the Pigs Marketing
Board's monopoly. By virtue of the same order, it also became the sole lawful
buyer of pig carcasses, but was authorised to license bacon curers to buy carcasses
for themselves. It did so license the society and other bacon curers who attended
the carcase market on Tuesdays and bought carcasses there. This was until

A July, 1948. It had in the meantime been enacted by S.R. & O. 1947 No. 1080* (made under the authority of the same Defence Regulation) that no person might slaughter a pig for manufacture to bacon except for sale to a licensed curer.

I must now say a few words about the position of the society. It was at all material times a licensed bacon curer, but it had before July, 1948, no abattoir of its own. By arrangement with the Ministry, it brought live pigs to the then market owner's abattoir for slaughter. This abattoir was closed down in the year 1947 and was not purchased by the respondents when they acquired the market rights in that year. Between 1934 and 1948, certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, the Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcasses which were sold outside the market. It has not been suggested that the rights of the parties were in any way affected by these payments.

I come now to the year 1948, reminding your Lordships that, up to that time, the carcass market was still active, though the society, mainly if not entirely, made its purchases outside and had the carcasses taken direct to its own premises. In 1948 a scheme (a word that I use in no sinister sense) which had for long been under consideration by the Ministry and the society was brought into operation. I can best describe the salient features of this scheme by a citation from the judgment of the lord chief justice, to whom the House is indebted for a clear and exhaustive exposition of the facts. This is what he says:

"The outcome of the negotiations between the society and the Ministry was that the necessary alterations and extensions were made at the society's premises [i.e., the building of an abattoir and enlarged storage space with refrigeration and modern machinery] and the Ministry then transferred its live pig collecting centre there. The new project, as I shall call it, came into operation on July 19, 1948, following an advertisement in the local press inserted with the knowledge and approval of the Ministry. This advertisement announced the opening of the society's new abattoir and that the Ministry's live pig receiving depot would be established there and would provide for the acceptance of live pigs from producers in County Fermanagh and part of County Tyrone. Then came a statement to the effect that live pigs would be conveyed from the farm to the abattoir by the Northern Ireland Road Transport Board at an 'all-in' charge of 8d. per pig, but that producers who wished to deliver their own live pigs to the abattoir would not have to pay this charge. The advertisement next gave the basis on which live pigs would be paid for by the Ministry, and after that it informed producers that what they had to do, if they wanted the transport service offered for pigs ready for slaughter, was to give notice by postcard or telephone, not later than the Friday morning prior to the week of the required uplift, to the society's office or the transport board's office or to one of the three named agents who included the defendants Messrs. Noble and Thompson [who are no longer parties to the proceedings]. The advertisement then ended by announcing that the society 'are still prepared to accept farm killed pigs, delivered at producer's expense to their premises. These will be paid for at current official prices for dead pigs'."

The learned lord chief justice then pointed out that one of the attractions of the new project as thus advertised was undoubtedly the cheap transport facilities it made available. It was, in fact, clear that such transport was heavily subsidised. He summed up the situation in words on which I cannot hope to improve:

"The result of this has been twofold: No sale of live pigs for slaughter has been possible in the market for there have been no competent buyers."

* The Livestock (Restriction on Slaughtering) (Northern Ireland) Order, 1947.

and the sale of dead pigs has stopped for the same reason. Since July 19, 1948, the society and the Ministry have ceased to pay the market owners any sum for or in lieu of tolls and the [respondents'] claim for tolls in respect of pigs passing through the society's premises has been met by the plea that no such tolls are payable. There cannot be any doubt that the effect of the new project, as it has been operated, has been to make most producers in the area sell their bacon pigs alive, instead of dead, and to withdraw the bacon pig trade from the [respondents'] market."

It was, in fact, clear that the respondents' market rights in carcasses had, as CURRAN, L.J., had observed, been rendered valueless as the direct result of the scheme.

In these circumstances, the question arises whether the transaction, in which the Ministry and society were thus involved, though it might otherwise be regarded as a legitimate trading transaction, and, beyond that, beneficial to the community by means of a reduction in the handling of pigs and a consequent improvement in their quality and the making of economies in their collection, was yet actionable as a disturbance of the respondents' market rights. The course which the action has taken precludes me from dealing forthwith with the case as on a single issue. For, though CURRAN, L.J., dismissed the whole action, a distinction was made in the Court of Appeal, which admitted the claim to the extent that I will now indicate. It will be remembered that the advertisement to which I have referred offered to producers the choice of sending live pigs to the society's premises by means of transport provided by the Ministry or by means of transport provided by themselves. The Court of Appeal decided that, when producers adopted the first alternative, no actionable wrong was committed by the society or the Ministry, but that, when the second alternative was adopted and the Ministry sold to the society the pigs thus delivered at the society's premises, there was a disturbance of the respondents' market for which the society and the Ministry were liable in damages. Similarly, the Court of Appeal held that the purchase by the society of dead pigs delivered by producers at their premises was a disturbance by the society of the market and an actionable wrong. Hence your Lordships are faced with an appeal by the society and the Ministry against one part, and a cross-appeal by the respondents against another part, of the judgment.

My Lords, before I consider whether there is any justification for the differentiation made by the Court of Appeal, I must examine somewhat more closely the nature of the respondents' claim that their market rights have been disturbed. In what way, it must be asked, have they been disturbed? "Disturbance of a market" says the classic text-book (PEASE & CHITTY'S LAW OF MARKETS AND FAIRS (2nd Edn.), p. 62)

"may be either by unlawfully setting up a rival market, or by doing some other act or acts whereby the market-owner is deprived, either wholly or in part, of the benefit of his franchise."

The respondents, accordingly, followed the traditional path by alleging a disturbance by the appellants of their market by the levying of a rival market or otherwise. It was the levying of a rival market that they put in the front of their case, and that was the only disturbance which was the alleged subject of conspiracy. It was also the ground on which they obtained a partial judgment in their favour from the Court of Appeal. It was, however, open to them to establish disturbance otherwise, and it was to this aspect of the case that their argument before your Lordships was largely directed.

I will deal first with the allegation that the appellants levied a rival market. In my opinion, the respondents fall far short of establishing anything of the kind. Once more I will cite PEASE & CHITTY (2nd Edn.), p. 65:

What is a rival market is a question of fact. To sustain an action for disturbance by setting up a rival market, it is not necessary to show that

A the defendant has set up what purports to be a legal market, or has usurped a franchise upon the Crown by taking toll or holding a court of pie powder. It is enough that he has erected stalls on his own soil and taken rents in the nature of stallage for their use by persons bringing their goods thither for sales, or has so used his land as to encourage and provide for a concourse thereon of buyers and sellers; for instance, by establishing a depot with

B conveniences for the benefit of buyers and sellers, or by holding public auctions or sales whereby persons are provided with a means of selling their goods without bringing them to market. Where, however, he does not publicly invite sellers indiscriminately but sells the goods of others under contract or by private arrangement he is not levying a rival market but is selling outside the market."

C It appears to me, my Lords, that this is an accurate and sufficiently exhaustive statement of the law and that it is supported by the cases that were cited at the Bar, of which I mention only *Great Eastern Ry. Co. v. Goldsmid* (1) ((1884), 9 App. Cas. 927) (sub nom. *Goldsmid v. Great Eastern Ry. Co.* (1883), 25 Ch.D. 511), *London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.* (2) ([1935] All E.R. Rep. 540), *Dorchester Corpn. v. Ensor* (3) ((1869), L.R. 4 Exch. 335), *Elwes v. Payne* (4) ((1879), 12 Ch.D. 468), and *Wilcor v. Steel* (5) ([1904] 1 Ch. 212). In

D the passage that I have cited, as over and over again in the cases that support it, the essential feature of a rival market is said to be the provision of facilities for a concourse of buyers and sellers. This follows logically from the nature of a franchise of market of which no better definition has been given than by CHATTERTON, V.-C., in *Marquis of Downshire v. O'Brien* (6) ((1887), 19 L.R. Ir. 380 at p. 390):

"A market is, properly speaking, the franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given."

Let me then examine the class of case which is the subject of the cross-appeal,

F viz., where the producer has availed himself of the transport facilities provided by or on behalf of the Ministry. The learned lord chief justice has held (and BLACK, L.J., agreed with him) that, in such a case, the sale to the Ministry having taken place at the farm at which the live pigs were delivered, there was so far no disturbance of the respondents' market rights. The market owners never had the right to prevent a farmer from selling privately on his farm, whether

G the sale was of one or two or a large number of pigs. Equally the same learned judges were of opinion that neither by bringing all the pigs so bought to the society's premises as a collecting centre nor by then selling them, whether before or after slaughter, to the society did the Ministry or the society in any way establish a rival market to the disturbance of the respondents' rights. It appears to me that this conclusion is unimpeachable, and the only criticism that I venture

H to make, which becomes of importance in considering the next class of case, is that the learned lord chief justice appears to me to attach too much significance to the fact that the sale takes place at the place at which the pigs are delivered to the transport authority or other agent of the Ministry. This, therefore, brings me to the second class of case, where the producer brings the live pigs to the society's premises by his own transport.

I My Lords, the learned lord chief justice proceeded to the consideration of this class of case on the basis that the contract for sale of the pigs took place on the society's premises. He found that this created a radically different situation, and held that it would be quite wrong and unrealistic to regard transactions induced by the invitation contained in the advertisement as private sales on private premises. He thought that the result was to make the society's premises a concourse of sellers though not of buyers, but was of opinion that the one-sided nature of the concourse facilities did not prevent what has been done in this connexion constituting a rival market. Here, my Lords, I must reluctantly

differ from the lord chief justice. I am by no means satisfied, from an examination of the relevant documents, that, in this second class of case as in the first, the sale does not take place at an earlier date, viz., when the Ministry acknowledges the producer's so-called "entry of pigs" and directs him to arrange to deliver them to a named place or person on a named day. This view, I believe, commends itself to some of your Lordships. If so, there is an end of the differentiation between the two classes of case. But, whether this is so or not, I cannot accede to the view that a rival market is levied even if the sale to the Ministry takes place on the society's premises and the Ministry (as the fact is) then sells to the society the pigs it requires and despatches any surplus to Belfast. It is true on this assumption that a number of sellers take their produce to the same premises, though it would be a misuse of language to speak of a "concourse" of sellers. But, apart from this, there does not appear to be any single feature of a market. So far from there being a concourse of sellers and buyers, the public had no right to enter on the society's premises in order to buy; and not only had they no right to enter but entry would have availed them nothing, for the Ministry, as they were well entitled to do, made their own arrangements for the disposal of the pigs. No doubt there have been cases where a rival market has been held to be established when all the sales have been made by a single auctioneer acting on behalf of a number of sellers, but such cases are remote from the present case and must, in any event, in view of the observations of MAUGHAM, L.J., in *London Corp'n. v. Lyons, Son & Co. (Fruit Brokers), Ltd.* (2) ([1935] All E.R. Rep. 540) be very closely scrutinised.

What I have said about the second case of live pigs applies also to the sale of carcasses to the society. In this the Ministry have no part. The society advertises its willingness to buy carcasses; the producers bring them to its premises. The society takes them, pays for them, and uses them for its own purposes. I will presently examine whether this can in any other way be regarded as a disturbance of the respondents' market, but to the proposition that it is a disturbance by levying a rival market I can by no means assent. I sum up this part of the case, therefore, by saying that the respondents fail in respect of both classes of live pigs and of carcasses to make good their claim of disturbance by rival market.

But, my Lords, this does not conclude the case; for, as I pointed out some time ago, disturbance may take some other form than levying a rival market. This aspect of the case has caused me the difficulty that is commonly created when it is sought to pour new wine into old bottles. For let it be said at once that there is no case in the books which, in its facts, remotely resembles the present one. Counsel for the respondents, taking as their text the latter part of the first citation that I made from *PEASE & CHITTY*, contended that, since there may be disturbance of a market by doing an act whereby the market owner is deprived either wholly or in part of the benefit of his franchise, it was sufficient to look at the sequence of events and thus conclude that, but for the scheme operated by the Ministry and the society, pigs live or dead which went direct to the society's premises would, or might, have found their way to the respondents' market. This means nothing less than that any act which may result in a loss to the market owner is an injury to him; it leaves no room for the *damnum absque injuria* which is a commonplace in a trading community, and it is, in fact, a proposition of law for which there is no foundation. If it was well-founded, no shopkeeper or, indeed, any private person could buy or sell any marketable article within market limits; a view at one time held, at least in regard to sales on market days, but long since discarded; see *Murdockfield Corp'n. v. Chapman* (7) ((1843), 12 M. & W. 18), and see, too, *London Corp'n. v. Lyons, Son & Co. (Fruit Brokers), Ltd.* (2), and particularly the observations of MAUGHAM, L.J. My Lords, I do not doubt that the general proposition for which the respondents contend must be qualified by saying that a sale outside the market which has, or may have, the effect of depriving the market owner

A of toll or some other advantage is an actionable disturbance only if the person selling takes or seeks to take the benefit of the market. That is clearly a "fraud upon the market". The market owner provides the facilities and attracts the concourse. Whoever takes advantage of that concourse cannot fairly avoid paying his proper dues. I know of no case in which (apart from rival market cases) this had not been an essential element either express or implied. It may
 B take many forms, e.g., where a cattle dealer leaves his sheep outside the market but goes to the market to find customers whom he takes outside and there sells his sheep to them (see *Bridgland v. Shapter* (8) (1839), 5 M. & W. 375), or by selling by sample in the market in order to evade paying toll on the bulk (see *Teukesbury Corpn. v. Bricknall* (9) (1809), 2 Taunt. 120), or by intercepting goods on the way to market (see *Turner v. Sterling* (10) (1672), 2 Vent. 25),
 C and, to cite a modern case, *Loughrey v. Doherty* (11) ([1928] L.R. 103). Always the underlying assumption is that, but for the act complained of, the producer would have paid toll or other dues in the market and that the intention of the act was to evade such payment.

It is impossible, in my opinion, to bring this law of the market into relation with the circumstances of the present case. It may well be that, if there had
 D been no Pigs Marketing Board, no war, no Defence Regulations, no Statutory Rules and Orders made under them, no Ministry of Agriculture, no new abattoir and other plant, the respondents' market in pigs alive or dead would have continued to flourish. It is possible to feel some regret that the market owners have suffered without compensation the loss of their market. But it is not the necessary consequence that the society or Ministry have been guilty of an
 E actionable disturbance. They would admit, for it is clear from the correspondence, that they did not fail to foresee that one of the results of the new régime would be that toll would not be payable on the pigs delivered to the society's premises, but it would be extravagant to suggest that the object of the scheme was to evade toll, or that at any stage of it the producers, the Ministry, or the society got the benefit of the market without paying the proper dues. It was
 F to the Ministry alone that the producer could sell live pigs for slaughter. Why should he send them to a market where there was no concourse of buyers and, if there had been, not one of them could buy? And how did the Ministry disturb the market when they sold the pigs to the licensed curer of their choice? No satisfactory answer was, or could be, given to these questions. Nor was a better answer given in respect of the carcasses that were sold direct to the society
 G by the producers. The claim that such sales were a disturbance of the market is, as I have already pointed out, tantamount to saying that no trader within the market limits can at any time buy a marketable article except in the market—a proposition that cannot be supported.

I need say nothing about the conspiracy claim. It follows from what I have said that it must fail.

H In my opinion, therefore, the appeal must be allowed with costs and the cross-appeal dismissed with costs. The respondents (the cross-appellants) must pay the costs of the appellants in the Court of Appeal and in this House, and the order of CURRAN, J., including his order as to costs, so far as it affects the parties to this appeal, should be restored.

I LORD REID: My Lords, I entirely agree with what has been said by my noble and learned friend, VISCOUNT SIMONDS, and I only add a few observations because we are differing from the Court of Appeal in Northern Ireland. I need say nothing about the position before 1948; the changes then made by the appellants, the society and the Ministry, were the cause of the present action being raised against them. The trade in pig carcasses in the respondents' market ceased as a result of those changes and the question is whether the actions of the appellants in that year were or were not legitimate.

The first contention of the respondents is that the appellants' actions amounted to levying a rival market at the society's premises. So it seems to me that the first thing to do is to see what happened at those premises. The Ministry, who were the sole buyers of live pigs for slaughter, set up a collecting centre there by agreement with the society, and large numbers of pigs were brought there. Some were brought by carriers engaged by the Ministry to collect them from farms, and some were brought or sent by the farmers. But no bargaining took place there. The price at which, and the terms on which, the Ministry bought had been published and were not subject to variation, and the position was similar with regard to pig carcasses sold to the society and delivered there. The public were not invited to come there; the only members of the public invited to come were persons who had live pigs or carcasses for sale and who chose to bring them there or persons whom the sellers engaged to take their pigs or carcasses there. Those pigs or carcasses were generally if not always brought at pre-arranged times and there was no concourse of people there; if two or more persons bringing pigs happened to arrive at the same time, I do not think that that could be described as a concourse of sellers. I am assuming that the property in the pigs and carcasses had not passed until they were delivered, although I think that it had. Even if there could be a rival market without a concourse of buyers and sellers, there must at least be activities in the "rival market" which bear some resemblance to the activities in an ordinary market and here I can see none. At best for the respondents all that happened was that a number of sellers arrived in succession and delivered their pigs or carcasses, the property in which then passed to the Ministry or the society.

Then the respondents contended on more general grounds that the appellants' activities amounted to disturbance of their market. In a sense they did because it may well be that if the changes made in 1948 had never been made the trade in their market would have continued. But that is not what is meant by disturbance of a market as an actionable wrong. In general a person commits no tort if he buys goods which the seller might otherwise have sent to market. What he is not entitled to do is to take advantage of the concourse of the market. Typical examples are intercepting a seller on the way to the market and buying the goods before they reach the market, or going into the market to find a buyer who will come out and buy goods outside the market. It might be difficult in some cases to decide whether a person had taken advantage of the concourse but in this case it appears to me to be impossible to say that the appellants took any such advantage. Their operations could have been conducted in exactly the same way if there had never been a market.

LORD TUCKER: My Lords, I agree that the appeal be allowed and the cross-appeal dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM: My Lords, I agree. I think that the learned lord chief justice (LORD MACDERMOTT) would have reached the same result if he had not thought that the society's premises were a place of public resort in respect of what he regarded as the sale there of live pigs and pig carcasses by the producers.

The transactions completed there he distinguished from the sales of pigs on the producers' farms which he held were private sales on private premises, whereas the transactions on the society's premises he held were not. He seems to regard the producers as public resorting to the society's premises and constituting a concourse of sellers, which, in his view, distinguishes the two cases.

- A The matter cannot, I think, be so regarded. The society's premises are, in my view, as much private premises as is the shop of a shopkeeper and though, as *Goldsmid v. Great Eastern Ry. Co.* (1) ((1883), 25 Ch.D. 511) shows, a rival market may be set up in private premises, the coming of sellers to the society's premises with a commodity in which the Ministry or the society trades does not seem to me to be distinguishable from a stream of purchasers coming to
- B a shop to buy the commodities in which the shopkeeper deals. In neither case is there a concourse of buyers and sellers. There is merely a succession of persons who come with a predetermined object to buy from, or sell to, a particular individual and depart when that object has been accomplished. I doubt if it is right to regard the buyers in the one case as a concourse of buyers and the
- C sellers in the other as a concourse of sellers. So far as I have observed from the cases, the phrase "a concourse of buyers and sellers" seems to be used as a coming together of buyers and sellers, a concourse of both, not separate concourses of each. "Concourse", in any event, does not seem to me to be an apt word to apply to persons who are not gathered together in one place for a common purpose, but who come independently and at their own convenience to particular
- D premises with the object of buying from, or selling to, the occupier of these premises. In my opinion, the arrangements and transactions of the Ministry and the society present none of the essential features of a market. *Goldsmid's* case (1) was a clear case of a concourse of buyers and sellers, but there is some indication, particularly in the judgment of COTTON, L.J., that, if the acts complained of had been solely the acts of the tenants of the railway company, the
- E decision might have been different. If the argument for rival market fails, a claim for any other kind of disturbance must, in this case, in my opinion, also fail.

- LORD SOMERVELL OF HARROW:** My Lords, LORD MACDERMOTT, C.J., held that, in cases where the contract of sale was made on the farms, no
- F advantage was taken of the market and no tort was committed. This was the position, in his view, when pigs were collected by the advertised transport facilities. Where pigs were delivered by the producers at the appellants' (the society's) premises he held (i) that the contract was not completed until delivery at the society's premises and (ii) that the sales were, therefore, tortious in that
- G the invitation to sellers to sell at the society's premises constituted a rival market. I think that, in those cases, the contract may have been concluded at an earlier stage, but in any case I am unable to regard the invitation to producers to bring their pigs to be purchased by the Minister at the society's premises as constituting those premises a rival market.

- A market is a place to which sellers who have not found buyers take their
- H goods in the hope of finding buyers, and to which buyers resort in the hope of finding the goods they want. If a seller has found a buyer or buyers, or a buyer has found the goods he wants in the hands of one or more sellers, there is no need for either side to resort to the market. The word "concourse" is ambiguous. The suggestion that an invitation to sellers in a market area might be a tort
- I would be very far-reaching. It is common for a trader to advertise the fact that he is a willing purchaser of old iron, fruit, or vegetables, etc. If, as a result, goods are sold to him direct which previously went through the market, no tort is, in my opinion, committed against the holder of the market. This, I think, disposes of the claim so far as it related to purchases by the Minister. The Minister having bought the pigs had only one buyer to whom he wished to sell, the society. I agree with LORD MACDERMOTT that these sales were not torts as against the respondents. The seller had found his buyer and had no need to take his goods to market.

There is a proviso to these general principles in that a man may commit the tort of disturbing market rights if he takes advantage of the market in order to find a buyer, or goods which he wants to buy. A simple case is that of a buyer who waits for and buys an animal on its way to the market. In the present transactions, it seems to me that no advantage was taken of the market. Everything would have happened as it did if there had been no market in Enniskillen and previous sales had been done direct between producers and curers.

For these reasons I would allow the appeal and dismiss the cross-appeal, and I agree with the order suggested by my noble and learned friend on the Woolsack.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Linklaters & Paines* (for the appellants); *Stephenson, Harwood & Tatham* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

PRACTICE DIRECTION

WESTGATE *v.* WESTGATE.

[COURT OF APPEAL (Hodson, Sellers and Harman, L.JJ.), May 26, 1959.]

Divorce—Appeal—Transcript of shorthand note of counsel's argument and judge's observations—Undefended suit—Whether necessary for Court of Appeal.

At the conclusion of his judgment in this appeal, **HODSON, L.J.**, said: It is right that a shorthand writer should take notes of counsel's argument and of the judge's observations, particularly in undefended cases, but it is an unnecessary extravagance for them to be transcribed for use in the Court of Appeal. If, however, something said by the judge in argument is relied on as a ground of appeal, different considerations may arise.

SELLERS and **HARMAN, L.JJ.**, agreed.

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

A **Re WHITEHEAD'S WILL TRUSTS. PUBLIC TRUSTEE AND ANOTHER v. WHITE AND OTHERS.**

[CHANCERY DIVISION (Harman, L.J., sitting as a judge of the Division). March 12, 13, 17, 18, 19, May 13, 1959.]

B *Will—Capital or income—Fixed investment trust—Sub-units held by will trustees—Nature of sums distributed by investment trust.*

C By her will a testatrix bequeathed her residuary estate to her executors and trustees on trust for sale and conversion and to hold the net proceeds and the investments thereof and any unsold property on trust for persons in succession. The trustees were expressly empowered to retain investments held by the testatrix at the date of her death. The estate included sub-units in a fixed investment trust which was governed by a trust deed. The trust deed provided for a trust period of twenty years during which all produce of the investments held by the trustees, whether cash or other property, was to be distributed in cash among holders of sub-units. The deed provided also that the trustees in making a distribution were to distinguish between the amounts payable by way of capital and income respectively. On the question whether the trustees of the will of the testatrix ought to treat sums distributed as capital by the unit trust as capital or income.

D **Held:** the trust deed did not affect the character of the produce of the unit, and the trustees of the will must, in any case of doubt, inquire into the source of a distribution described as a capital distribution in order to establish its true nature (see p. 503, letter B, post).

E Dictum of COHEN, L.J., in *Re Doughty* ([1947] 1 All E.R. at p. 211) applied.

[As to distribution by a company of profits as dividends or capital, see 29 HALSBURY'S LAWS (2nd Edn.) 647-650, paras. 929, 930; and for cases on the subject, see 40 DIGEST (Repl.) 718-723, 2106-2134.]

F Cases referred to:

- (1) *Howe v. Dartmouth (Earl)*, *Howe v. Aglesbury*, (1802), 7 Ves. 137; 32 E.R. 56; 44 Digest 197, 265.
- (2) *Hill (R.A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] All E.R. Rep. 87; [1930] A.C. 720; 144 L.T. 65; sub nom. *Re Hill (Richard)*, 99 L.J.P.C. 191; Digest Supp.
- G (3) *Re Duff's Settlements Trusts, National Provincial Bank, Ltd. v. Greyson*, [1951] 2 All E.R. 534; [1951] Ch. 923; 2nd Digest Supp.
- (4) *Re Sechiari, Argenti v. Sechiari*, [1950] 1 All E.R. 417; 2nd Digest Supp.
- (5) *Re Taylor, Waters v. Taylor*, [1926] Ch. 923; 96 L.J.Ch. 17; 137 L.T. 17; 40 Digest (Repl.) 726, 2162.
- (6) *Bouch v. Sproule*, (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 40 Digest (Repl.) 725, 2152.
- H (7) *Inland Revenue Comrs. v. Blott, Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest 107, 663.
- (8) *Re Doughty, Burridge v. Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp.

I **Adjourned Summons.**

This summons was issued by the trustees of the will of Emma Whitehead, deceased, for the determination of the question whether sums of money (amounting to £666 19s. 3d.) included in periodical distributions from time to time received by the plaintiffs in respect of sub-units in fixed investment trusts for the time being comprised in the residuary estate of the testatrix, which sums were described as capital in the counterfoils attached to the relevant warrants for payment, ought to be treated by the plaintiffs for the purposes of the said will as capital or as income, or ought to be apportioned between capital and income.

E. I. Goulding for the plaintiffs.

D. H. Mervyn Davies for the first, second and third defendants (interested in income).

T. L. Deuchurst for the fourth and sixth defendants (interested in capital).

The fifth defendant did not appear.

Cur. adv. vult.

May 13. **HARMAN, L.J.**, read the following judgment: The late Emma Whitehead, who died on July 15, 1947, and whose will was proved on Nov. 5, 1947, by the plaintiffs, left included in her estate property of a comparatively novel kind, viz., sub-units in three Fixed Trusts. These her trustees retained during their currency and thus became possessed of what I may call the produce of the sub-units. The problem is that of the allocation of this produce to the beneficiaries under the will, whether interested in capital or income of the estate. This seems to be a novel question in these courts and one which may become of increasing importance as this form of investment or something like it seems to be the fashion of the day.

The testatrix by her will made on Aug. 10, 1944, appointed the plaintiffs to be executors and trustees and bequeathed to them her residuary estate on the usual trusts for sale and conversion and out of the proceeds to pay her debts and funeral and testamentary expenses and to invest the residue in authorised trust investments and to stand possessed of them and of all parts of her estate for the time being unsold on trust to pay the income to her three nieces, the first three defendants, in equal shares, with remainders as to both capital and income on the several deaths of the first three defendants for other persons represented for present purposes by the last three defendants. By para. 6 the testatrix authorised her executors to retain

"either temporarily or permanently all or any of the investments standing in my name at my decease or which I may be then possessed of or entitled to although such investments do not come within the range of investments hereinbefore authorised."

She made a codicil which has no bearing on this present question. Included in her property were the following: 940 sub-units—Scottish Fixed Trust: 500 sub-units—"A" National Fixed Trust and 1,130 sub-units—"D" National Fixed Trust. The plaintiffs sold 430 of the last mentioned, but retained the rest until paid off in the years 1953, 1954 and 1955. During the years of retention the plaintiffs received half-yearly payments from the managers of the Trusts. Most of these were described as income and were clearly rightly so described, but sums amounting in the whole to £666 19s. 3d. were described by the payers as capital and have been provisionally retained by the plaintiffs: the question is whether this has been rightly done. In order to answer it it will be necessary to examine closely the nature of an investment in a Fixed Trust. These are regulated by trust deeds which are exhibited to the affidavit in support.

The first such deed regulating the Scottish Fixed Trust is dated in May, 1935, and is made between the National Fixed Investment Trust, Ltd. (hereafter called the Trust) and the Clydesdale Bank, Ltd., described as the trustees. It recites the intention of the Trust to transfer (as was done) into the name of the trustees or their nominees a group of investments particularised in sch. 1

"with the intention that the same shall constitute a unit as below defined and be held by the trustees subject to the provisions of this deed."

Clause 1 of the deed is the definition clause and provides that "first unit" means the said group of investments subject to variation under the deed; "unit" means a group of like investments; "unit investment" means any one of the investments comprised in a unit; "sub-unit" means a share in a unit entitling the owner to the beneficial interest in one four thousand eight hundredth part of a unit; "cash produce" means all dividends, bonuses and other sums whether

A capital or income received by the trustees in respect of a unit or any unit investment in cash or by warrant, cheque or money credit; "specie produce" means all dividends, bonuses and other sums whether capital or income received by the trustees in respect of a unit or any unit investment in any shape or form other than as aforesaid; "trust period" means twenty years from the date of the deed. By cl. 2 the trustees are directed to stand possessed of each unit when received
 B during the trust period on the trusts declared by the deed, but if during that time any investment should cease to pay dividends (or for certain other reasons) the trustees are bound on the Trust's request to realise the investment and deal with its proceeds as if they were cash produce. Clause 3 provides for the issue by the trustees as required by the Trust of certificates in favour of persons purchasing sub-units. Clause 4 provides that until sale sub-units shall belong to
 C the Trust. Clause 7 provides that the trustees shall during the trust period stand possessed of all cash produce and specie produce on trust to

"(a) . . . procure the realisation of all specie produce and convert the same into money. (b) . . . distribute all cash produce and the proceeds of realisation of all specie produce among the certificate holders in proportion to their respective interests therein. (c) . . . such distributions shall be
 D made half yearly [in June and December]."

Clause 8 (b) provides that if any part of the amount distributable be in respect of capital moneys the trustees shall arrange that the cheque or warrant shall contain a statement to that effect and "shall distinguish between the amounts payable by way of capital and income respectively." By cl. 8 (d) it is provided
 E that the trustees shall with every cheque or warrant issue a certificate "to the effect that all income tax payable in respect of the amount distributed has been or will be duly paid." Clause 9 provides that if any unit investment shall during the trust period be redeemed either with or without an option to convert, the Trust may call on the trustees either to accept the cash or exercise the option,
 F and if the proceeds be cash it shall be deemed cash produce, but if the option be exercised the resulting shares shall (subject to certain conditions) not be regarded as specie produce. Clause 15 (b) provides that the executors or administrators of a deceased certificate holder shall be the only persons recognised by the trustees as having title to the sub-units comprised in such certificate. By cl. 16:

"No person shall be recognised by the trustees as holding or being entitled to the benefit of any sub-unit upon any trust and the trustees shall not be
 G bound by or required to recognise any equitable or partial interest in any sub-unit or any other than an absolute beneficial right."

Clause 19 deals with the realisation and distribution of the units on the expiration of the trust period and provides in particular that all cash produce and specie produce for the last six monthly period shall be distributed as though it were part
 H of the proceeds of realisation of the units. Clause 31 contains a power of modification. Clause 34 contains an undertaking by the trustees to purchase sub-units at a certain price if called on.

The power of modification was exercised in particular by a supplemental deed executed in January, 1947, whereby a new clause was inserted obliging the trustees to send to a certificate holder half-yearly copies of audited accounts
 I showing (a) the gross amount of the cash produce and specie produce per unit received during the period and the amount of income tax deducted by the trustees or before receipt by the trustees, (b) the cash produce and specie produce per unit received by the trustees as aforesaid free of and without deduction of income tax, and (c) the net amount proposed to be distributed per unit distinguishing between capital and income and indicating the source of such capital.

The National Fixed Trust Unit "A" was regulated by a trust deed of Mar. 9, 1933, and made between the National Fixed Investment Trust, Ltd., and the Midland Bank Executor and Trustee Co., Ltd. This deed was on broadly similar lines to

the deed above recited and I do not think I need rehearse it in detail. There were four thousand sub-units in this Unit. The trust period was twenty years from June 8, 1932. The half-yearly distribution dates were May and November. The deed itself did not require cheques or warrants to distinguish between capital and income, but did require that distinction to be shown in the half-yearly accounts.

The National Fixed Trust Unit "D" was regulated by a trust deed of July 16, 1934, made between the last mentioned parties and was subsequently varied by two further deeds. The trust period was twenty years from July 16, 1934. Half-yearly distribution dates were January and July. The principal trust deed required cheques or warrants to distinguish between capital and income distributed, but this was deleted by a modifying deed which required these details to be shown in the half-yearly accounts.

All the deeds above recited or referred to are exhibited to the affidavit in support of the summons but do not, in my judgment, require further notice here. The same affidavit sets out in detail the various payments by way of half-yearly distributions on each group of sub-units. The affidavit shows the total net sum received on each occasion and the portion (if any) of that sum declared in accordance with the provisions of the deed to be capital. Counterfoils to the warrants contain explanations of the so-called capital items. In the case of the Scottish Fixed Trust, most of these arise from the realisation under the terms of the deed (by virtue of which they were defined as specie produce) of bonus shares issued by the several companies whose shares figured in the portfolio of the unit. These realisations which converted specie produce into cash produce were distributed in accordance with cl. 7 of the original deed and the Trust no doubt in distinguishing between capital and income was acting under cl. 8 (b). Distributions described as capital were not all proceeds of sale of bonus shares. Notably there was a special tax free dividend issued by the Imperial Continental Gas Association and a sum described as "capital repayment" made by the same company. There are also what are called "capital distributions" or dividends from the Staveley Coal & Iron Co. Distributions by the other two trusts are on similar lines.

It is at once evident that here is a new type of investment raising thorny questions for trustee recipients charged with the duty of holding the balance true between the conflicting interests of beneficiaries under a will or settlement, some entitled to income and some to corpus. It is true that trustees holding investments in limited companies face similar problems, but these have long been familiar and are regulated by well-known authorities, but a sub-unit is not, directly at any rate, such an investment. Unit trusts are not controlled by the shackles of the Companies Act, 1948: within the wide limits set by their trust deeds they may retain income receipts as capital or distribute capital receipts as income at their will. The use of the word "produce" underlines this freedom.

The Fixed Trusts are by their charters not bound or indeed entitled to look beyond the registered holder of each sub-unit. It does not matter to them whether that holder be the absolute owner or a mere trustee or a partial owner. When he is in fact the absolute beneficial owner he can, of course, deal with sums realised as he chooses. It was argued that the object of the provisions requiring the Trust to make distinction between capital and income must have been for the convenience of sub-unit holders so as to show them which distribution had suffered deduction of tax or was liable to it and which was regarded from an income tax point of view as not subject to tax. When, however, a trustee is the registered holder he must consider the rights on the one hand of life beneficiaries and on the other of remaindermen.

Three views are possible. First, that the whole of the "produce" ought to be treated as income, second, that all so-called capital sums should be treated as capital, and, third, that the trustees must inquire, just as trustees holding directly the shares which form the portfolio of a sub-unit must do, whether the sum received is in truth capital like a bonus share or income like a dividend paid

A out of capital profits. The difficulty of the last course would seem to be that owners of sub-units are not directly interested in the companies whose shares make up the portfolio and therefore have no right to make the inquiries which a shareholder is entitled to make. No doubt the trustees themselves being the shareholders can make these inquiries, but I see nothing to oblige them to do so, and they might well decline to add to their duties.

B The argument that all realisations shall be treated as income may, I think, be stated thus. The testatrix held these sub-units: she authorised her trustees to retain them as investments: she must therefore be supposed to have intended that her beneficiaries should enjoy the investments as they found them, i.e., subject to the provisions of the trust deeds, as to converting specie produce into cash produce and deputing to the Fixed Trusts the right to decide what to distribute as income and what to treat as part of the capital of the sub-unit. It was submitted by counsel for persons interested in income that the provisions of the trust deed impressed on every distribution the character of income and that there is nothing in the will to contradict this. There is, however, I observe, no provision in the will excluding the rule in *Howe v. Earl of Dartmouth* (1) ((1802), 7 Ves. 137). This, if the right view, will have resulted in the present case in a considerable portion of the original corpus of the unit finding its way into the hands of income beneficiaries in the form of proceeds of bonus shares which in the case of an ordinary trust rank as capital. Even more striking results might ensue if, under cl. 9 of the recited deed, the Trust should direct the proceeds of redemption of a unit investment to be received in cash, for it would then be distributed as cash produce. On the other hand, the Trust might elect to exercise an option to convert, with the result that the investment received would then remain corpus, thus affecting the beneficial interests in a way over which the beneficiaries had no control. The contrary view would have the opposite effect, for it would convert into capital certain payments, which, if the will trustees were direct holders of the shares in question, would be distributable as income, for ever since the decision of LORD RUSSELL OF KILLOWEN in *R. A. Hill v. Permanent Trustee Co. of New South Wales, Ltd.* (2) ([1930] All E.R. Rep. 87) distributions by a company still a going concern and not being by way of reduction of capital remain income and are only distributable as such. This is subject to the modification, which is not relevant here, noted in *Re Duff's Settlements Trusts, National Provincial Bank, Ltd. v. Gregson* (3) ([1951] 2 All E.R. 534). There were some startling illustrations of *Hill's* case (2) during the tenure of office by the Labour Government from 1945 onwards (when nationalisation was the order of the day), notably in the case of holdings by Thos. Tilling & Co. a large part of whose business was compulsorily acquired by the Crown under the Transport Act, 1947, in exchange for government stock. The firm continued in existence and distributed the stock among its shareholders: this was held to be income in the hands of trustees: see *Re Sechiari, Argenti v. Sechiari* (4) ([1950] 1 All E.R. 417).

H My attention was directed to a decision of TOMLIN, J., in *Re Taylor, Waters v. Taylor* (5) ([1926] Ch. 923) where he says (*ibid.*, at p. 930) that it is the intention of the distributing company that controls the result. In this, he followed similar opinions expressed in *Bouch v. Sproule* (6) ((1887), 12 App. Cas. 385) and *Inland Revenue Comrs. v. Blott* (7) ([1921] 2 A.C. 171). In the present case, the distributing companies are those whose shares are included in the unit portfolio, and the Trust accordingly received the shares or cash impressed with the character to which their intentions pointed. Is this process to be repeated when the Trust carrying into effect the terms of the trust deed made distributions to the holders of sub-units? I do not think that there is any authority on this point, but I will assume the answer to be affirmative.

I Looking then at the trust deed, do I find that it directs the Trust to alter the nature of the money or securities received? I think not. It is true that the Trusts are directed to distribute everything received as "produce" of the shares in the portfolio and distribute it as cash, but I do not think that in this

deed "produce" is synonymous with income. There is no doubt that it is aptly described as the "yield" of those shares in the sense that it is the holding of them that is the source of the distribution, but that is true of a bonus share issued on a capitalisation of profits which has always been treated as capital: see *Blott's case* (7).

It was further argued that the testatrix who was the owner of the sub-units ought to be taken to have agreed to abide by the decision of the Trust as to what part of their yield was capital and what income, and that having authorised her trustees to retain the sub-units she had put them in a like position. As I have already observed, the Trust was forbidden to look beyond the registered holder of a sub-unit. He could of course, so far as the Trust was concerned, treat the yield in his hands as a capital or an income receipt. I come to the conclusion that the provisions in the trust deeds requiring the Trust to distinguish between capital and income were merely inserted for income tax purposes in an effort to ensure that the portions described as capital should not be treated in the recipient's hands as subject to income tax. The case may be considered as analogous to *Re Doughty, BurrIDGE v. Doughty* (8) ([1947] 1 All E.R. 207) where it was provided by the articles of association of a limited company that "... the company in general meeting or the directors ... may ... pass a resolution ... that any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets ... or received in respect of any capital assets ... shall be divided among the members of the company by way of capital distribution in proportion to their rights ...". It was held that the article, on its true construction, merely authorised distribution of capital profits, and did not purport to fix their character as between tenant for life and remaindermen; and that accordingly the sums received by the executors must be treated as income and paid to the tenant for life.

COHEN, L.J., delivering the first judgment ([1947] 1 All E.R. at p. 211), cites this passage from *Hill's case* (2) ([1930] All E.R. Rep. at p. 92):

"(1) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only. (2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any other name, it still must remain a payment on division of profits. (3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate."

COHEN, L.J., after expressing agreement with these principles then continues (*ibid.*):

"It seems to me that on its true construction the article we have to consider and the resolution passed thereunder merely authorise distribution of capital profits in such a way that they cannot attract income tax, and do not purport to deal with the question of their character as between tenant for life and remainderman."

So, here, it seems to me that the managers are not concerned, except from the fiscal point of view, with the character in which the sub-unit holders receive the cash produce twice yearly and have no intention of dictating to them, even

A if they could do so, whether, from any other point of view, the distribution be capital or income. Similar reasons appear to me to negative the argument that the decision of the Trust to call some part of the yield capital impresses that part with a capital nature.

I do not think there can be any authority directly in point. The will trustees must, in my judgment, notwithstanding the provisions of the trust deeds, which B do not affect anything beyond the absolute rights of the registered holders, inquire in any case of doubt into the source of each distribution which is labelled a capital distribution and treat it as income or capital just as if they were the direct holders of the shares included in the portfolio.

The case of the Imperial Continental Gas Association, which is a company governed by a private Act of Parliament, may raise considerations different to C those applicable to a company limited under the Companies Acts.

There will be liberty to apply for an inquiry if the trustees find difficulty in applying the principles which I have tried to indicate.

Order accordingly.

Solicitors: *Gardiner & Co.*, agents for *D'Angibau & Malim*, Boscombe, D Hampshire (for the plaintiffs and the third defendant); *Donovan J. Smalley & Co.* (for the first and second defendants); *D. L. Hale* (for the fourth defendant); *Gardiner & Co.* (for the sixth defendant).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

E

CLACK v. ARTHURS ENGINEERING LTD.

F

[COURT OF APPEAL (Hodson, Romer and Willmer, L.J.J.), March 11, 12, 13, May 11, 1959.]

County Court—Practice—Non-suit—Jurisdiction in absence of plaintiff's consent—Need to hear parties affected—Prior invitation to plaintiff to amend refused—C.C.R., Ord. 23, r. 3.

G

The power of the county court under C.C.R., Ord. 23, r. 3, to non-suit a plaintiff who appears "but does not prove his claim to the satisfaction of the court" applies whether his evidence is insufficient to prove the claim or is rejected in favour of the defendant's evidence (see p. 510, letter D, post).

National Cash Register Co. v. Stanley ([1921] 3 K.B. 292) applied.

H

Westgate v. Crowe ([1908] 1 K.B. 24) distinguished.

I

The powers of the county court today in relation to non-suit must be related to the practice of the old courts of common law, as it existed before 1873 (see p. 507, letter C, post). Thus (1) if, at any time before verdict, a plaintiff elected to be non-suited, he was entitled to that as of right; (2) where, before verdict, the plaintiff refused to be non-suited, the position was not clear, but it seems that, if all evidence had been taken, the court had a discretion to enter a non-suit; and (3) if the evidence had been completed and a verdict had been taken, or the judge (there being no jury) had found the facts, the court had an unfettered discretion either to enter a non-suit or to give judgment for the defendant (see p. 509, letters C to H, post).

Robinson v. Lawrence ((1851), 7 Exch. 123), *Outhwaite v. Hudson* ((1852), 7 Exch. 380), *Davis v. Hardy* ((1827), 6 B. & C. 225), *Doc d. Armstrong v. Wilkinson* ((1840), 12 Ad. & El. 743) and *Doc d. Bedford (Duke) v. Kightley* ((1796), 7 Term Rep. 63) considered.

The plaintiff, having been summarily dismissed at the end of the first week of his employment with an additional week's salary in lieu of notice, claimed by action in a county court damages for wrongful dismissal, alleging that he had been engaged for one month. At the conclusion of the evidence the county court judge invited counsel for the plaintiff to consider whether he was satisfied with the particulars of claim as they stood, thus offering him opportunity to amend them so as to put forward an alternative claim that the plaintiff had been dismissed without reasonable notice. Counsel declined to amend. The county court judge then gave judgment, preferring the evidence of the defendants' witnesses to that of the plaintiff. He found that the plaintiff had failed to make out his case that he had been engaged for a month and, without having heard counsel on the question of non-suit, non-suited the plaintiff, stating that he was not satisfied that justice would be done if judgment were given for the defendants. The result of the non-suit would be that the plaintiff could bring a fresh action on the ground of wrongful dismissal without reasonable notice. On appeal by the defendants,

Held: although the judge, having heard the evidence and found the facts, had (in accordance with (3) ante) a discretion to non-suit the plaintiff without his consent, yet he had not exercised his discretion judicially, since (i) he had not heard counsel on either side on the question of non-suit and (ii) as the plaintiff had elected not to take advantage of the opportunity to amend, it was unjust to give him another opportunity (by non-suit) to proceed again against the defendants for wrongful dismissal without reasonable notice; therefore the defendants were entitled to judgment (see p. 511, letters C to F, post).

Appeal allowed.

[**Editorial Note.** It is intimated that the power of non-suit in the county court ought to be abolished (see p. 511, letter H, post).]

As to non-suit in the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 258, 259, paras. 601-603; and for cases on the subject, see 13 DIGEST (Repl.) 443-446, 674-697.]

Cases referred to:

- (1) *Fox v. Star Newspaper Co.*, [1900] A.C. 19; 69 L.J.Q.B. 117; 81 L.T. 562; 21 Digest 150, 122.
- (2) *Stancliffe v. Clarke*, (1852), 7 Exch. 439; 21 L.J.Ex. 129; 16 J.P. 425; 155 E.R. 1020; 13 Digest (Repl.) 443, 675.
- (3) *Fletcher v. London & North Western Ry. Co.*, [1892] 1 Q.B. 122; 61 L.J.Q.B. 24; 65 L.T. 605; 31 Digest (Repl.) 128, 644.
- (4) *Robinson v. Lawrence*, (1851), 7 Exch. 123; 21 L.J.Ex. 36; 18 L.T.O.S. 156; 16 J.P. 105; 155 E.R. 883; 13 Digest (Repl.) 443, 674.
- (5) *Outhwaite v. Hudson*, (1852), 7 Exch. 380; 21 L.J.Ex. 151; 155 E.R. 995; 13 Digest (Repl.) 444, 680.
- (6) *Kershaw v. Chantler*, (1872), 26 L.T. 474; 13 Digest (Repl.) 444, 676.
- (7) *Davis v. Hardy*, (1827), 6 B. & C. 225; 9 Dow. & Ry. K.B. 380; 5 L.J.O.S. K.B. 91; 108 E.R. 436; 33 Digest 504, 459.
- (8) *Doe d. Armstrong v. Wilkinson*, (1840), 12 Ad. & El. 743; Arn. & H. 39; 4 Per. & Dav. 323; 5 J.P. 45; 113 E.R. 995; 31 Digest (Repl.) 495, 621a.
- (9) *Doe d. Bedford (Duke) v. Kightley*, (1796), 7 Term Rep. 63; 101 E.R. 856; 31 Digest (Repl.) 499, 624d.
- (10) *Westgate v. Crowe*, [1908] 1 K.B. 24; 77 L.J.K.B. 10; 97 L.T. 769; 13 Digest (Repl.) 446, 694.
- (11) *National Cash Register Co. v. Stanley*, [1921] 3 K.B. 292; 90 L.J.K.B. 1220; 125 L.T. 765; Digest Supp.

Appeal.

The defendants appealed from a judgment of His Honour JUDGE REID.

A given at Kingston-upon-Thames County Court on Oct. 28, 1958, whereby he non-suited the plaintiff. The facts are stated in the judgment.

M. J. Anwyl-Davies for the defendants.

J. B. Deby for the plaintiff.

Cur. adv. vult.

B May 11. HODSON, L.J.: The judgment of the court will be read by WILLMER, L.J.

C WILLMER, L.J.: In this case the defendants appeal from a judgment of His Honour JUDGE REID, given at Kingston-upon-Thames County Court on Oct. 28, 1958, whereby he non-suited the plaintiff and awarded costs to the defendants. It is contended that judgment ought to have been entered for the

D The plaintiff claimed damages from the defendants for wrongfully terminating his contract of employment as works manager. His case was that, though paid weekly, he was engaged for a month's trial period in the first instance. The defendants, however, terminated his employment at the end of the first week, paying him an additional week's salary in lieu of notice. The plaintiff's claim was, therefore, for the balance of a month's salary, amounting to £65 18s. The defendants denied that there was any engagement for a month's trial period, and contended that as the plaintiff was paid weekly they were entitled to dismiss him with a week's notice, or with a week's salary in lieu of notice.

E The learned judge, having heard evidence from the plaintiff and from Mr. Arthur for the defendants, preferred the evidence of Mr. Arthur, and found that the plaintiff had failed to prove his claim to have been engaged for a month in the first instance. He held that on the pleadings as they stood no other question arose, and in particular that no question arose whether, apart from the alleged engagement for a month, the notice received by the plaintiff was a proper notice. After the conclusion of the evidence, and before giving judgment, the learned judge had invited counsel for the plaintiff to consider whether he was

F satisfied with the particulars of claim as they stood—a clear invitation, as it seems to us, to amend the particulars of claim so as to put forward an alternative claim that the plaintiff was dismissed without reasonable notice. Counsel for the plaintiff, however, expressed himself as satisfied with the particulars of claim as they stood, so that the learned judge was left with only the one issue to determine, namely, whether the plaintiff had made out his case that he was engaged for one

G month. In these circumstances the learned judge, having found that the plaintiff had failed to establish the case set up in the particulars of claim, concluded his judgment as follows:

H “The plaintiff therefore cannot succeed. But I am not altogether satisfied that proper justice would have been done if judgment were given for the defendants, and this seems to me to be one of the rare cases in which the plaintiff should be non-suited.”

I Since the introduction of the 1883 Rules of the Supreme Court, the High Court retains no power to enter a non-suit (see *For v. Star Newspaper Co.* (1), [1900] A.C. 19). In the county court the power survives, and is specifically preserved by Ord. 23, r. 3 of the County Court Rules, which is in the following terms:

“(1) Where the plaintiff appears but does not prove his claim to the satisfaction of the court, it may either non-suit him, or give judgment for the defendant. (2) Where—(a) after a plaintiff has been non-suited; or (b) after an action has been struck out; a subsequent action for the same or substantially the same cause of action is brought before payment of any costs awarded to the defendant when the plaintiff was non-suited or the proceedings were struck out, the court may stay the subsequent action until such costs have been paid.”

It follows that in the present case on the judgment of the learned judge, the plaintiff would be free, on payment of the defendants' costs, to institute a fresh action in which he would be able to make a second claim for damages for wrongful dismissal, which, in the light of what the learned judge said, would no doubt be based on the absence of reasonable notice. This, the defendants say, would be a hardship to them, and on this appeal they contend that the learned judge was wrong to non-suit the plaintiff, and that he ought to have entered judgment for the defendants.

Three submissions have been advanced on behalf of the defendants in support of the appeal. First, it has been contended that the power to non-suit a plaintiff cannot be exercised without the consent of the plaintiff. Here the plaintiff never consented to be non-suited, and was never invited to consent. Secondly, it has been urged that the rule has no application to a case such as the present, where the plaintiff's evidence, if it had been accepted, would have fully proved his case. This is not a case, it is pointed out, in which the plaintiff's evidence fell short of proving his pleaded case; on the contrary, the evidence would have proved the claim but for the fact that it was disbelieved. The defendants' third submission is that, assuming the rule to be applicable to the circumstances of this case, the learned judge failed to exercise his discretion judicially, in that he chose to non-suit the plaintiff, without being invited to do so, after the plaintiff by his counsel had specifically declined an invitation to amend the particulars of claim.

In order to appreciate the significance of the defendants' first submission it is necessary to refer briefly to the history of non-suit in the High Court and county court respectively. Before the Supreme Court of Judicature Act, 1873, there is no doubt that in the common law courts, which were the predecessors of the Queen's Bench Division of the High Court, the power to enter a non-suit existed at common law. In the case of the county courts, however, their jurisdiction was wholly statutory, and the power of the court in relation to non-suit was defined by s. 79 of the County Courts Act, 1846, the material part of which provided as follows:

"if he shall appear, but shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to non-suit the plaintiff, or to give judgment for the defendant."

Though the wording is different, the substance of that provision is in our judgment precisely the same as that of the present Ord. 23, r. 3 (1) of the County Court Rules. In 1852 in *Stanceliffe v. Clarke* (2) ((1852), 7 Exch. 439), it was laid down by PARKE, B. (*ibid.*, at p. 446) in relation to s. 79 of the Act of 1846, "... that the term 'non-suit' is there used in the same sense as in ordinary law proceedings", by which we understand him to have meant that non-suit had the same meaning in relation to proceedings in the county court as it had at common law. The Supreme Court of Judicature Act, 1873, contained a provision* whereby, in the High Court a judgment of non-suit became a bar to subsequent proceedings in the same way as judgment for the defendant would be; and shortly afterwards a similar provision† was introduced into the County Court Rules. This situation persisted, so far as the High Court was concerned, until 1883, when the Rules of the Supreme Court came into force. These, as previously mentioned, contained no provision whatever for non-suit, and since that date non-suit in its strict sense has found no place in the procedure of the High Court. We use the phrase "in its strict sense" because there has been a number of cases in which the expression "non-suit" has been loosely used in the High Court, where all that has been

* Schedule, Rules of Procedure, r. 46: "any judgment of non suit, unless the court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." Replaced in same terms by the Act of 1873, Schedule, Rules of Court, Ord. 41, r. 6.

† C.C.R., 1875, Ord. 16, r. 17.

A meant has been that the defendant had no case to answer—see, for example, *Fletcher v. London & North Western Ry. Co.* (3) ([1892] 1 Q.B. 122) where we think it must be clear that the term is used in this loose sense.

The history of non-suit in the county court has been somewhat different, for there, since 1888, the power to non-suit has been specifically preserved. The effect of s. 88 of the County Courts Act, 1888, was substantially to re-enact s. 79 of the Act of 1846, and, as has already been pointed out, the present rule in the County Court Rules, 1936, is for all practical purposes the same. For seventy years, therefore, there has been a divergence between the High Court and county court practice, so far as non-suit is concerned. This circumstance makes it impossible in our judgment to invoke s. 100 of the County Courts Act, 1934, so as to interpret the county court rule relating to non-suit by reference to the present practice of the High Court. In relation to this we venture to differ from the view expressed by the learned editors of the COUNTY COURT PRACTICE in the first paragraph of the notes to Ord. 23, r. 3. Having regard to the similarity between the present rule and the provision of s. 79 of the Act of 1846, we entertain no doubt that the powers of the county court today in relation to non-suit must be related to the practice of the old courts of common law as it existed prior to 1873.

D In support of his proposition that, by the practice of the old common law courts, the power to non-suit a plaintiff could not be exercised without the plaintiff's consent, counsel for the defendants relied in the first instance on *Stancliffe v. Clarke* (2) where PARKE, B., said (7 Exch. at p. 446):

"... it is optional with the plaintiff whether he will submit to be non-suited: and in the event of his refusing, if there is no case to warrant a verdict for him, it is the duty of the judge to direct the jury to find for the defendant."

E Reliance was also placed on *Robinson v. Lawrence* (4) ((1851), 7 Exch. 123), *Outhwaite v. Hudson* (5) ((1852), 7 Exch. 380) and *Kershaw v. Chandler* (6) ((1872), 26 L.T. 474). In *Robinson v. Lawrence* (4), where the appeal was by the defendant, PARKE, B., said (7 Exch. at p. 124):

F "The question was, whether or not the plaintiff in an action for money had and received, in which there was a plea of set-off, after the judge had taken time to consider, and before the judge had delivered his verdict, could be non-suited: and whether the judge had power to direct a non-suit, according to the Acts of Parliament which regulate the county courts. At common law, whenever the plaintiff ought to appear in court, he was at liberty to withdraw . . . In the present case, when the judge was about to deliver his opinion, and indeed by the permission of the judge, the plaintiff withdrew. We have looked through the County Court Acts, but do not find any clause contained in them that prohibits the plaintiff from exercising this common law right. We therefore think that in this case the plaintiff was at liberty to be non-suited, and that the judge was right in permitting him to be non-suited."

H In *Outhwaite v. Hudson* (5) the claim was for breach of warranty of a horse. After the judge had directed the jury, and while the jury were deliberating, the plaintiff stated that he elected to be non-suited. The defendant objected, and the judge held that the plaintiff's election to be non-suited was too late. On appeal by the plaintiff it was held that the county court judge was wrong in refusing to allow the plaintiff to be non-suited. PARKE, B., said (7 Exch. at p. 381):

"The plaintiff's power of demanding to be non-suited continued to the last moment—until the jury had given their verdict: or, where the case is tried by a judge without the intervention of a jury, until the judge had pronounced his judgment."

Kershaw v. Chandler (6) was a case where the county court judge, after the completion of the plaintiff's case and during the hearing of the defendant's witnesses, discharged the jury, and, notwithstanding the repeated protests of

the plaintiff and his attorney, and without the plaintiff's consent, directed a non-suit to be entered. It was held, on a rule calling on the judge to proceed with the trial of the cause, that the judge had acted judicially, and that therefore the court had no power to afford the plaintiff any remedy on this rule, but the members of the court left no room for doubt that in their view the county court judge had been in error in thus non-suiting the plaintiff without his consent. COCKBURN, C.J., is reported as saying (26 L.T. at p. 475):

"I regret much that we have no power upon this rule to direct a new trial; for with no propriety can a judge non-suit a plaintiff without his consent."

If the matter stopped there, it would seem that the discretion which s. 79 of the County Courts Act, 1846, appears by its terms to have conferred on the court "to non-suit the plaintiff, or to give judgment for the defendant" was wholly illusory, and that there was in practice no discretion, the court being bound to abide by the election of the plaintiff. If that were true of the Act of 1846, we should, it seems, be bound to hold that the present Ord. 23, r. 3, of the County Court Rules must be construed in the same way. But by way of contrast to the cases already cited reference should next be made to *Davis v. Hardy* (7) ((1827), 6 B. & C. 225) to which our attention was called by counsel for the plaintiff. In that case, which was decided in 1827, the plaintiff claimed damages for malicious prosecution. At the conclusion of the plaintiff's case the judge indicated that in his view there was sufficient evidence of want of probable cause. The defendant accordingly called a witness, and on the conclusion of his evidence the judge intimated that on the whole of the evidence there was a probable cause for preferring the indictment. Counsel for the plaintiff insisted that it ought to be left to the jury to decide whether they believed the evidence of the defendant's witness. The judge, however, refused to leave any question to the jury, and non-suited the plaintiff. On appeal by the plaintiff it was held by ABBOTT, C.J., with whom BAYLEY, J., concurred, that the non-suit was proper, and that the rule for setting it aside must be discharged. Here then was a case in which clearly the plaintiff was non-suited against his will, and at first sight it is a little difficult to reconcile this decision with the view expressed some twenty-five years later by PARKE, B., in *Stancliffe v. Clarke* (2) (7 Exch. at p. 446) that "it is optional with the plaintiff whether he will submit to be non-suited".

Reference may also usefully be made to TIDD'S PRACTICE (9th Edn.) (published in 1828), where the following statement appears (Vol. II, at p. 867):

"If it be clear that, in point of law, the action will not lie, the judge at nisi prius will non-suit the plaintiff, although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or on a writ of error. But where the case turns on a question of fact, it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to his being non-suited."

We confess that we find the statement in the first sentence of this extract difficult to reconcile with the view expressed by PARKE, B., in *Stancliffe v. Clarke* (2) (7 Exch. at p. 446) that

"if there is no case to warrant a verdict for [the plaintiff], it is the duty of the judge to direct the jury to find for the defendant."

Equally the second sentence is at variance with what was done in *Davis v. Hardy* (7) and there is in fact a footnote calling attention to the discrepancy.

It is, however, relevant to remark that all the authorities to which we have so far referred related to cases where the question of non-suit arose before verdict. Before attempting to account for the apparent discrepancy between the decision in *Davis v. Hardy* (7) and those in the other cases referred to, it is useful to examine the practice in relation to non-suit after verdict. No such

- A cases were cited to us in argument, but an examination of the reports of cases during the first half of the nineteenth century reveals the fact that it was a frequent occurrence for a plaintiff to be non-suited after verdict quite regardless of his own wishes. By way of illustration we may perhaps refer to two cases which happen to have been cited to this court in another connexion since the conclusion of the argument in the present appeal. It appears from *Doe d. Armstrong v. Wilkinson* (8) ((1840), 12 Ad. & El. 743) that after the verdict of the jury the defendant was entitled to move for a non-suit, and the court had a discretion to grant or refuse it. Similarly *Doe d. Duke of Bedford v. Kightley* (9) ((1796), 7 Term Rep. 63), seems to have been a case of non-suit after verdict against the plaintiff's wish, and on the plaintiff obtaining a rule to set aside the non-suit, which was opposed by the defendant, the rule was made absolute.
- C Other cases are to be found in the reports where a verdict was given for the plaintiff, but with leave to the defendant to move to set that verdict aside and to enter a non-suit.

From an examination of all these cases it seems possible to draw the following conclusions: (1) At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right, and the court had no discretion to refuse—see *Robinson v. Lawrence* (4); *Outhwaite v. Hudson* (5).

- (2) If before verdict the plaintiff refused to be non-suited, the position is not so clear. If the statement in TIDD'S PRACTICE is correct the plaintiff could apparently be non-suited if his action was not sustainable in point of law. And it would appear from *Davis v. Hardy* (7), notwithstanding the contrary view expressed in TIDD'S PRACTICE, that, where all the evidence on both sides had been taken, the court had a discretion to enter a non-suit, even against the expressed wish of the plaintiff that the evidence should go to the jury. The apparently contrary views expressed in *Stancliffe v. Clarke* (2) and *Kershaw v. Chantler* (6) may perhaps be explained on other grounds. In *Stancliffe v. Clarke* (2) there was a submission of no case, and it was in this context that PARKE, B., said that a non-suit against the will of the plaintiff was not allowable.
- F but that if there was no case it was the duty of the judge to direct a verdict for the defendant. In *Kershaw v. Chantler* (6) it was during the hearing of the defendants' witnesses that the judge discharged the jury and, without the plaintiff's consent, directed a non-suit to be entered. It may be, therefore, that the apparent discrepancy between these decisions and that in *Davis v. Hardy* (7) is to be explained on the basis that in the former cases the relevant question was whether a non-suit without the plaintiff's consent was admissible at so early a stage in the case.

(3) Once the evidence had been completed and the verdict of the jury taken—or, where there was no jury, once the judge had found the facts—it seems clear that the court had an unfettered discretion, if the verdict was against the plaintiff, either to enter a non-suit or to give judgment for the defendant.

- H If this analysis of the procedure before the old courts of common law is correct, it seems to us to be destructive of the first submission put forward on behalf of the defendants. The present case clearly belongs to the third class mentioned above, in that the learned judge decided to non-suit the plaintiff only after all the evidence had been given and he himself had given his judgment on the facts. In such a situation it seems clear that following the old practice of the courts of common law, the learned judge had an unfettered discretion to enter a non-suit regardless of the absence of consent on the part of the plaintiff. The defendants, therefore, have no cause for complaint on this appeal merely on the ground that the plaintiff was non-suited without his consent.

I We pass, therefore, to the second submission put forward on behalf of the defendants—namely, that Ord. 23, r. 3 of the County Court Rules has no application to a case such as the present, where the plaintiff's evidence, but for the fact that it was disbelieved, would have fully substantiated the claim put forward on his behalf. The contention is that the rule, on its true construction,

applies only to a case where the evidence called for the plaintiff falls short of substantiating the pleaded case. Reliance is placed on the wording of the rule, which refers to a plaintiff who "does not prove his claim to the satisfaction of the court"—words which, it is contended, are appropriate to a case where the evidence falls short of proving the pleaded case, but are quite inappropriate to a case where the plaintiff's evidence is rejected and that of the defendant is preferred. In support of this we were referred to the decision in *Westgate v. Crowe* (10) ([1908] 1 K.B. 24), where the evidence adduced for the plaintiff in an action for personal injuries showed clearly that the liability was not that of the defendant, but of another party not before the court, and it was held that a non-suit was not the appropriate remedy, but that the defendant was entitled to judgment.

In our judgment this argument, though attractive, is fallacious. This is not a case like *Westgate v. Crowe* (10), where the evidence showed that in no circumstances could the defendant be liable. Here, as we understand the view of the learned judge, the plaintiff might yet be able to succeed against the defendants if his claim were framed in a different way. But even if it were framed in a different way, it would still be a claim against the defendants for damages for wrongful dismissal—that is to say, this is not a case in which any other possible claim would be an entirely different cause of action. We do not think that the argument based on the wording of the rule is sound, for the words used are, in our judgment, wide enough to cover any case in which the evidence is held not to prove the claim, whether because it is of itself insufficient, or because it is rejected in favour of the defendant's evidence. In this connexion it may perhaps be remarked, by way of illustration, that the form of decree in a matrimonial cause, whereby it is pronounced "that the petitioner has sufficiently proved the contents of the said petition", is the same whether the cause be undefended or defended. We do not see how *Davis v. Hardy* (7) could have been decided as it was, unless it was regarded as competent for the court to non-suit a plaintiff where his evidence was rejected on the strength of that called for the defendant. Moreover, we find it difficult to reconcile the argument for the defendants with the decision of the Divisional Court in *National Cash Register Co. v. Stanley* (11) ([1921] 3 K.B. 292) to which we were referred by counsel for the plaintiff. In that case the plaintiffs brought a default summons against the defendants in the county court for an alleged debt incurred owing to the defendants' refusal to accept delivery of a cash register under a hire-purchase agreement. The learned county court judge held that on the evidence no debt was proved, but that the plaintiffs' remedy, if they had one, was by way of an action for damages. He is reported as having said (*ibid.*, at p. 293):

"As the plaintiffs have chosen to proceed by default summons they cannot obtain damages in this action, but there is no reason why they should not do so in a fresh action properly constituted. I think the proper course is to enter a non-suit."

On appeal to the Divisional Court it was held by LUSH, J., and SANKEY, J., that the learned judge was right and that his judgment should be affirmed.

In these circumstances we find ourselves unable to accept the second submission put forward on behalf of the defendants, or to say that C.C.R., Ord. 23, r. 3, has no application to a situation such as arose in the present case. In our judgment this case is within the rule, and it was a matter for the discretion of the learned county court judge whether he should non-suit the plaintiff or give judgment for the defendants.

It remains, therefore, to consider the defendants' third submission, namely, that, assuming the rule to apply, the learned judge failed to exercise his discretion judicially having regard to all the circumstances of the case. It is on this point that in our judgment the learned judge's order is open to attack. It is not unimportant to observe that the plaintiff here was not without legal advice.

A He had the advantage of counsel and solicitors not only in presenting the case in court, but also in preparing the particulars of claim. This is not a case of an unassisted litigant who, through ignorance, may perhaps plead his case the wrong way or fail to produce all the necessary evidence in support. We apprehend that it was largely with a view to assisting such persons that the power to enter a non-suit was preserved in the county court after its abolition in the High Court.

B In our view the learned judge's exercise of discretion in this case was open to criticism in two ways. First, he appears to have arrived at his decision to non-suit the plaintiff without hearing counsel on either side. The possibility of a non-suit was not discussed in argument and, as we were informed, the order which the learned judge made took counsel on both sides completely by surprise. We do not think that it is a judicial exercise of discretion to make an order of this kind without giving the parties affected an opportunity of being heard.

D An even more serious criticism in our view is that the learned judge non-suited the plaintiff—thereby giving him the opportunity of bringing fresh proceedings against the defendants—after he had already specifically drawn attention to the state of the plaintiff's pleaded case, and had invited counsel for the plaintiff to consider whether any amendment was desired. The plaintiff had, therefore, already had his chance of putting forward his claim against the defendants in the alternative way, and—not in ignorance, nor hastily, but deliberately through his counsel—had elected not to take advantage of the opportunity already afforded to him. To give him a second chance, thereby enabling him to harass the defendants by instituting fresh proceedings, would in our judgment be a grave injustice to the defendants in the circumstances of this case. It seems to us that much the same considerations apply to the question that arises now as apply when an application is made to this court for leave to amend a party's pleading, when that party has already been offered, and has refused, an opportunity of doing so in the court below. Such an application is not readily granted; and for similar reasons we do not think that a plaintiff should readily be granted the concession of a non-suit, when he has already had his chance to frame his case in an alternative way. In either case, as it seems to us, the overriding consideration is that in the public interest there should be an end to litigation.

E For these reasons, although the defendants have failed to satisfy us that under the rule it was not competent for the learned judge to non-suit the plaintiff, they are in our judgment entitled to succeed on this appeal on the ground that in the circumstances of this case he failed to exercise his discretion judicially by doing so. The appeal must therefore be allowed.

G We cannot leave this case, however, without venturing to offer the suggestion that consideration might well be given to the desirability of abolishing the power to non-suit in the county court, as it has been abolished in the High Court. Non-suit was a remedy suitable enough in an age when the plaintiff won or lost his case according to the way in which it was pleaded, and when no right of amendment existed such as exists today. Bearing in mind the right of discontinuance which is conferred by C.C.R., Ord. 18, and the abundant facilities for amendment provided under C.C.R., Ord. 15, we find it difficult to appreciate what object is served by preserving in the county court today the old common law remedy of non-suit, which we venture to think few practitioners of today fully understand.

Appeal allowed: judgment entered for defendants.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Horne, Engall & Freeman*, Egham, Surrey (for the defendants); *W. H. Thompson* (for the plaintiff).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod and Harman, L.J.J.),
April 7, 8, 9, May 11, 1959.]

Income Tax—Return—Incorrect return—Penalty—Treble the tax which he ought to be charged—Whether treble the total amount of tax payable for year of assessment or only treble the amount of tax evaded—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 25 (3) (a).

The interest on the defendant's Post Office Savings Bank account for the year ending with Apr. 5, 1952, was £51 5s. 9d. In the return of his income for the purposes of assessing him to income tax for the year 1952-53, which he signed on Apr. 19, 1952, and delivered to the Commissioners of Inland Revenue, he stated that his income from this source for the year was £18 6s. The commissioners, having discovered the understatement from other sources than the defendant, made an additional assessment on him in November, 1955, under Sch. D of £14 5s. for income tax at the standard rate on the difference between the true interest and the stated interest. In June, 1956, the commissioners brought an action claiming from the defendant under s. 25 (3) (a) of the Income Tax Act, 1952, the £20 fixed penalty and also "treble the tax which he ought to be charged under this Act", which sum they computed at £418 14s. 6d., being three times his income tax (viz., £125 6s. 6d., Sch. E, together with the £14 5s., Sch. D) for the year 1952-53.

Held: the Crown was entitled under s. 25 (3) (a) to judgment for £62 15s., i.e., a penalty of £20, and three times the tax (viz., £14 5s.) which the taxpayer ought to be charged, but with which he had not been charged by reason of his defective return; and the words "treble the tax which he ought to be charged under this Act" in s. 25 (3) (a) did not mean "treble the taxpayer's whole (properly) assessed tax for the relevant year."

A.-G. v. Till ([1909] 1 K.B. 694; [1910] A.C. 50) considered.

Decision of DIPLOCK, J. ([1958] 3 All E.R. 682) varied.

[As to the recovery of income tax penalties, see 20 HALSBURY'S LAWS (3rd Edn.) 717, para. 1441; as to their recovery before the General Commissioners, see *ibid.*, p. 718, para. 1444; and as to proceedings for penalties in the county court, see *ibid.*, para. 1442.]

For the Income Tax Act, 1952, s. 25 (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 37.]

Cases referred to:

- (1) *Lord Advocate v. McLaren*, (1905), 5 Tax Cas. 110; 28 Digest 104, *l*.
- (2) *A.-G. v. White*, (Mar. 3, 1931), unreported.
- (3) *A.-G. v. Johnstone*, (1926), 136 L.T. 31; 10 Tax Cas. 758; Digest Supp.
- (4) *A.-G. v. Till*, [1909] 1 K.B. 694; 78 L.J.K.B. 708; 100 L.T. 275; *reversd.* H.L., [1910] A.C. 50; 79 L.J.K.B. 141; 101 L.T. 819; 5 Tax Cas. 440; 28 Digest 103, 641.
- (5) *Re Hodson's Settlement, Brookes v. A.-G.*, [1939] 1 All E.R. 196; [1939] Ch. 343; 108 L.J.Ch. 200; 160 L.T. 193; Digest Supp.
- (6) *A.-G. v. Lloyds Bank, Ltd.*, (1934), 151 L.T. 268; *affd.* H.L., [1935] All E.R. Rep. 518; [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.
- (7) *A.-G. v. Adamson*, [1932] All E.R. Rep. 159; [1933] A.C. 257; 102 L.J.K.B. 129; 148 L.T. 365; Digest Supp.

Appeal.

This was an appeal by the plaintiffs, the Commissioners of Inland Revenue, from a judgment of DIPLOCK, J., given on Dec. 2, 1958, and reported [1958] 3 All E.R. 682.

- A By their specially indorsed writ the plaintiffs claimed from the defendant £438 14s. 6d. as a penalty payable under the Income Tax Act, 1952. Pursuant to s. 19 of the Act of 1952, the defendant delivered to H.M. Inspector of Taxes a statement, signed by him on Apr. 19, 1952, which purported to be a true and correct return in the prescribed form of all the sources of the defendant's income and of the amount derived from each source for the year ended Apr. 5, 1952,
- B this being the year preceeding the year of assessment, i.e., 1952-53. The return was not a true and correct return in that the defendant had understated the amount of his income from "interest on accounts and deposits in banks including Post Office and other savings banks", stating his income from an account at a Post Office Savings Bank to be £18 6s. when in fact it was £51 5s. 9d. The defendant's explanation for understating the amount of this income was
- C that he intended to transfer to savings certificates and other non-taxable funds any savings in excess of those which yielded £18 per year. When the understatement of income was discovered from the returns which the Post Office Savings Bank is required to make of interest which it has allotted to customers, an additional first assessment under Sch. D was made on the defendant, on Nov. 30, 1955, for the amount of the understated income the tax on which was £14 5s.
- D On Mar. 9, 1956, an assessment under Sch. E in respect of the year ended Apr. 5, 1952, was made on the defendant. At the date of the issue of the specially indorsed writ on June 13, 1956, assessments had been made on the defendant in respect of all the tax to which he was liable for the tax year 1952-53.

By reason of the incorrect return made by the defendant he became liable to forfeit, under s. 25 (3) of the Income Tax Act, 1952, the sum of £20 and

E "treble the tax which he ought to be charged" under the Act of 1952, and the commissioners claimed under s. 25 (3) a penalty amounting to £438 14s. 6d., being three times the amount of tax payable by the defendant for the year 1952-53, viz., £139 11s. 6d. (comprising £14 5s. Sch. D tax and £125 6s. 6d. Sch. E tax), plus £20.

- DIPLOCK, J., gave judgment for the plaintiffs for £20, holding that at the
- F time when the action was begun, no tax remained to be charged on the defendant, i.e., to be quantified by assessment on him, since the assessment had been made. The grounds of appeal were (i) that the judge was wrong in law and misdirected himself that the penalty imposed by s. 25 (3) (a) of the Income Tax Act, 1952, was a penalty of £20 and treble the tax to which at the date of the commencement of the proceedings for such penalty, the taxpayer ought to be, but has
- G not by reason of his default been, assessed; and (ii) that the penalty thereby imposed was a penalty of £20 and treble the whole of the tax to which the taxpayer was chargeable by direct assessment, but after taking into account any reliefs or allowances due to him, for the year of assessment in question.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), John Penny-cuick, Q.C., and A. S. Orr for the Crown.

- H The respondent taxpayer appeared in person.

Cur. adv. vult.

- May 11. LORD EVERSHED, M.R., read the following judgment of the court: The question arising on this appeal is apparently short and simple enough: it is the meaning of a few words in s. 25 (3) (a) and (b) of the Income Tax Act, 1952—" . . . treble the tax which he ought to be charged under this Act". But the full arguments of counsel for the Crown have at least made clear that not only the subsection but the whole fasciculus of sections, s. 18 to s. 30 inclusive, which form part of Chapter 2 of the Act, and which in large measure trace their descent through the Income Tax Act, 1918, from that of 1842, has in the course of 117 years and in greatly changed circumstances acquired an obscurity, and in some respects an artificiality, quite remarkable even in a taxing statute. As long ago as 1909, SIR HERBERT COZENS-HARDY, M.R., described the prototype of the subsection under review, s. 55 of the Act
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of 1842, as "ungrammatical and almost unintelligible". The language of that section has nevertheless been reproduced, substantially unchanged, in the two consolidating statutes of 1918 and 1952. We shall in the course of this judgment have occasion to refer to more than one of the problems which the present subsection and its fellows present, problems which (if they are soluble at all) it is fortunately unnecessary for us to solve.

It is the contention of the Crown that the words we have cited mean "treble the taxpayer's whole (properly) assessed tax for the relevant year". If that view be right, results and anomalies of an extravagant kind follow. Yet it is clear that the court (unlike the commissioners) has no dispensing power under the subsection. The remedy in the last resort, according to the Crown's argument, is found in the power of the commissioners or the Treasury (e.g., under s. 500) to mitigate or remit the penalty before or after judgment. It has indeed been urged on us that the Crown's practice has been consistent for over a century and that we should give judicial sanction to it, relying on the Treasury in the exercise of its statutory discretion to avoid harshness or injustice. We have no warrant to suggest that the Treasury's discretion has not at all times been most fairly and properly exercised, and certainly in the present case we can see no ground for sympathy with the respondent, who, being an officer in the Department of Customs and Excise, deliberately failed to make true and correct disclosure over many years of one source of untaxed income of his wife and himself, viz., the Post Office Savings Bank. Nevertheless, we venture to think that the results of the Crown's contention—particularly at a time when present rates of taxation may swell the penalty for a trifling mistake to almost astronomical figures—are most unsatisfactory however well the Treasury's discretion be exercised; and we express the hope accordingly that Parliament may find time to review the sections in question.

The facts of the case are themselves not free from obscurity, but for the purpose of this appeal they may not greatly matter. We have said that the respondent was and is a servant of the Crown employed in the Customs and Excise Department. His salary as such was taxable under Sch. E, and tax was levied at the source under P.A.Y.E. For the tax year 1952-53 this levy was £125 6s. 6d. He had for the same year disclosed in his income tax return the sum of £18 6s. for Post Office Savings Bank interest received by himself and his wife. It is not now in doubt that the true amount of such interest was £51 5s. 9d. As we have said, he had made similar understatements for a number of previous years. He has now been duly assessed for the year 1952-53 in the full sum of £51 5s. 9d. According to the writ in the action the full tax assessment for the year is £139 11s. 6d., viz., £125 6s. 6d. Sch. E tax in respect of his employment and £14 5s. "income tax Sch. D in respect of untaxed interest". In an earlier paragraph of the writ reference is made to the amount of £18 6s. which the respondent had disclosed. But the sum of £14 5s. represents arithmetically 9s. 6d. in the £ on £30—9s. 6d. being the appropriate rate of tax. From one of the documents in the case, containing a computation by the Crown of the amount of tax properly due from the respondent in respect of the difference between the sums received for Post Office Savings Bank interest and the sums disclosed, there appears against the year 1952-53 the item for bank interest "Assessed, say £21", a sum less by £30 than the true amount of such interest, and £14 5s. is shown as the amount of tax (at 9s. 6d. in the £) on this figure of £30. In the circumstances, it must, we suppose, be assumed for the purpose of this case that the respondent had been assessed and taxed in respect of Post Office bank interest on the sum of £21 but that, as later appeared, the true and correct amount of such interest for the year was £30 more, namely, £51. Even so, however, the claim made by the writ appears to be entirely at variance with the Crown's so-called practice, according to which he should now be charged the treble penalty not only on the P.A.Y.E. tax and not only on the tax on the excess income of £30, but on the full amount of the Post Office bank interest.

- A £51 odd—let alone on certain other income which appears from his return. For the purposes of this case, however, and in view of the conclusion which we have formed, it is sufficient to say that £14 5s. must be taken to represent the tax (at 9s. 6d. in the £) on the undisclosed amount of bank interest, namely, £30. It is nevertheless to be observed that the Crown's view of the true construction of the subsection which forms the second ground of appeal stated in the notice
- B in the present case is inconsistent with the claim in the writ at least in two respects: first, the claim was not confined to sums charged by direct assessment as it included P.A.Y.E. levy; second, £14 5s. was not the tax on the whole Post Office interest but only on the balance of £30 undeclared.

- We return now to the question of construction of s. 25 (3). The view of the learned judge was that the Crown's claim must be limited to £20 only. He was
- C of opinion that since before the issue of the writ the respondent had been assessed in the sum of £139 11s. 6d., viz., £125 6s. 6d. under Sch. E plus £14 5s., it could no longer be said that, at that date, there was any tax which the respondent "ought to be charged under the Act". It was also the judge's view, though this is not reflected in his decision, because of the opinion above referred to, that the essential phrase "the tax which he ought to be charged" is limited
- D to the tax for which he should be charged, but was not in fact charged on his income tax return as a result of his incorrect statement therein of the amount of bank interest—i.e., in figures, £14 5s. On this third view the Crown would be entitled to judgment (in addition to the sum of £20) for three times £14 5s., or £42 15s. The Crown's dissent from this view forms its first ground for the present appeal, as the notice shows.

- E We propose to consider the question first as a matter of construction of the Act, without reference to any decided cases; and then to see whether the conclusion at which we so arrive is affected by any decision binding on this court. It is necessary first to refer at some length to the group of sections to which we have already alluded.

- F Section 18 is the first of a series of sections under Chapter 2 with a cross-heading "Returns and assessment". That section provides:

"(1) It shall be the duty of every person who is chargeable to income tax for any year of assessment to give notice to the surveyor that he is so chargeable at or before the end of that year . . .

- "(2) If any person, without reasonable excuse, fails to give such a notice as aforesaid, he shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added
- H to the assessment."

Section 19 provides:

"Every individual, when required so to do by a notice given to him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a true and correct return in the prescribed form of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment, computed . . ."

I as therein provided; and I can pass over the proviso. Section 20 contains a similar provision relating to the current year's chargeable income, and I need not read that; or the supplemental provisions in sub-s. (2), sub-s. (3) and sub-s. (4), but I should perhaps add that there is at the end of sub-s. (4) a proviso as follows:

"Provided that the penalty inflicted upon any person proceeded against for not complying with this provision who proves that he was not chargeable to tax shall not exceed £5 for any one offence."

Section 21 provides:

" (1) Every person acting in any character on behalf of any incapacitated person or person not resident in the United Kingdom who, by reason of such incapacity or non-residence in the United Kingdom, cannot be personally charged under this Act, shall, whenever required to do so by a notice given to him by the surveyor, within the time limited by the notice and in any division in which he may be chargeable on his own account, deliver such a statement as in the last preceding section is described of the profits or gains in respect of which tax is to be charged on him on account of that other person, together with the prescribed declaration.

" (2) Where two or more such persons are liable to be charged for the same person—(a) one statement only shall be required to be delivered which may be made by them jointly, or by any one or more of them . . . "

and then there is a second provision, (b), which I need not read. Section 22 is a somewhat similar provision, which I can summarise by saying that it involves the obligation to deliver a list by persons in receipt of taxable income belonging to others containing a true and correct statement of all income and the names and addresses of the persons concerned, etc. Section 23 provides:

" Every person, when required so to do by a notice served on him by the surveyor, shall, within the time limited by the notice, prepare and deliver to the surveyor a list, in writing, containing to the best of his belief—(a) the name of every lodger or inmate resident in his dwelling-house; and (b) the name and ordinary place or residence of any such lodger or inmate who has any ordinary place of residence elsewhere at which he can be assessed . . . "

Section 24 I can again summarise as being related to returns as to the annual value of land. I come to s. 25. Subsection (1) provides:

" Any such lists, declarations, statements and returns as are provided for by the preceding provisions of this Chapter shall be in such form as the Commissioners of Inland Revenue shall prescribe, and in prescribing forms under this subsection the commissioners shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom."

Subsection (2) I can pass over, as it provides for a general declaration as regards profits under Sch. A, Sch. B, Sch. D or Sch. E. Subsection (3) (which is the vital subsection for the purposes of this appeal) is as follows:

" A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

It will be noticed that these penal provisions are *ipsis verbis* the same as these already once stated in s. 18. Subsection (4) reads:

" The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid."

Subsection (5) provides for some relief, for it contains a provision that if a person required to deliver a list (etc.) states the reasons for his inability to have done

A so he shall not be liable to the penalty if the commissioners are satisfied with his reasons and if he delivers within a further time "as perfect a list . . . as the nature of the case permits". I leave out sub-s. (6) and sub-s. (7).

Section 26 also I can summarise, as it relates to returns by persons coming to reside in a particular division. I must read s. 27 more fully. Subsection (1) is:

B "Every employer, when required to do so by notice from the assessor, shall, within the time limited by the notice, prepare and deliver to the assessor a return containing— (a) the names and places of residence of all persons employed by him; and (b) the payments made to those persons in respect of that employment . . ."

as provided in the rest of the subsection. I need not read the further provisions of that subsection, and I pass to sub-s. (2), which provides:

C "Any director of a company, or person engaged in the management of a company, shall be deemed for the purposes of this section to be a person employed."

Subsection (3) provides:

D "Where the employer is a body of persons, the secretary of the body, or other officer (by whatever name called) performing the duties of secretary, shall be deemed to be the employer for the purposes of this section: Provided that where the employer is a body corporate, that body corporate shall be liable to a penalty for failure to deliver a return in pursuance of this section as well as the said secretary or other officer."

E Section 28, having been repealed, I do not read. Section 29 (1) states:

F "Every person carrying on a trade or business who, in the ordinary course of the operations thereof, receives or retains money in such circumstances that interest becomes payable thereon which is paid or credited without deduction of income tax, and, in particular, every person carrying on the trade or business of banking, shall, if required to do so by notice from a surveyor, make and deliver to the surveyor, within the time specified in the notice, a return of all interest paid or credited by him as aforesaid during a year specified in the notice in the course of his trade or business or any such part of his trade or business as may be so specified, giving the names and addresses of the persons to whom the interest was paid or credited and stating, in each case, the amount of the interest."

G I can pass over the proviso to that subsection; and I can also omit a reading of the remainder of the section. Section 30 (which is the last of this series of sections) is:

H "The provisions of s. 25 of this Act with respect to the failure to deliver lists, declarations, statements and returns [and I interpose by way of reminder that that is the section with the provisions of which we are now concerned] shall apply to returns under the three last preceding sections."

Having regard to the repeal of s. 28 that should now read "s. 27 and s. 29" —the obligation to deliver lists of employees and what I for convenience call compendiously the bankers' obligation.

I Whatever other epithets the language of the sections or any of them may invite, it is impossible to acquit them of a considerable degree of repetition or overlapping and inelegance. The two parallel and independent penalties exigible by the General Commissioners on the one hand and by the court on the other, which are found in s. 25 (3), are found also in s. 18 (relating to the failure of persons chargeable to tax to give notice of chargeability): these same penalties are expressed in s. 25 (3) to be exigible on default in delivering a "true and correct statement or return" as required by any of s. 19 to s. 24 inclusive; further, by s. 30 the penalties under s. 25 are made applicable to the returns required by s. 27 and s. 29. Much more curious is the phrase at the end of s.

18 (2) repeated at the end of s. 25 (3), "and the increased tax shall be added to the assessment". To no part of the subsection was the use of the adjective "unintelligible" by SIR HERBERT COZENS-HARDY, M.R., more appropriate than to this baffling sentence. It was strongly contended by the Attorney-General that by the words "increased tax" was meant the amount of treble the tax (or less) which the commissioners are by s. 18 (2) and s. 25 (3) (b) entitled to forfeit. The argument finds support in the submission that otherwise the provisions of s. 25 (4) (at least in cases of proceedings before the commissioners) would be otiose notwithstanding the use therein of the word "also"; but perhaps more forcibly in the old statutory provisions (see, e.g., the Taxes Management Act, 1880, s. 21 (6)) that penalties exacted by the commissioners should be recoverable by way of their being made the subject of assessment. The contention involved the Attorney-General, however, in the concession that the word "penalty" in the penultimate line of s. 18 (2) and of s. 25 (3) meant only the fixed sum of £20—a concession very difficult to accept on more grounds than one, including the use of the same word "penalty" in s. 25 (5) where it would be virtually impossible so to confine it. The difficulties of interpretation of this perplexing sentence are much enhanced by the circumstance that s. 25 (3) might well, and s. 18 (2) almost inevitably would, apply to cases in which there had previously been no assessment at all. We have, however, come to the conclusion that the solution, if possible at all, of this particular problem cannot materially assist in providing the answer to the instant question. We, therefore, confine ourselves to observing that the difficulty created by the sentence mentioned may well illustrate the justice of the comment made in the Irish case later mentioned that amendments and additions have been made in the course of time to the original enactment without any proper appreciation of their effect; and certainly reinforces our earlier plea that Parliament should find time to consider the advantage of making penal provisions of a taxing statute reasonably intelligible to those who may be affected by them.

We return once more to the essential formula for present purposes "... the tax which he ought to be charged under this Act". We do not at all deny that the words are capable of the meaning which the Crown attributes to them, viz., the tax (i.e., the entire amount of tax) which ought to be charged, as distinct from the (smaller) amount, if any, which has in fact been charged by reason of the deficiency of the taxpayer's return. This, however, is not in truth the meaning attached to it by the Crown, which in practice omits income not taxed by direct assessment, but by deduction, with an exception, illustrated in this case, of income deducted under P.A.Y.E. (See the second ground of appeal). Moreover, no reference is made in the subsection to the year of assessment. The Crown seeks to overcome this difficulty by observing that any return must in the nature of things be related to a year: and if this were the only difficulty the answer might, we will assume, suffice. But there are other and far graver difficulties: for it is not in doubt (nor has the Attorney-General sought to deny or excuse it) that the Crown's contention involves anomalies so extravagant as to be shocking in a penal provision. We do not attempt an exhaustive list, but observe that the penalty is one which the court (according to the Attorney-General) is bound to exact without remission or mitigation and is so bound notwithstanding that the offence may be relatively trivial or even adverse to the taxpayer's interest. It is first to be noted that "tax" will include surtax as well as income tax at the standard rate—though surtax in any year is commonly payable in respect of a different year of assessment from income tax. It is true that the intrusion of surtax, not dreamt of in 1842, presents, on the third view above formulated, an inescapable difficulty in any case: for if "the tax which he ought to be charged" be limited to tax evaded by the incorrect return, such "tax" would include surtax; and there is no indication which year is intended nor whether the undisclosed income should, for penalty purposes, be treated as

A that part of the income which in the particular case attracts the highest rate of surtax.

We will next refer to the effect of the Crown's contention on a case arising under s. 21 (and similarly under s. 22) where one or more persons (and commonly it will be more than one) are bound to make returns of the taxable income of a third party. The Attorney-General expressly conceded that, in such a case, where
 B a statement incorrect in some respect had been made, each of the persons liable to make such a return would be liable to a penalty including a sum equivalent to three times his own personal tax liability—a penalty which would be liable to vary enormously as between one such person and another, both equally at fault, according to their own respective incomes. An escape from so apparently absurd and unjust a conclusion might be found by relating the tax penalty to that of the
 C person on whose behalf the return was made; but this means of escape was not embraced by the Attorney-General.

In this connexion the Attorney-General informed us, and the stated ground of appeal shows, that, according to the practice of the Treasury "the tax which the taxpayer ought to be charged" excluded tax deducted at the source other than P.A.Y.E.—by way of distinction from cases arising under para. 4 of Sch. 6
 D to the Act, to which we later refer. With all respect to the Attorney-General, we have failed to find any justification in the statute for the distinction: but assuming it to be well founded, it follows that a startling anomaly arises in point of liability between a taxpayer whose income is wholly or substantially directly taxable and one whose income is substantially derived from sources attracting tax deduction at the source—an anomaly which might well be thought
 E to run quite contrary to ordinary justice, giving (as it does) an immense advantage to the taxpayer whose income is wholly or substantially unearned.

Even more startling are the anomalies arising under s. 23, s. 27 and s. 29: for failure to return accurate lists under any of these sections will expose the defaulter to penalties wholly unrelated to the extent of the default, but calculable by reference to his own tax liability albeit fully discharged. Thus, in an extreme,
 F though not extravagant case, a company which failed to return an accurate list of employees would be liable to a penalty equivalent to three times its own tax liability, which might run into hundreds of thousands; and not only so, but the secretary of the company (who might be the person in fact responsible for the default) would also be liable for a penalty calculated on his own personal tax assessment—a sum enormously less than the corresponding liability of his
 G employer.

Nor is this by any means all. In the present case the Crown has expressly disclaimed any allegation of fraud against the respondent. Yet had the case been otherwise, i.e., had the default of the respondent been treated as dishonest, then
 prima facie s. 48 of this Act would have been applicable. Subsection (1) of that section provides:

H "Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has— (a) fraudulently changed his place of residence or fraudulently converted, or fraudulently released, assigned or conveyed any of his property: or (b) made and delivered any statement or schedule which is false or fraudulent: or (c) fraudulently
 I converted any of his property, which was chargeable [in the way there indicated]; or (d) been guilty of any falsehood, wilful neglect, fraud, covin, art or contrivance whatsoever, such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him: Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount

of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment ”; A

and sub-s. (2) contains a provision rendering a third party abetting or aiding such a fraudulent disclosure liable to a penalty of £500. It is to be noticed that the relevant words in the section differ somewhat from those in s. 25 (3); for the words in the former case are “ . . . the amount of the charge which ought to have been made upon him ”. It was the contention of the Crown that these words have, in effect, the same meaning as the language in s. 25 (3)—“ tax which he ought to be charged ”. None the less, the proviso in s. 48 makes it clear that, in cases under that section, only what we will for brevity call the excess tax is to be taken into account in assessing the liability. On that view it is, at the least, a startling proposition that the taxpayer’s penal liability in cases of fraud is very much less than his liability in the absence of fraud; the result being that it would be an advantage to the Crown to treat the rogue as an honest man. Dishonesty, it seems, is plainly indicated as the best policy for the taxpayer. B

It is convenient here to refer to two other provisions of the statute. The first is para. 4 of Sch. 6, applicable again to fraud—in this case in relation to a claim for tax relief. Sub-paragraph (1), so far as relevant, is as follows: C

“ A person who, in making a claim for or obtaining any relief to which this schedule relates, or in obtaining any certificate as aforesaid—(a) is guilty of any fraud or contrivance; or (b) fraudulently conceals or untruly declares any income or any sum which he has charged against or deducted from, or was entitled to charge against or to deduct from, another person; or (c) fraudulently makes a second claim for the same cause, shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income as if such claim had not been allowed ”; D

and again there is a sub-paragraph relating to a person abetting. It will be noticed that once again there is a variation in language—in this case it is “ the tax chargeable in respect of all the sources of his income . . . ”, a formula plainly apt (as the Scottish Court of Session has in fact held in *Lord Advocate v. McLaren* (1) ((1905), 5 Tax Cas. 110), later mentioned) to cover the total tax liability, without any exception for tax deducted at the source. E

Our second reference is to s. 49, applicable to a case where an increased assessment has been properly made and there has been any “ fraud, covin, art or contrivance ” on the taxpayer’s part; in which case his penal liability is “ treble the amount of the tax on the amount of the excess ”—a phrase which we assume to be intended as synonymous with the third possible construction above mentioned of the relevant words in s. 25 (3). F

We make no attempt to answer the question why there should be so much variation in the penal consequences of defaults—why fraud in one case (under s. 48) should be so much more lightly punished than fraud in another (under Sch. 6), and what is the exact place of s. 49 in relation to s. 19 to s. 24. There is, of course, much force in the Crown’s argument that if in s. 25 (3) Parliament had intended to limit the penal tax liability to what we have called the excess tax, it could or would naturally have resorted to the language used in s. 49 or the qualifying proviso of s. 48. On the other hand, the numerous and illogical variations in penalty produce in our view the result that no safe assistance can be got from the language of other sections of the Act in construing the words of s. 25 (3). G

We do not think that it is necessary or useful to refer to the corresponding provisions and the corresponding anomalies in the earlier legislation—save in one respect. Until 1923 and the passing of the Finance Act of that year, which by s. 23 (2) introduced what is now para. (a) of s. 25 (3), the penalty which the court had to exact, if proceedings were brought before it instead of the commissioners, was the fixed sum of £50 only. It is obvious, therefore, that the worst of the anomalies to which we have above referred did not arise before 1923. H

A even if the phrase "treble the tax which he ought to be charged" were construed as the Crown suggest, the commissioners were not bound to exact its full measure. The startling feature of the present legislation is that, however extravagant the result, the court is now bound to forfeit the full penalty and the Crown may to that end invoke s. 25 (3) even though the more appropriate section, according to the facts of the case, might appear to be s. 48 or s. 49—neither of which exacts, even though the case be one involving fraud, anything like so extreme a forfeit. The remedy of the subject is left to the power of the Treasury (or the commissioners) to mitigate the penalty or stop the proceedings under s. 500 or s. 55. As we have earlier said, we cannot think the result either just, sensible or satisfactory, however well and conscientiously the discretions be exercised.

C These then being the consequences of the Crown's contention on the construction of the subsection, are there other possible interpretations less extravagant in their results?

D DIPLOCK, J., avoided what he called the absurd and unjust consequences of the Crown's contention by holding that once the defaulting taxpayer had been duly and properly assessed (as was the case with the respondent before the issue of the writ) then it could no longer be said that he "ought to be charged" with the tax for which he had been assessed; in other words that, by the assessment, he had been charged and there was accordingly at the relevant date nothing left undone which ought to be done. We do not think that this can be right. It appears to us that the offence is committed either when the false return is received by the commissioners or when the time for making the return has expired. Subsequent events, whether assessment or payment, are irrelevant. In order to arrive at the correct figure which has to be multiplied by three, assessment is a necessary preliminary, and, therefore, if the judge be right the penalty, apart from the £20, could never be levied because there would never come into existence the basis for it. We add that, in the (unreported) case in the Irish Supreme Court of *A.-G. v. White* (2) decided on Mar. 3, 1931, the learned judges adopted this view and held accordingly that the proceedings to recover the penalty of £20 plus treble the tax under the corresponding legislation in Ireland were premature where there was no final assessment of the tax.

F There remains the judge's interpretation of the relevant words (the third view above indicated), viz., that "the tax which he ought to be charged" means what we have called the excess tax, i.e., the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make any return at all, the "tax which he ought to be charged" will, of course, be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income.

H It is no doubt true that if you speak of the "sum I ought to be charged" for an article which you have bought, you may be supposed to be referring to the true price of the article in contrast to the amount of the bill which you have in fact received. But where you have already had a bill (and more particularly when you have paid it) it would, we think, be more natural, if you wished to refer to the true price, to speak of "the sum I ought to have been charged"; and these, be it noted, are the words used in s. 48. So in a case arising under s. 25 where (as must not uncommonly be the case) the taxpayer has already been charged an assessed sum of tax and paid it and then, later, an undisclosed item of income is revealed, it would surely be more natural if the total tax liability was intended to refer to the tax which "he should have been charged". We do not forget that the word is "charged", not "assessed". On the other hand, the phrase is "ought to be charged" and not "is chargeable". Mr. Penneyeick was disposed to concede that if in ordinary speech you refer to your bills which ought to be

paid or the letters which you ought to write, you are in each case referring to those things only which at the time of speaking you have left undone. So as a matter of English it seems to us at least a legitimate interpretation of the phrase "tax which he ought to be charged" to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income.

We agree that, if such had been the intention, Parliament might have been expected to use the formula adopted in s. 49. We observe, however, that the provisions of s. 49 differ materially from those of s. 127 of the Act of 1842, which was its original ancestor: in that, as we understand the latter section, the taxpayer was relieved from any forfeit in the absence of any fraud, covin, art or contrivance, etc. At least it may equally be said that, on the Crown's view, recourse could have been had to the language found in para. 4 of Sch. 6, for, with all respect to the Attorney-General and the so-called practice of the Treasury, we find difficulty in apprehending the justification for excluding tax (or certain tax) deducted at the source from the penal consequences of s. 25 (3). We have referred already to the (as we think, significant though slight) variation in language between s. 25 (3) and s. 48. But in any case, as we have earlier stated, we do not think that any sufficiently safe guide to the construction of the relevant subsection can be extracted from the language of other parts of what has been called (in the Income Tax Codification Committee's Report, Cmd. 5131) the "flotsam and jetsam" of the penal provisions of the Act.

There is, however, one final matter which seems to us of some significance. It will be observed that, though (according to the Crown's contention) the tax referred to in the subsection means the entire tax liability (with the exception conceded) for the relevant year, there is in the subsection no reference whatever to the year or to any period of assessment. The Attorney-General's answer was that all the relevant sections must be treated as related to statements or returns for a particular tax year. But the answer is not, we think, satisfactory. A case may well be supposed in which an undisclosed item of income received in a particular year is revealed, say, two or three years later, when the taxpayer has long since discharged his liability, calculated on his defective return, for the year in which the undisclosed income was received. If the Crown's contention were correct you would, as we think, at least expect some language specifying the relevant year. We do not refer again to the surtax difficulty. But the point we are making is, we venture to think, more striking if applied to cases of failure to deliver lists of lodgers or of employees; for in those cases the taxpayer penalised will not have failed at any stage to pay all the tax for which he is chargeable. In such cases, which, then, is the relevant year—the year to which the list of lodgers or employees was intended to relate or the year in which the default in delivering the list occurred? If the interpretation which we are now suggesting be the true interpretation, then the absence of any reference to time or to any year of assessment is natural and appropriate; for the tax referred to is the tax in relation to a specific item or number of items not disclosed at a date or dates when disclosure should have been made. But over and above all these considerations we take, we confess, strongly the view that the interpretation now put forward most closely conforms to sense and justice. If an amount of tax has been evaded, then on disclosure the taxpayer is bound to pay it and is liable to a penalty of three times the amount of such tax. Where no tax has been evaded by the defaulting party, there is certainly no logic in relating the penalty to the tax liability he has faithfully discharged; and at least if the default persists, new demands may presumably be repeated with penal results on each occasion of default. We do not say that all anomalies are avoided, but we do say that they lose their absurd and extravagant character. Treating the matter, then, as *res integra*, we would conclude that the phrase "tax which he ought to be charged" has the limited significance which we have for brevity called "the excess tax". It remains to

A consider whether we are constrained to a different conclusion by authority binding on this court.

There has been no decision of any court directly on the point which we have to decide. It is said by the Attorney-General that the construction for which he contends has so far always been assumed; and if that is so, then it may fairly be said of those responsible that the way in which the discretions vested in the Treasury have been exercised has been such that the Crown's view has been generally accepted. The assumption was undoubtedly made by ROWLATT, J., in *A.-G. v. Johnstone* (3) ((1926), 10 Tax Cas. 758); but the Attorney-General concedes that he cannot for present purposes further rely on the dictum of that learned and experienced judge. Support for the Crown's view may also be derived from the text-books—see, for example, SIMON'S INCOME TAX (2nd Edn.), Vol. 1, p. 290, para. 417; though a contrary opinion is found in KONSTAM'S INCOME TAX (12th Edn.), para. 383. We have already referred to the Scottish case of *Lord Advocate v. McLaren* (1) (5 Tax Cas. 110); but that was concerned with the different language of para. 4 of Sch. 6. In this paucity of authority there remains, however, *A.-G. v. Till* (4) (reported in the Court of Appeal, [1909] 1 K.B. 694, and in the House of Lords, [1910] A.C. 50), and on this case, and most particularly on language of SIR HERBERT COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., in this court, the Crown have most strenuously relied.

It is first necessary to observe that *Till's* case (4) arose under the Income Tax Act, 1842, s. 55, when the penalty exigible by the courts was limited to £50. The question, therefore, before the court and the House of Lords in *Till's* case (4) was confined to this—whether Mr. Till was liable to forfeit £50. The relevant facts were that, having married a lady in whose favour the firm of solicitors of which he was the sole member had covenanted to pay an annuity of £200, Mr. Till had omitted in his relevant income tax return to include that annuity. Mr. Till's contention was—and it was the sole issue in the case—that s. 55 applied only to cases where the taxpayer had made no return for tax at all and did not, therefore, cover the case where, a return having been made, it later appeared not to have been a true and correct return. The considerable argument, as reported, turned on the effect of the words “as aforesaid”, which are found in s. 55. It was, however, one of Mr. Till's main contentions in support of his denial of liability (on which, as LORD LOREBURN, L.C., observed in the House of Lords, he had the misfortune to persuade not only himself but the Court of Appeal) that a contrary conclusion involved the absurd and extravagant result that the commissioners (though not the court) would be able to impose on a taxpayer who had made one omission, however insignificant, in his return, a penalty including treble his entire tax liability for the year. Since that view of the corresponding powers of the commissioners coincided with the consistent interpretation and practice of the Inland Revenue Department, counsel for the Crown were not concerned to challenge it either in the Court of Appeal or the House of Lords; and it was, therefore, assumed in argument throughout. The Court of Appeal accepted Mr. Till's argument and dismissed the action. In the course of his judgment, the Master of the Rolls (in support of the view which he took) said ([1909] 1 K.B. at p. 700):

“(4) The Act imposes a penalty on a false or fraudulent statement which is less severe than that which, on the other hypothesis, is imposed upon an honest mistake.”

FLETCHER MOULTON, L.J., said (*ibid.*, at p. 702):

“It seems a very startling proposition that the slightest inaccuracy in a statement should make its delivery a nullity. It is not in accordance with ordinary legislative usage, and I am of opinion that if the legislature had intended that this penal clause should have so far-reaching an effect it would have used very different language to express its intention. Moreover, the nature of the penalty raises a presumption that it relates to an absolute

non-delivery and not to errors in the statement delivered. It will be seen that the amount of the penalty is 'treble the duty at which such person ought to be charged', or, in other words, treble the duty on the whole assessment. That the measure of the penalty should be based on the duty on the whole assessment may be necessary and proper where there is a total failure to make any return whatever, but all justification for this course disappears when a return has been made and the only complaint is that it contains an inaccuracy."

If the matter had rested with the Court of Appeal decision, it might fairly be said that the acceptance by two of the judges of the Crown's present contention formed part of their rationes decidendi; though the decision would have been fatal to the Crown in the present case on other grounds. But the decision of the Court of Appeal was reversed in the House of Lords. It is true that none of the noble Lords expressed any dissent from the views expressed in the Court of Appeal on the words "tax at which he ought to be charged"—and LORD ATKINSON certainly may be said expressly to have indorsed them when he said ([1910] A.C. at p. 54):

"With all respect to the Court of Appeal, it would appear to me that, finding themselves confronted with this contention, they allowed themselves to be too much influenced by the quite natural repugnance which one must necessarily feel against adopting a construction of these enactments which would render the subject liable to those very heavy penalties if, while honestly endeavouring to furnish a correct statement according to his lights, he made some mistake or was guilty of some error in estimating what his gains and profits amounted to."

It is, however, plain that such views could by no possibility be regarded as constituting a ground for the decision of the House. The validity of those views was, as we have said, assumed throughout; and their only relevance in the House was whether, assuming their validity, they sufficed to defeat the Crown's claim. In the circumstances, these views cannot, in our judgment, have any binding authority. At best they are dicta, deserving due weight as such.

This view of the present effect in the circumstances of the opinion expressed by SIR HERBERT COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J. (above quoted) is supported by the case in this court of *Re Hodson's Settlement, Brookes v. A.-G.* (5) ([1939] 1 All E.R. 196). In that case FARWELL, J., at first instance had felt himself bound by the decision of this court in an earlier case of *A.-G. v. Lloyds Bank, Ltd.* (6) ((1934), 151 L.T. 268) in the course of which this court had held that a still earlier case in the House of Lords of *A.-G. v. Adamson* (7) ([1932] All E.R. Rep. 159) had laid down certain principles which, when applied to the deed with which the court was concerned (as the court construed it) in *A.-G. v. Lloyds Bank, Ltd.* (6), produced a result which he, FARWELL, J., thought it his duty to follow in *Hodson's* case (5). But in the case last-mentioned, this court pointed out that the construction of the relevant deed in *A.-G. v. Lloyds Bank, Ltd.* (6) which this court had accepted had been shown by later cases in the House of Lords to have been incorrect: as CLAUSON, L.J., observed in reading the judgment of the court ([1939] 1 All E.R. at p. 203):

"... and that means that the principles enunciated in the judgments in this court, though no doubt entitled to the most serious consideration, have been formulated in regard, not to the correct, but to a hypothetical, and in fact erroneous, view of the meaning and effect of the material deed. In our judgment, this circumstance leaves it open to this court to refuse to accept the stated principles as necessarily correct."

So in the present case it is equally open to the court not to accept as necessarily correct the views expressed in *Till's case* (4) of the construction of the formula "the tax which he ought to be charged" which were applied to support the

A erroneous conclusion of the effect of s. 55 of the Act of 1842. And in assessing the weight of these views it is essential to bear in mind that the question of construction with which we are concerned was not an issue in the case; not only so, but it was never argued at any stage, the interpretation which was assumed being adopted by both sides—for different reasons—as that most suited to their respective interests.

B There is, therefore, in our judgment, no authority which requires us to reject the interpretation of the relevant language of s. 25 (3) which, independently of authority, we regard as the right one. The result is that the contention which the Crown has put forward on the appeal must, in our judgment, be rejected. But since we have been unable to accept the construction most favourable to the respondent on which the learned judge founded his judgment, we think the order
C made by him should be varied by substituting for the sum of £20 the sum of £62 15s. As we understand that the Crown has agreed in any event to pay the costs of the appeal, there will be an order to that effect also.

Appeal partly allowed. Leave to appeal to the House of Lords granted.

Solicitor: *Solicitor of Inland Revenue (for the Crown).*

D [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

E

GREEN v. RUSSELL (MC CARTHY AND OTHERS THIRD PARTIES).

F [COURT OF APPEAL (Hodson, Romer and Pearce, L.J.J.), April 22, 23, 24, May 14, 1959.]

G *Fatal Accident—Damages—Assessment Deductions from damages—“Any sum paid or payable . . . under any contract of assurance”—Policy taken out by employer to insure against injuries to or death of employee—Employee having no contractual right to receive benefit although a reasonable expectation of benefit—Employee and employer killed in fire and policy moneys paid by employer’s personal representative to employee’s administratrix—Whether amount of benefit deductible from damages payable to administratrix by employer’s personal representative—Fatal Accidents (Damages) Act, 1908 (8 Edw. 7 c. 7), s. 1.*

H R., an employer, took out an insurance policy, described as a personal accident group policy, with the Y. company. The policy, having recited “whereas [R.] is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his sustaining accidental bodily injury”, provided that, if any insured person should sustain bodily injury resulting in death, Y. company would pay the sum insured which was set out in a schedule to the policy. It was a condition of the policy that “the company shall be entitled to treat the insured as the absolute owner of this policy . . . and the receipt of the insured or the insured’s legal representative alone shall be an effectual discharge”. R. paid the premiums on the policy.
I G., an employee of R., was one of the insured persons under the policy and by it R. was insured for £1,000 in the event of G.’s death from bodily injury. The existence of the policy was known to G. and the other employees of R., so that they had a reasonable expectation of benefit for their dependants should they be killed, but they had no enforceable right at law or in equity

to receive any benefit under the policy. As a result of a fire at the premises where G. was employed by R., both G. and R. died. In an action by G.'s mother, as administratrix of his estate, under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, claiming damages against the personal representative of R. for R.'s negligence in causing the fire, liability was admitted and damages were agreed, apart from any question of deduction of insurance moneys therefrom, at £1,300. The Y. company paid to R.'s personal representative in respect of G.'s death £1,000 under the policy. R.'s personal representative had paid or had decided to pay this sum to G.'s mother. The question arose whether the £1,000 should be deducted from the agreed damages as being a benefit arising on the death of G. or was not so deductible by virtue of s. 1 of the Fatal Accidents (Damages) Act, 1908, whereby "any sum paid or payable on the death of the deceased under any contract of assurance" was not to be taken into account.

Held: although neither G. nor his administratrix had any right at law or in equity to claim under the policy, yet the £1,000 was a sum paid or payable under a contract of assurance within s. 1 of the Fatal Accidents (Damages) Act, 1908, and was not deductible in assessing the damages recoverable for G.'s estate for the following reasons—

(i) (per HODSON and ROMER, L.JJ.) s. 1 of the Act of 1908 extended to payments of policy moneys contractually made to or on behalf of or for the benefit of employees or dependants and was not limited to payments made directly to them (see p. 533, letter F, post); in the present case the policy had been maintained by R. for the benefit of members of his staff, and the £1,000 policy moneys paid by R.'s personal representative to the estate of G. were within s. 1, though they were not paid in pursuance of enforceable right.

(ii) (per PEARCE, L.J.; HODSON and ROMER, L.JJ., dissenting from this reason) the expression "paid or payable on the death of the deceased under any contract of assurance" in s. 1 was descriptive of the sum itself and did not import that the sum was payable to G.'s estate under the contract of assurance (p. 535, letters D and E, post; cf., p. 532, letters G and H, and p. 533, letter B, post).

Bowskill v. Dawson ([1954] 2 All E.R. 649) considered.

Dicta of DENNING, L.J., in *Smith v. River Douglas Catchment Board* ([1949] 2 All E.R. 179) and *Drive Yourself Hire Co. (London), Ltd. v. Strutt* ([1953] 2 All E.R. 1475), as regards a right at common law to claim sums under a contract to which the claimant was not a party, not followed.

Dicta of VISCOUNT HALDANE, L.C., in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* ([1915] A.C. at p. 853) and of LORD GREENE, M.R., in *Re Schebsman* ([1943] 2 All E.R. at p. 770) applied.

Decision of ASHWORTH, J. ([1958] 3 All E.R. 44) affirmed on different grounds by HODSON and ROMER, L.JJ., and on the same ground by PEARCE, L.J.

[As to deductions from damages claimed under the Fatal Accidents Acts, see 23 HALSBURY'S LAWS (2nd Edn.) 698, 699, para. 986; and for cases on damages recoverable under the Fatal Accidents Acts, see 36 DIGEST (Repl.) 220-225, 1159-1194.]

As to the rights of strangers to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 66, 68, paras. 110, 114; and for cases, see 12 DIGEST (Repl.) 45-51, 227-278.

For the Fatal Accidents (Damages) Act, 1908, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 10.]

Cases referred to:

(1) *Bowskill v. Dawson*, [1951] 2 All E.R. 649; [1955] 1 Q.B. 13; 3rd Digest Supp.

- A (2) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest (Repl.) 223, 1191.
- (3) *Jenner v. Allen West & Co., Ltd.*, ante, p. 115.
- (4) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- B (5) *Drive Yourself Hire Co. (London), Ltd. v. Strutt*, [1953] 2 All E.R. 1475; [1954] 1 Q.B. 250; 3rd Digest Supp.
- (6) *Bourne v. Mason*, (1669), 1 Vent. 6; 2 Keb. 454, 457, 527; 86 E.R. 5; 12 Digest (Repl.) 45, 236.
- (7) *Price v. Easton*, (1833), 4 B. & Ad. 433; 1 Nev. & M.K.B. 303; 2 L.J.K.B. 51; 110 E.R. 518; 12 Digest (Repl.) 45, 238.
- C (8) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest (Repl.) 284, 1754.
- (9) *Vandepitte v. Preferred Accident Insurance Corp. of New York*, [1932] All E.R. Rep. 527; [1933] A.C. 70; 102 L.J.P.C. 21; 148 L.T. 169; Digest Supp.
- (10) *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman*, [1943] 2 All E.R. 768; [1944] Ch. 83; 113 L.J.Ch. 33; 170 L.T. 9; 2nd Digest Supp.
- D

Appeal.

The defendant appealed against the decision of ASHWORTH, J., given on July 11, 1958, reported [1958] 3 All E.R. 44, that a sum of £1,000 paid to the defendant under a contract of insurance on the death of the plaintiff's son and being paid by the defendant to the plaintiff, should not be deducted from the damages payable by the defendant to the plaintiff under the Fatal Accidents Acts, 1846 to 1908 and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of the plaintiff's son. The facts are set out in the judgment of ROMER, L.J.

- F *M. D. Van Oss* for the defendant.
Marven Everett, Q.C., and *J. Ritchie* for the plaintiff.

Cur. adv. vult.

May 14. The following judgments were read.

- HODSON, L.J.: I have had the advantage of reading the judgment which ROMER, L.J., is about to deliver. I agree entirely with that judgment and the reasons which he will give. I only wish to emphasise that those reasons are applicable to this particular case and I do not wish to be taken as going further than ROMER, L.J., in answering the question left open by this court in *Bouskill v. Dawson* (1) ([1954] 2 All E.R. 649).
- G

- ROMER, L.J.: This is an appeal from an order of ASHWORTH, J., under which the plaintiff was awarded the sum of £1,300 against the defendant in an action brought under the Fatal Accidents Acts, 1846 to 1908. The plaintiff sued as the administratrix of her son, Alfred Edward Green, who was, at the time of his death, employed as an assistant architect by Arthur Henry Russell, and the defendant is Mr. Russell's personal representative.
- H

- The facts are not in dispute. Mr. Russell was an architect and had office premises at 11, Duke Street, Bermondsey. He and Mr. Green and other employees of Mr. Russell worked at these premises. On June 6, 1955, there was a disastrous fire at the premises which caused the deaths of both Mr. Green and Mr. Russell. As a result of this the plaintiff started the present proceedings. The defendant admitted liability but took third-party proceedings, which were settled out of court, and this court is not concerned with them. It was agreed between the plaintiff and the defendant that the sum to be awarded as damages to the plaintiff should be £1,300, but subject to an issue which was argued before the learned judge, and which is the subject of the present appeal.
- I

The point arises in this way. In the year 1951 Mr. Russell took out a group accident insurance policy with the Yorkshire Insurance Co., Ltd. in respect of certain members of his staff, including Mr. Green. The accident which caused the death of Mr. Green was covered by the policy in the sum of £1,000, and following on his death a claim for this amount arose and was met by the company. The sum was paid to the defendant as representing the estate of her husband, who was "the insured" under the policy. The question is whether this sum of £1,000 (which has been or is in the course of being paid over by the defendant to the plaintiff) falls to be deducted from the agreed damages of £1,300 by virtue of the provisions of s. 1 of the Fatal Accidents (Damages) Act, 1908. The learned judge held that the sum was not deductible, and it is against that decision that the defendant has appealed.

The learned judge arrived at certain findings of fact which are relevant to the issue now before us in certain of its aspects, and he expressed them in the following terms ([1958] 3 All E.R. at p. 47):

"... it is, to my mind, plain that the terms of their [namely, the employees named in the policy] employment did not include any provision in regard to the policy. There was nothing in these terms which resembled the provisions contained in the booklet issued by the employers in *Bowskill v. Dawson* (1) ([1954] 2 All E.R. 649). On the other hand, I think that the existence of the policy was known to Mr. Russell's employees in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed. I should perhaps add, in view of a point taken in the course of the argument in reply to counsel for the defendant, that I can find nothing which would justify the inference that the possibility of benefit under the policy affected the employees' attitude in regard to their employment; there was nothing to show that they refrained from giving notice or from asking for an increase in salary in consideration of the benefits which might come to them from the policy, nor was there anything to show that Mr. Russell undertook an obligation to maintain or renew the policy."

These findings of the learned judge were not challenged before us by either side, and it follows from them, in my judgment, that the £1,000 now in question would clearly have to be brought into account by the plaintiff, as a benefit arising out of her son's death, against the loss which she has sustained by reason of his death unless she is able to rely on s. 1 of the Fatal Accidents (Damages) Act, 1908 (*Baker v. Dalgleish S.S. Co., Ltd.* (2), [1922] 1 K.B. 361, *Jenner v. Allen West & Co., Ltd.* (3), ante, p. 115).

Section 1 of the Act of 1908 is as follows:

"In assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act."

As the result of this appeal depends, in my judgment, primarily on the terms of the policy which Mr. Russell effected with the Yorkshire Insurance Co., Ltd., I will refer now to its provisions in some little detail. It is described as a personal accident group policy, and has a recital:

"Whereas the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his sustaining accidental bodily injury as hereinafter provided and by a proposal and declaration which shall be the basis of this contract and be deemed to be incorporated herein has applied to the company and has paid or agreed to pay the premium as consideration for such insurance during the period

- A of insurance or during any period for which the company may accept payment for the renewal of this policy."

Then the policy witnessed:

- B "That subject to the terms of exceptions and conditions contained herein and of any indorsement hereof if at any time during the currency of this policy any insured person shall sustain bodily injury caused by violent accidental external and visible means and such injury shall as the direct sole cause thereof and independently of all other causes within three calendar months from the occurrence thereof: Section A:—Result in death the company shall pay the sum insured stated against section A in the schedule. Section B:—Result in the loss by physical severance of one or both hands or one or both feet or the complete and irrecoverable loss of sight of one or both eyes the company shall pay the sum insured stated against section B in the said schedule. Section C:—Totally disable the insured person from engaging in or attending to his usual occupation but shall not entitle him to the sum insured under section B the company shall pay for such total disablement the sum insured per week stated against section C in the said schedule. Section D:—Partially disable the insured person from engaging in his usual occupation but shall not entitle him to the sum insured under section B the company shall pay for such partial disablement the sum insured per week stated against section D in the said schedule."

- E Then there follow a proviso and exceptions to which I need not refer. Then certain conditions are stated. It says:

"This policy and the schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this policy or of the schedule shall bear such specific meaning wherever it may appear."

- F Then there follow eight conditions of which I need mention only condition 5 and condition 8. Condition 5 provides:

- G "The company shall be entitled to treat the insured as the absolute owner of this policy and shall not be bound to recognise any equitable or other claim to or interest in the policy, and the receipt of the insured or the insured's legal representative alone shall be an effectual discharge."

Condition 8 provides:

- H "The due observance and fulfilment of the terms conditions and indorsements of the policy in so far as they relate to anything to be done or complied with by the insured or any insured person and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

- I Then under the schedule to the policy the insured is described as "Arthur H. Russell". Certain dates then appear, including dates of the period of insurance, and the renewal date. Then follows a list of the insured persons, and they include Mr. Russell himself. Opposite the name of each insured person under sections A, B, C, D, and E respectively, there are sums mentioned, some capital and some weekly sums, which are payable on the happening of the insured risks. Then it is stated:

"The weekly benefits under sections C and D are payable collectively for one hundred weeks."

The first premium is stated to be £24 18s. 9d., and the annual premium is the same amount. Then there are some indorsements to the policy, and I need refer only to two, both of them dated Sept. 7, 1951. The first one states:

"It is hereby declared and agreed that in addition to the weekly compensation payable under sections C and D the company will reimburse the medical expenses necessarily incurred by any insured person up to an amount not exceeding fifteen per cent. of such weekly compensation."

The other indorsement of the same date says:

"Notwithstanding anything herein contained to the contrary it is hereby declared and agreed that the following section is added to the policy: Section E—Permanently and totally disable the insured person from engaging in business of any kind but shall not entitle him to the sum insured under section B then on the expiration of one hundred weeks from the date of such injury the company shall pay the sum insured stated against section E in the schedule."

The learned judge decided the question in issue in the plaintiff's favour mainly on the ground which he expressed as follows ([1958] 3 All E.R. at p. 49):

"In my judgment, the expression 'paid or payable on the death of the deceased under any contract of assurance' is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover, I think that force is lent to this view by the double use of the word 'any'; any sum, any contract of insurance."

The plaintiff had further contended that Mr. Green and the plaintiff, as his personal representative, had a right enforceable in equity to receive payment of benefits under the policy, and submitted alternatively that Mr. Green and the plaintiff had contractual rights at common law in relation to the policy which the courts would enforce. The learned judge rejected the first of these contentions, but did not decide the second. Both of them are raised before us by a respondent's notice which we gave the plaintiff leave to introduce at the close of the defendant's argument.

I think that it is convenient at the outset to consider whether Mr. Green in his lifetime had any legal or equitable interest in the moneys which would become payable under the policy on his death. The contention that he had a legal interest was founded on the submission, as stated by the learned judge in his judgment ([1958] 3 All E.R. at p. 47):

"... that inasmuch as the sums payable under the policy were in the light of the recital paid for the benefit of (inter alios) Mr. Green, he or his personal representatives had a right at common law to claim the sums even though he was not a party to the contract."

This view, on which the learned judge found it unnecessary to express a concluded opinion, is supported by passages in the judgments delivered by DENNING, L.J., in *Smith v. River Douglas Catchment Board* (4) ([1949] 2 All E.R. 179) and in *Drive Yourself Hire Co. (London), Ltd. v. Strutt* (5) ([1953] 2 All E.R. 1475) respectively. In both those cases the lord justice, after a review of the authorities dealing with the matter, accepted as still surviving the principle that a person interested can sue on a contract expressly made for his benefit*—and that apart altogether from s. 56 of the Law of Property Act, 1925, on which the plaintiff in the present case does not rely. As is pointed out in CHITTY ON CONTRACTS (21st Edn.), Vol. 1, at p. 62, DENNING, L.J., did not, when reviewing the earlier decisions, make any reference to *Bourne v. Mason* (6) (1669), 1 Vent. 6) or to *Price v. Easton* (7) ((1833), 4 B. & Ad. 433) in both of which cases it was held in effect that a stranger to a contract cannot sue on it. Had these decisions been present to the lord justice's mind, it is possible that they might have affected his opinion on the matter. However that may be, there is authority binding on this court which, in my judgment, precludes us from deciding the point now under

* Compare *Mulland Silvanus, Ltd. v. Scruttons, Ltd.* (p. 289, ante).

A consideration in the plaintiff's favour. In *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (8) ([1915] A.C. 847) the appellants brought an action for breach of a contract made between the respondents and a third party which contained terms as to the re-sale of goods of the appellants' manufacture. It was held that the contract was unenforceable at the suit of the appellants. VISCOUNT HALDANE, L.C., said (*ibid.*, at p. 853):

B "My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in *personam*."

C So also in *Vandepitte v. Preferred Accident Insurance Corp'n. of New York* (9) ([1932] All E.R. Rep. 527), LORD WRIGHT, in delivering the judgment of the Judicial Committee, said (*ibid.*, at p. 532):

D "No doubt, at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds";

and he cited the above passage from LORD HALDANE's speech in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (8). Accordingly, on the authorities as they stand, it seems clear to me that Mr. Green had no right at common law to claim under the contract of insurance into which the company entered with Mr. Russell, and for which Mr. Green himself gave no consideration.

E The next question then which arises is whether Mr. Green had an equitable interest in the policy, and in the sum which was paid on, and in respect of, his death. The plaintiff contends that Mr. Russell constituted himself a trustee for the various employees (including Mr. Green) named in the schedule to the policy in respect of the benefits attributable to each of them respectively. The learned judge rejected this contention and, in my opinion, rightly so. The F suggestion that Mr. Russell assumed the position and obligations of a trustee was based primarily on the recital to the policy which I have already read and will not read again. I take the following definition of a trust from UNDERHILL'S *LAW OF TRUSTS AND TRUSTEES* (10th Edn.), p. 3:

G "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust."

H In my judgment no such conception as that described by SIR ARTHUR UNDERHILL arises from the recital to the policy. An intention to provide benefits for someone else, and to pay for them, does not in itself give rise to a trusteeship; and yet that is all that emerges from the recital. Nor does the judge's finding that the existence of the policy was known to the employees in such a manner as to create in them a reasonable expectation of benefit affect the matter. There was nothing to prevent Mr. Russell at any time, had he chosen to do so, from surrendering the policy and receiving back a proportionate part of the premium which he had paid. Nor was he under any obligation to pay the renewal premiums each year. The truth is that the benefits payable in pursuance of the policy were sums which the company would become contractually liable to Mr. Russell to pay if the insured risks matured; and as LORD GREENE, M.R., said in *Re Schebsman, Ex p. Official Receiver, Trustee v. Cargo Superintendents (London), Ltd. & Schebsman* (10) ([1943] 2 All E.R. 768 at p. 770) to which the learned judge referred ([1958] 3 All E.R. at p. 50):

"It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third."

Apart from the recital in the policy, the plaintiff relied to some extent on a letter which Mrs. Russell's solicitors wrote to her solicitors on June 16, 1955. It was suggested that this letter recognised the existence of a trust affecting the £1,000 in question in favour of Mr. Green's estate. In my judgment no such significance can be attributed to this letter. The writer of the letter was, in my opinion, inaccurate in saying that under the policy the £1,000 "would appear to be payable to the estate of the above named [A. W. Green deceased] in consequence of his death", but there is no doubt but that part at least of Mr. Russell's intention in effecting the policy was to secure benefits to his employees on the happening of certain contingencies and the object of that letter was to carry this intention into effect. The annual payment of premiums by Mr. Russell on which the plaintiff placed some reliance, was also referable to such intention and is quite insufficient, as I think, to support the conclusion that Mr. Russell had assumed the obligations of a trustee in relation to the policy.

It follows, therefore, that Mr. Green had, in my judgment, no right, either at law or in equity, to claim under the policy; and the only question which remains is whether, nevertheless, the plaintiff, as Mr. Green's administratrix and dependant, can on other grounds claim exemption from accountability for the £1,000 by virtue of s. 1 of the Act of 1908. The question in general whether sums which are paid under a contract of insurance on an employee's death, and in respect of which the employee had no more than an expectation of benefit which in fact materialises, fall within the Act was left open by this court in *Boveskill v. Dawson* (1). It was unnecessary to decide the point in that case because the court held that the employees had an equitable interest in the policy moneys there in question, and that such an interest was sufficient to attract the operation of the Act of 1908. In my opinion it is not necessary (even if it were possible) to answer the question in its general form in the present case; for in my judgment the plaintiff's rights fall to be determined mainly on a consideration of the terms of the policy which Mr. Russell effected with the company, though the judge's finding, as to the employees' knowledge of the policy and of their possible benefits under it is, perhaps, of some relevance.

Counsel for the plaintiff relied principally before us on the ground which commended itself to the learned judge and to which I have already referred. Section 1, said counsel for the plaintiff, is descriptive of a particular category of money, namely, money paid or payable on the death of the deceased under any contract of assurance or insurance. The submission is that once a sum representative of that category is paid it bears, as it were, a label, and is thenceforth identifiable in the same way as, for example, a piece of jewellery would be. Therefore, it is said, on payment by the insurance company to the defendant of the £1,000 in question it became irrevocably stamped as a s. 1 payment notwithstanding that under the contract it was neither paid nor payable to Mr. Green or his estate, with the result that if by any means it should subsequently be received by the plaintiff she could claim the statutory exemption for it which is conferred by the Act. For myself I find some difficulty in accepting this proposition. On the hypothesis that neither Mr. Green nor his estate had any legal or equitable title to or interest in the £1,000, it is clear that the sole legal and beneficial ownership of this sum would have become vested in Mr. Russell had he survived. Supposing that he had put it on deposit account at a bank, enjoyed the interest on it during his life, and then bequeathed it by will to the plaintiff, then, according to the plaintiff's argument, on Mr. Russell's death the £1,000 received by the plaintiff would be within the scope of s. 1. It is, of course, true

A that in such circumstances the plaintiff would not have to give credit for it, if only because the bequest might well not have been made by Mr. Russell when she claimed her damages; but I have used the illustration for the purpose of testing the "labelling" theory, and in my opinion the money receivable by the plaintiff in the events supposed would be a legacy and nothing else. The theory would also lead to great complication and difficulty where insurance money passed through several hands before finally reaching the estate of the deceased employee or his dependants, or where the insured, as legal owner of the money, invested and reinvested it. As I say, therefore, I am unable for myself to accept this proposition of the plaintiff.

I am, however, of opinion that the plaintiff is entitled to the benefit of the Act of 1908 for a different reason. As I ventured to observe in *Bowskill v. Dawson* (1), s. 1 leaves something to the imagination. It envisages the payment of money on the death of the deceased under an insurance contract, but is silent as to the identity both of the payer and of the payee. The payer would normally be the insurer having regard to the words "paid under any contract of assurance or insurance". As to the payee, it seems clear that as the payment is relevant to the assessment of damages under the Fatal Accidents Acts, 1846 to 1908, the payee or payees envisaged by the section must mean the estate or dependants of the deceased employee. Now if the payments contemplated by the section were to the estate or dependants direct then, as it seems to me, the plaintiff in the present case could not succeed; for the section is dealing with sums paid or payable "under" a contract of insurance, and under the contract into which Mr. Russell entered with the Yorkshire Insurance Co. the £1,000 was payable and was paid to the defendant, and not to the plaintiff. It was, indeed, argued for the plaintiff that the company could have paid the money to the plaintiff direct, and then called on the defendant to give them a receipt for it under condition 5. I do not accept this, however, for "the insured" under the contract and the person who paid all the premiums was Mr. Russell and no one else. Nevertheless I do not think that s. 1 was envisaging only payments made directly to the employees or their dependants, but extends to payments contractually made to or on behalf of or for the benefit of the employees or dependants.

In *Bowskill v. Dawson* (1) ([1954] 2 All E.R. 649) payments were held to be within the Act of 1908 which were made by the insurers to trustees on behalf of the employees; and in my opinion it would be within the language of the section, and the general sense of the legislation, to hold that if sums are received by an employer under a scheme which was designed for the benefit of the employees, but without conferring any enforceable right on them, and he pays the sums over to the estates or dependants of the men when the risk matures, then the provisions of the Act apply. That the policy which Mr. Russell effected for members of his staff in 1951 and thereafter maintained was intended by him to benefit those members is not open to question. The recital of the policy expressly reveals such an intention. The schedule mentions the members concerned by name, and specifies the capital or weekly sums payable in respect of each of them on the happening of the insured contingencies. The weekly sums payable in respect of each "insured person" are described in the schedule as "the weekly benefits". Sections C and D of the policy refer to the insured persons in terms of entitlement, as also does one of the indorsements dated Sept. 7, 1951. Another indorsement of the same date provides that the company "will reimburse the medical expenses necessarily incurred by any insured person" up to a prescribed amount. In these circumstances it is clear that part, at least, of Mr. Russell's intention in effecting and maintaining the policy was to benefit his employees, and the defendant has now implemented that intention in favour of Mr. Green's estate. It would, in my judgment, be an undue restriction on the language used in s. 1 to hold that it does not apply to the terms and

provisions of Mr. Russell's policy, and to the facts of the present case. In my opinion the section does apply, and I would accordingly dismiss the appeal.

PEARCE, L.J.: In this case the defendant, Mrs. Russell, received £1,000 from the Yorkshire Insurance Co. as a result of Mr. Green's death and paid it over, or is in the course of paying it over, to the plaintiff, Mrs. Green. For the defendant it is contended by counsel that the £1,000 so paid to the plaintiff must be taken into account and deducted in assessing the damages payable to the plaintiff under the Fatal Accidents Act, 1846, in respect of Mr. Green's death. The £1,000 is not, he argues, excluded from being so taken into account by the Fatal Accidents (Damages) Act, 1908, since it is not "any sum paid or payable on the death of the deceased under any contract of assurance or insurance". Admittedly the £1,000 paid by the insurance company to the defendant came within that definition; but thereby payment under the contract was exhausted, and the payment made by the defendant to the plaintiff did not constitute a payment under any contract of insurance. It was, he argues, a payment made by the defendant purely of her own volition. It is assumed for the purposes of this argument that the learned judge was right in holding that (whatever her moral claims might be) the plaintiff had no enforceable right to the £1,000 in law or in equity.

The policy is a personal accident group policy. It provides for various benefits for various persons in the event of accident. By its form it is clearly intended as a means whereby one policy holder can secure such benefits for several persons, the policy holder being the person to whom the insurance company looks for payment of premiums, and the person whom it is entitled to treat as the absolute owner and as the recipient of the various benefits arising under the policy.

The policy starts with the recital:

"Whereas the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his sustaining accidental bodily injury as hereinafter provided . . ."

I read the word "secure" in the context as meaning to provide or obtain for the insured person. I do not accept the contention that the word means "obtain for himself the money so that it will be safely available if and when he himself of his own volition wishes to benefit the insured persons". The use of the words "secure to" any insured person indicates an intention that the insured person shall certainly receive it. The policy then provides that if any insured person shall sustain bodily injury caused by accident, and this results in death "the company shall pay the sum insured stated against section A in the schedule". The sum stated against Mr. Green's name in section A in the schedule (which is expressly said to be part of the contract) was £1,000 in the event of death.

It will be observed that the policy clearly takes cognisance of Mr. Green as a named individual, coming within the class of insured persons (a class whose due observance of certain things is expressed in cl. 8 to be a condition precedent to the insurance company's liability to pay) and that the benefit secured to him is a payment of £1,000 under the policy in certain circumstances. Clause 5 by implication recognises the fact that other persons than the policy holder may have some equitable or other claim or interest in the policy. As a matter of machinery the company by that clause unilaterally reserves to itself the right to treat the insured as the absolute owner of the policy, and to be effectually discharged by his receipt (or that of his legal representatives). It would obviously be inconvenient to have the various insured persons making their own claims and dealing with the company direct. From the terms of the policy, therefore, the parties contemplate that the policy holder is securing benefits to a named person, Mr. Green, and that the insurance company will pay £1,000 on Mr. Green's death by accident. It is true that the company are entitled (as a matter of convenient machinery) to deal direct with the policy holder, and to treat him as

A if he alone were intended to get the benefits of all the insured persons. But the terms of the agreement as a whole make it clear that (whatever may be Mr. Green's legal or equitable rights against the policy holder) the £1,000 payable on Mr. Green's death is intended by the parties to be a benefit to Mr. Green's estate, and is not intended for the pocket of Mr. Russell. Moreover I think that the terms of the agreement as a whole show that the parties envisage payment of the £1,000 direct to the policy holder and payment over by him to Mr. Green's estate. Thus the second payment, namely, by the defendant to the plaintiff, is a payment envisaged by the contract and is in my view clearly a sum paid under a policy of assurance within the terms of the Fatal Accidents (Damages) Act, 1908. I would prefer, however, not to rest my decision on such narrow grounds, derived as they are from particular words in the policy. I think that the proper construction of the Act is that adopted by the learned judge, who said ([1958] 3 All E.R. at p. 48):

"As it seems to me, there is no need to strain the language in order to give effect to the plaintiff's claim; on the other hand, to give effect to the defendant's argument involves the notional inclusion in the section of words of limitation restricting the scope of the section to cases in which the deceased or his representatives had some enforceable right to the sum in question . . . In my judgment, the expression 'paid or payable on the death of the deceased under any contract of assurance' is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover, I think that force is lent to this view by the double use of the word 'any'; any sum, any contract of insurance."

I wholly agree with those observations.

MORRIS, L.J., in *Bowskill v. Dawson* (1) ([1954] 2 All E.R. 649) said, in a passage (*ibid.*, at p. 655) on which the learned judge ([1958] 3 All E.R. at p. 48) relied:

"It is true that the deceased was not a party to the contract of assurance, but it is to be noted that s. 1 of the Act of 1908 refers to 'any' contract of assurance or insurance and appears, therefore, to cover and include contracts of assurance or insurance other than those made with the deceased. When it is sought to reduce the damages recoverable by the relations of Mr. Dawson because of the receipt of the £3,300, it can, in my judgment, be shown that such sum had the attribute or feature of being a sum paid on the death of Mr. Dawson under a contract of assurance."

Although he expressly left open (*ibid.*) the question raised by the present argument, those two sentences are, I think, rightly applicable to the case before us.

The Fatal Accidents Act, 1846, s. 2, provided *inter alia*:

"and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

The task was expressly left to a jury and was put in broad and simple terms. Subsequent cases established that in estimating such injury, actual and prospective gains as well as actual and prospective losses must be taken into account in order to arrive at the net loss. Where the man whose death was the subject-matter of the claim had kept up an insurance on his life, the payment under it would lessen the amount of damages recoverable by his widow. Thus the tortious defendant secured the benefit of his victim's thrift and foresight in place of the victim's widow for whom it had been intended. The object of the Fatal Accidents (Damages) Act, 1908, was to remove this injustice. By s. 1 it provided that in assessing damages in any action under the Fatal Accidents Act, 1846,

"... there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance

It is obvious that in each case there must be an assured or insured person and a payer and a payee. It would have been possible to insert in the Act detailed provisions dealing with these matters. But the Act, deliberately as I think, dealt with the matter on broad lines as the original Act had done. It was excluding a certain type of consideration from the broad and difficult task which the jury had to achieve in each case. The legislature contented itself with describing the nature of the moneys that were not to be taken into account, without seeking to limit the exact path of those moneys or specifying from whom and by whom they had to be received. Since the Act introduced an exception to the general rule, I agree that the words must not be strained to achieve any meaning beyond their clearly avowed intention; but they are entitled to be read in their simple normal sense without any gloss or artificial restrictions. The view put forward by the defendant does in my view put an unduly restricted meaning on the words, and writes into the Act words that are not there.

Whether a sum comes within the definition in the Act read in its normal sense is a question of fact in each case, subject, of course, to the legal limitation that it may not be possible as a matter of law for a certain sum in a particular case to come within that definition. In my view, on the facts of this case, the £1,000 paid by the defendant to the plaintiff does come within that definition. It is, in the normal sense, money paid on the death of the deceased under a contract of insurance.

We have been pressed by counsel for the defendant with endless difficulties that might occur unless his argument is accepted. He suggests that if money passing through several hands could still be said to be a sum paid under any contract of insurance, confusion would arise. However, I see no reason why such money should pass through several hands. And if it did, the court is left to decide whether, when it comes to the hands of the widow, it still sufficiently retains the quality of a sum paid on the death of the deceased under any contract of insurance. On the facts of this case I see no difficulty in holding that the sum paid to the plaintiff did retain that quality.

I agree with the learned judge and with my Lords that the plaintiff had in respect of the £1,000 no right that was enforceable in law or in equity. *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (8) ([1915] A.C. 847) compels us to hold that since she was not a party to the policy, she had no legal rights enforceable by action. Nor do the terms of the policy themselves suffice to create a trust which she could enforce in equity in a case like this where the insuring of the employee was purely voluntary, and was no part of the terms of his employment. She cannot, therefore, bring herself within the decision in *Bowskill v. Dawson* (1). But for the reasons I have given, she has no need to do so.

In my opinion the appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords granted on terms as to costs.

Solicitors: *Greenwoods* (for the defendant); *Abbott, Baldwin & Co.* (for the plaintiff).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A THE ZAFIRO. JOHN CARLBOM & CO., LTD. v. OWNERS OF
S.S. ZAFIRO.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hewson, J.), April 27, 28,
May 6, 1959.]

B *Shipping—Necessaries—Arrest of ship in action for necessities—Status of plain-
tiffs as secured creditors—Administration of Justice Act, 1956 (4 & 5 Eliz.
2 c. 46), s. 1 (1) (m), (p).*

*Company—Winding-up—Voluntary winding-up—Stay of proceedings—Ad-
miralty action for necessities—Arrest of ship after plaintiffs had notice of
meeting to pass resolution to wind-up—Whether arrest was “execution”
within Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 325.*

C C. Ltd. made necessary disbursements on account of the Oro and the
Zafiro, vessels owned by B. Ltd. Subsequently, on Jan. 22, 1958, B. Ltd.
sent to C. Ltd. notice of a meeting of creditors of B. Ltd. On Feb. 3, 1958,
C. Ltd. issued a writ in rem against the owners of the Zafiro and arrested
her. On Feb. 14, 1958, B. Ltd. passed a resolution for voluntary winding-
D up (a creditors' winding-up) and the creditors of B. Ltd. appointed a liquida-
tor. Subsequently the Zafiro was sold under order of the court made at the
instance of the liquidator and the proceeds were paid into court. C. Ltd.
moved for judgment (in default of defence) and for payment out of court of
the sum due for necessities and the owners (in effect, the liquidator) moved
E for a stay of C. Ltd.'s action and payment out to them, on the grounds that
the winding-up had supervened since the commencement of the action
and, the notice of the meeting having preceded the issue of the writ, C. Ltd.
had not acquired the status of secured creditors.

Held: there should be judgment in favour of C. Ltd. for the amount due
for necessities and there should be payment out of court of that amount
because—

F (i) by the issue of the writ and arrest of the Zafiro C. Ltd. obtained a
statutory lien and became secured creditors for the amount due for neces-
saries, notwithstanding that C. Ltd. had received notice of the impending
winding-up of B. Ltd. before the date of the arrest.

The Cella ((1888), 13 P.D. 82) considered.

G (ii) as C. Ltd. were secured creditors their action should not be stayed,
notwithstanding the general practice that actions against a limited company
would be stayed when it went into liquidation.

H Dicta in *Harrison v. Mortgage Insurance Corpn.* ((1893), 10 T.L.R. 141)
and *Anglo-Baltic & Mediterranean Bank v. Barber & Co.* ([1924] 2 K.B.
410) applied.

(iii) the arrest of the Zafiro was not “execution” within s. 325* of the
Companies Act, 1948, and accordingly C. Ltd. were not thereby disentitled
to retain the benefit of the arrest as against the liquidator of B. Ltd.

(Observations on the special character of a claim of a necessities man
(see p. 544, letters G to I, post).

I [As to Admiralty jurisdiction over claims for necessities, see 1 HALSBURY'S
LAWS (3rd Edn.) 56, para. 109; and for cases on the subject, see 1 DIGEST
126-129, 318-348.

As to execution and attachment before commencement of voluntary winding-
up of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 690-694, paras. 1377-1382;
and for cases on the subject, see 10 DIGEST (Repl.) 1017-1019, 6999-7013.

* The terms of s. 325 (1) are at p. 540, letters H and I, post.

As to the court's power to stay and restrain proceedings to wind-up a company voluntarily, see 6 HALSBURY'S LAWS (3rd Edn.) 754, para. 1523; and for cases on the subject, see 10 DIGEST (Repl.) 1079, 1080, 7462-7475.

For the Administration of Justice Act, 1956, s. 1, see 36 HALSBURY'S STATUTES (2nd Edn.) 3.

For the Companies Act, 1948, s. 325, see 3 HALSBURY'S STATUTES (2nd Edn.) 707.]

Cases referred to:

- (1) *Re Australian Direct Steam Navigation Co.*, (1875), L.R. 20 Eq. 325; sub nom. *Re Australia Direct Steam Navigation Co., Ex p. Baker*, 44 L.J.Ch. 676; 10 Digest (Repl.) 1025, 7069.
- (2) *Harrison v. Mortgage Insurance Corp.*, (1893), 10 T.L.R. 141; 10 Digest (Repl.) 1079, 7463.
- (3) *Anglo-Baltic & Mediterranean Bank v. Barber & Co.*, [1924] 2 K.B. 410; 93 L.J.K.B. 1135; 132 L.T. 1; 10 Digest (Repl.) 1081, 7481.
- (4) *The Cella*, (1888), 13 P.D. 82; 57 L.J.P. 55; 59 L.T. 125; 10 Digest (Repl.) 904, 6140.

Motions.

These were two motions in an action by the plaintiffs, John Carlbon & Co., Ltd., against the owners of the s.s. Zafiro (who were a limited company) to recover judgments against the s.s. Zafiro for a sum of £239 16s. for necessities. The first motion was by the plaintiffs for judgment in default of defence and for payment out of court of the sum due for necessities and costs. The second motion was by the liquidator of the defendants (i) that all proceedings in the action might be stayed on the ground that since the date of the issue of the writ a resolution had been passed for the voluntary winding-up of the defendants and that at that date the plaintiffs had notice that a meeting had been called at which such a resolution was to be proposed, and (ii) that moneys in court, being the proceeds of sale of the Zafiro, be paid out to the defendants after satisfaction of a claim in another action wherein the defendants were sued by the owners of the s.s. Pinewood.

In November and December, 1957, and January, 1958, the plaintiffs, a firm of shipbrokers and agents, made necessary disbursements on account of two vessels, the Oro and the Zafiro, both owned by the defendants, the B. & G. Shipping Co., Ltd. These disbursements, in so far as they remained unpaid, amounted to £239 16s. of which £217 0s. 9d. was disbursed on account of the Oro. On Jan. 6, 1958, a collision had occurred between the Zafiro and the Pinewood in Birmingham dock while the Pinewood was at her moorings, and the Pinewood had suffered damage in respect of which a separate action had been brought against the defendants. On Jan. 14, 1958, notice of an extraordinary general meeting of the defendants at which a resolution for the voluntary winding-up of the defendants was to be proposed was published in the London Gazette. On Jan. 22, 1958, the defendants sent to the plaintiffs, and other creditors of the defendants, notice that a meeting of the defendants' creditors would be held on Feb. 14, 1958, for the purpose of appointing a liquidator. On Feb. 3, 1958, the plaintiffs issued a writ in rem against the defendants as owners of the Zafiro (the Oro having already been sold for breaking up) for the £239 16s. necessities. On the same day the plaintiffs arrested the Zafiro in London in respect of necessary disbursements on account of both vessels in pursuance of s. 1 and s. 3 of the Administration of Justice Act, 1956. On Feb. 10, 1958, appearance was entered on behalf of the defendants. On Feb. 14, 1958, the members of the defendants passed a resolution that, it having been proved at the meeting that the company could not by reason of its liabilities continue its business, it was advisable that the company be wound up. On the same day

A at a meeting of the creditors of the defendants a liquidator was appointed. On Feb. 17, 1958, notice of the appointment of the liquidator was sent to the plaintiffs who, on Mar. 3, 1958, delivered their statement of claim to the defendants. On Mar. 10, 1958, the liquidator obtained an order of the court that the Zafiro be sold. On Mar. 25, 1958, the Zafiro was sold for the sum of over £5,000, the proceeds being paid into court. The plaintiffs and defendants now applied to
B the court by motion as stated at p. 538, letters D and E, ante.

Gerald Darling for the plaintiffs.

H. V. Brandon for the defendants in liquidation.

Cur. adv. vult.

C May 6. HEWSON, J., having summarised the facts, continued: Counsel for the owners of the Zafiro (whom I shall now call "the defendants") submitted that if the plaintiffs had begun their action before the notice of the proposed meeting the plaintiffs would have acquired the status of secured creditors, but that having begun their action, by issue of a writ in rem for the arrest of the ship, after they had received such notice they should not be regarded as secured
D creditors and so get priority over other creditors. On the contrary, they should be in the same position as other unsecured creditors and take their share of the available fund rateably with them. [His LORDSHIP then stated that, as the defendants were a limited company, presumably they owned property other than the Zafiro, and it was possible that the total fund available for distribution would considerably exceed the fund arising out of the sale of the Zafiro, and con-
E tinued:] In support of his argument counsel referred to various sections of the Companies Act, 1948, and I shall refer to that Act briefly now.

Section 211 provides:

"(1) The winding-up of a company may be either—(a) by the court; or (b) voluntary; or (c) subject to the supervision of the court.

F "(2) The provisions of this Act with respect to winding-up apply, unless the contrary appears, to the winding-up of a company in any of those modes."

Section 226, which applies to companies being wound up by an order of the court, gives a discretion to the court, on the application of the company or any creditor or contributory, to stay proceedings at any time after the presentation of a
G winding-up petition and before a winding-up order is made.

It was argued by the defendants that the presentation of a petition is analogous to notice of creditors' meeting in the case of a voluntary winding-up, to which procedure I shall shortly refer.

Neither counsel argued that s. 228 (to which I shall next refer) had any bearing
H on the present case, the present case being one of a voluntary winding-up by the creditors. Section 228 provides that in the case of a compulsory winding-up order in respect of any company registered in England

"... any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the
I winding-up shall be void..."

I was referred in the course of argument to *Re Australian Direct Steam Navigation Co. (1)* (1875), L.R. 20 Eq. 325, where it was held that the arrest of a ship in the Admiralty Division was a sequestration within the meaning of s. 163 of the Companies Act, 1862. That section is almost similar in wording to s. 228 of the Act of 1948, except that the earlier Act was not confined to a company registered in England. In *Re Australian Direct Steam Navigation Co. (1)* Sir GEORGE JESSEL, M.R., held (*ibid.*, at p. 326):

The term "sequestration" has no particular technical meaning: it simply means the detention of property by a court of justice for the purpose of answering a demand which is made. That is exactly what the arrest of a ship is; and consequently, as I read s. 163, it is void in the case of a creditor who can prove under the winding-up, if the sequestration takes place after the winding-up order has been made . . ."

I was then referred to s. 229 of the Companies Act, 1948, which reads as follows:

"(1) Where, before the presentation of a petition for the winding-up of a company by the court, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution . . .

"(2) In any other case, the winding-up . . . by the court shall be deemed to commence at the time of the presentation of the petition . . ."

Section 231 provides that in cases where there is a winding-up by order of the court all actions are stayed except by leave of the court.

Then I was referred to certain sections dealing with voluntary winding-up: s. 278, which provides for voluntary winding-up in various circumstances; s. 283, which provides that voluntary winding-up may be either a members' voluntary winding-up or a creditors' voluntary winding-up; and s. 292 to s. 300 inclusive, which contain provisions which apply to creditors' voluntary winding-up, under which provisions the B. & G. Co. in this case was wound up and a liquidator appointed. Going back, s. 280 provides that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution for voluntary winding-up. Sections 301 to 310 contain provisions which apply to every voluntary winding-up, and in particular I was referred to s. 302 and s. 307. Section 302 provides that, subject to certain preferential payments, the property of a company shall, on its winding-up, be applied rateably in satisfaction of its liabilities; and, as I understand it, "preferential payments" there referred to includes secured creditors. Section 307 provides, inter alia,

"(1) The liquidator . . . may apply to the court to determine any question arising in the winding-up . . .

"(2) The court, if satisfied that the determination of the question . . . will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

Counsel for the defendants submitted that under this section the court has a discretionary power to stay an execution on the company's property, and with that submission I agree.

I now turn to s. 325 (1), which provides:

"Where a creditor has issued execution against the goods . . . of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up . . . unless he has completed the execution or attachment before the commencement of the winding-up:

"Provided that—(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding-up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding-up . . . (c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

- A Subsection (2) says that "an execution against goods shall be taken to be completed by seizure and sale"; and sub-s. (3) states that "'goods' includes all chattels personal, and the expression 'sheriff' includes any officer charged with the execution of a writ or other process". It is not suggested that a ship is not a chattel personal, and counsel for the defendants argued that the Admiralty marshal in the Admiralty court is equivalent to a sheriff and that arrest by the
- B marshal comes under the heading "other process".

The last section to which I was referred was s. 326, which sets out the duties of a sheriff regarding goods taken in execution. It provides by sub-s. (1) that:

- "... where any goods ... are taken in execution, and, before the sale thereof ... notice is served on the sheriff ... that a resolution for voluntary winding-up has been passed, the sheriff shall, on being so required, deliver the goods ... to the liquidator ..."
- C

Subsection (3) provides that the rights of "the liquidator may be set aside by the court in favour of the creditor ... as the court thinks fit". I am told by counsel for the defendants that the provisions of s. 325 and s. 326 came into force for the first time in 1929*, except that the provisions giving the court discretion appeared for the first time in the Act of 1948†.

D

The defendants' main points, as I understood them, were these. First, that the general practice of the court was to stay all actions against a company after the commencement of the winding-up and it could only be departed from in exceptional circumstances; secondly, that where a creditor has notice of the meeting at which the resolution for voluntary winding-up is to be proposed he cannot have the benefit of execution against any of the company's goods unless execution is completed before such notice.

E

As to the first proposition, I was referred to several cases‡, two of which I am going to mention. The first one was *Harrison v. Mortgage Insurance Corpn.* (2) ((1893), 10 T.L.R. 141). That was a case before a Divisional Court in which

F WILLS, J., after being referred to a number of cases establishing that it was a general rule to stay actions when a company was being wound up, whether voluntarily or otherwise, agreed that it was so, and continued (*ibid.*, at p. 142):

- "If it was quite clear that no creditor would be injured by the plaintiff then obtaining execution, the action need not necessarily be stayed, but in this case the rough probabilities appeared to be the other way. The plaintiff could not be treated as a secured creditor; there was not enough ground to say that he was such at any place or time."
- G

WRIGHT, J., concurring, said (*ibid.*):

- "If the winding-up were for the benefit of the company and not in order to secure equality to all the creditors, the matter would be different. But if it were for the benefit of all the creditors *prima facie* there ought to be a stay."
- H

The second case to which I was referred was *Anglo-Baltic & Mediterranean Bank v. Barber & Co.* (3) ([1924] 2 K.B. 410), where SCRUTTON, L.J., said (*ibid.*, at p. 418):

I

"But it is only in very special circumstances ... that the court will depart from its general practice of staying execution when the company is in

* They were formerly s. 268 and s. 269 respectively of the Companies Act, 1929.

† The amendments enacted by s. 96 (4) of the Companies Act, 1947, were brought into force at the time when the legislation consolidated in the Act of 1948 came into operation.

‡ These were *Re Rio Grande do Sul Steamship Co.*, (1877), 5 Ch.D. 282; *Re Ford, Ex p. The Trustee*, [1900] 2 Q.B. 211; *Westbury v. Twigg & Co. Ltd.*, *Greyson Claimant*, [1892] 1 Q.B. 77, in addition to the two cases cited in the judgment.

voluntary liquidation, for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets *pari passu*” A

ATKIN, L.J., saying much the same thing, also referred to the well-established practice* and enumerated some exceptions to it, for example, if there had been some fraud or sharp practice; he went on to say that there were possibly some other exceptions. I accept that principle, with respect, remarking in passing that in neither of these cases, or any case to which I was referred on this point, was the court considering, as one of the elements, the arrest of the vessel to secure a statutory lien. B

The question was posed by counsel for the defendants (who, I should remark, admitted that he was in effect instructed by the liquidator) to what extent does a writ in rem and arrest of a vessel by a necessities man constitute a special reason which prevents the application of the general rule? He admitted that if the issue of the writ and arrest had preceded the notice of the meeting, to which I have referred, then such special circumstances would have existed. But in this case the notice was served on Jan. 22, 1958, and the writ was not issued, nor was the arrest made, until Feb. 3, 1958. I agree with his submission that if the issue of the writ and arrest had preceded the notice I, at all events, would have exercised my discretion in favour of the necessities man. I agree with that submission, for this reason, that, by arresting without having notice of the meeting he would have made himself a secured creditor under a statutory lien. C D

I was referred to *The Cella* (4) ((1888), 13 P.D. 82) by both counsel. The facts in *The Cella* (4) were somewhat different from the case that I have to consider. The claim in *The Cella* (4) arose in the following way: The master of the ship, the *Cella*, gave a bill on his owners for necessities supplied to the ship by the plaintiff at Halifax, Nova Scotia, in January, 1885. That bill was accepted, but it was later dishonoured. In June of the same year, whilst the *Cella* was under arrest at the instance of the master for wages and disbursements, the plaintiff, that is, the necessities man, began an action in rem† against the ship; but a week later the mortgagee, Mr. Wood, intervened. An agreement was made and embodied in an order of the court that the ship should be released, the mortgagee having undertaken to pay the plaintiff what the plaintiff could, if the arrest continued, recover from the ship, after satisfying all prior incumbrances. After a while the prior incumbrances were paid off and Mr. Wood was ordered to pay the balance into court, the balance being sufficient to cover the amount of the plaintiff's claim. Then on Aug. 8, 1885, the owning company of the *Cella* was ordered to be wound up, and on Aug. 13, 1885, the plaintiff brought his action against the owners on the bill, which had been dishonoured, and recovered judgment on the amount, which was never paid. In October of the same year the plaintiff brought an action against the master on the bill, and obtained judgment, of which he recovered only a small amount; and it was during this month of October that the liquidator of the company was appointed. E F G H

It will be seen from that that the order to be wound up was made two months after the ship had been released against the mortgagee's undertaking. The plaintiff, by motion, applied for payment out. The liquidator opposed it because, among other reasons, he said that the plaintiff was not a secured creditor, having no maritime lien, and that he had no leave of the Chancery Division to sue as he was obliged to have under the Companies Act, 1862, s. 87. That section provided: I

“When an order has been made for the winding-up of a company under this Act no suit, action or other proceeding shall be proceeded with or

* The practice in voluntary winding-up not to permit a creditor after the commencement of winding-up to issue execution against the company (see [1924] 2 K.B. at p. 419).

† The action was brought under s. 4 of the Admiralty Court Act, 1861, since repealed.

- A commenced against the company except with the leave of the court and subject to such terms as the court may impose."

B *The Cella* (4) was first heard by SIR JAMES HANNEN, P., and he held that at the time when the undertaking was given, which was in June, 1885, the plaintiff had a lien on the ship by virtue of the proceedings that he had taken, that is his action in rem. He had not a maritime lien; but he had a security for his money which arose at the commencement of the action in rem. In any event, the action was against Wood, the mortgagee, and not the ship or the company, and the President dismissed the liquidator's objections.

The case went to appeal, and LORD ESHER, M.R., said this (13 P.D. at p. 87):

- C "The judge is to enforce the writ, and to determine the rights of the parties at the time the writ is served. That is so, as it seems to me, in every action. But in every action we may have bankruptcy and I know not what intervening, so that when judgment is given it cannot be effectually carried out. But if the money be in court, or the court has possession of the res, it can give effect to its judgment as if it had been delivered the moment after it took possession of the res. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any acts of theirs but upon the amount of business which the court has to do. Therefore the judgment in regard to a thing or to money which is in the hands of the court, must be taken to have been delivered the moment the thing or the money came into the possession of the court."

- E LORD ESHER, M.R., then referred to three Admiralty cases*, and continued (ibid.):

- F "[The three cases] are undoubtedly based on the same rule as the two bankruptcy cases†, and they show that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the court as a security for whatever may be adjudged by it to be due to the claimant."

FRY, L.J., said much the same thing (ibid., at p. 88):

- G "The arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment."

- H Counsel for the defendants submitted that *The Cella* (4) was binding on this court where the facts are the same and subject to the effect of subsequent statutes. He sought to distinguish the facts, and he also said that since *The Cella* (4), which was in 1888, the legislature had cut down the rights of creditors to levy execution. The facts in the present case are different in that, among other things, in *The Cella* (4) the writ and arrest were two months before the winding-up order, whereas in the present case the writ was issued twelve days after the notice of the proposed meeting. As I see it, *The Cella* (4) is still good law, and arrest in such cases creates a statutory lien, making the holder a secured creditor. I do not think that that is contested.

- I There is intervening legislation, and in particular there is s. 325 of the Companies Act, 1948, to which I have already referred‡; that section says that where a creditor has issued execution and the company is subsequently wound

* I.e., *The Two Ellens*, (1872), L.R. 4 P.C. 161; *The Pierre Superior*, (1874), L.R. 5 P.C. 482; *The Henrich Bjorn*, (1886), 11 App. Cas. 270.

† Referred to in argument by counsel for the respondent, i.e., *Ex p. Banner, Re Kipparth*, (1874), 9 Ch. App. 379, and *Ex p. Baughard, Re Moajan*, (1879), 12 Ch.D. 26.

‡ See p. 540, letters H and I, ante.

up, the creditor shall not be entitled to retain the benefit of the execution against the liquidator unless he has completed the execution before the commencement of the winding-up, which in this case would be on receipt of the notice of the proposed meeting to consider the matter. To decide whether this section applies turns on whether the arrest of the ship is to be regarded as part of the execution. If it is, then the plaintiffs fail, unless under proviso (c) of s. 325 (1) I exercise discretion in their favour.

In the course of argument as to the meaning of the word "execution", I was referred, among other things, to 16 HALSBURY'S LAWS (3rd Edn.), p. 2, para. 1, where it says:

"The word execution in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice. In a narrower sense, it means the enforcement of those judgments or orders by a public officer [under various writs]."

I am not reading it all. I accept that definition, with respect, fortified, as I am, by certain passages in the ANNUAL PRACTICE, 1959, where, on p. 991, is set out R.S.C., Ord. 42, r. 1, sub-r. (1) of which reads:

"Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand."

So it will be seen, therefore, that either the judgment or the order are for payment of money. R.S.C., Ord. 42, r. 8, refers to the various writs of execution which give effect to those orders, but it will be seen that the execution follows either a judgment or an order for the payment of money. The arrest of a ship in an action in rem is the means whereby, among other things, a necessities man obtains security for a debt of a special character without a judgment or order for payment of money. It is a right given to him by the legislature, a right the scope of which, in my view, has recently been extended by the Administration of Justice Act, 1956, s. 1 (1) (m), and possibly also by s. 1 (1) (p).

The special character of the debt, in my view, is that it is incurred by giving credit to the owners of vessels for the use of those vessels. It is to be regarded in this way: it is the advancing of goods on credit to a ship which, in the ordinary course of business, moves away from the port of supply, to which it may or may not return. The goods have been supplied for the necessary use of the ship and for the purpose of the ship prosecuting its adventures, and, as I say, the ship may never return to that port again.

Counsel for the defendants very strongly argued that an arrest such as this could be regarded as an anticipatory execution. Arrest, as I see it, is the means, given by law, whereby security is obtained for a debt of a special character, and, by so arresting, the necessities man becomes a secured creditor. It seems to me (and I accept what counsel for the defendants says) that the wording of some of the sections, to which I have referred, in the Companies Act, 1948, is very inapt when applied to certain Admiralty matters; but I see no reason why I should extend the meaning of the word "execution" to include a writ in rem in the circumstances that we have to consider in this case. Execution, in my view, succeeds, and does not precede, judgment, whereas in arrest there is no existing judgment on which to execute.

On the authority of *Re Australian Direct Steam Navigation Co.* (1), to which I have already referred, it was held that the arrest in such circumstances was a sequestration. If it is that, it is not an execution because both of those

A words appear in s. 228 which section both counsel have accepted as not applying to voluntary winding-up proceedings. They are used separately in that section and convey to me that they do not mean the same thing, and that "sequestration" is different from "execution". In s. 325 of the same Act "execution" is the only one of those two words that is mentioned.

B I have no doubt that under s. 228 even a maritime lien (which, of course, is superior to a statutory lien) gives way to a court order for compulsory winding-up, if the arrest in respect of the maritime lien succeeds the order, unless the court gives leave. It is difficult sometimes to speculate on the reasons, but, quite apart from the fact that the general principle of the court is to enable unsecured creditors to obtain their portions rateably to what is owed to them, it may also be that one Division of this court is not to be set up in competition with the
C other, and where a court has ordered a company to be wound up it is not seemly to set another Division of the court in opposition to it. I have no doubt that s. 228 of the Act does not apply to this case, and, from what I have said, in my judgment, neither does s. 325. Should I be wrong about that, I would still be left to exercise a discretion.

D Counsel for the defendants, in arguing on that limb of the case, put the position in three ways, and I am going to alter the order of his points. He said that if the vessel was arrested before the receipt of the notice of the meeting he would accede to the exercise of the court's discretion in favour of the necessities man. I have already dealt with that and I accept it. Then—it was not his second point, but I am putting it second—if the arrest was after the resolution was passed he submitted that the court should refuse to exercise discretion in favour of the
E necessities man. Then, thirdly—if, as in this present case, the arrest came between the receipt of notice of the meeting and the passing of the resolution, the court should still refuse to exercise discretion in favour of the necessities man and stay his action.

While I am not called on to express any opinion on the second submission, I do not accede to the third submission, which covers the circumstances of this present
F case. The proposed meeting might never have taken place. It seems to me to be something quite different from a court order to wind up or a resolution to wind up, and I have to try to hold the balance. Necessaries men are given a right to secure the risks that they take in catering for shipping, and if they exercise their rights without undue delay their rights to become secured creditors should be respected and enforced.

G In my judgment I find that the plaintiffs in this action rightly, by the action which they took, became secured creditors.

Counsel for the defendants said that if I find the plaintiffs in this action to be secured creditors, as I do, he would not oppose payment out. I have had evidence to satisfy me that this debt of £239 16s. was incurred, and there has been no
H defence filed to it. I, therefore, give judgment in default for that amount and I order the payment out of that amount to the plaintiffs.

As to the remainder, I order the payment out of that amount to the defendants in liquidation.

Judgment for the plaintiffs and orders accordingly.

Solicitors: *Edward & Childs* (for the plaintiffs); *Bentleys, Stokes & Lowless* (for the defendants in liquidation).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

FOOTBALL LEAGUE, LTD. v. LITTLEWOODS POOLS, LTD.

[CHANCERY DIVISION (Upjohn, J.), April 15, 16, 17, May 13, 1959.]

Copyright—Infringement—Chronological list of football matches—Weekly partial reproduction by football pool promoters—Distinction between a compilation requiring skill and the giving of information—Weekly reproductions of part amounting to reproduction of the compilation.

The Football League, Ltd., organised in each year an association football competition among ninety-two football clubs in four divisions. Each club played every other club in its division twice during the season (of some thirty-five weeks), and also took part in a separate competition for the Football Association Cup. In compiling its fixture list each year, the league had regard to the wishes of the clubs so far as possible and care was taken to ensure that local fixtures did not clash. The compilation of the complete fixture list was a matter of considerable complication, requiring a great amount of labour, skill and ingenuity. After the provisional fixture list for each club ("the clubs list") had been considered by the clubs the league drew up from the clubs list the final chronological fixture list, showing the day-to-day fixtures throughout the season. The defendants organised a system of gambling based on the football league matches, and for that purpose they reproduced week by week a list of the matches from the league's chronological list. The league claimed that the defendants infringed the league's copyright in the chronological list.

Held: (i) the league was entitled to copyright in the chronological list, which was produced by the skill, labour, judgment and ingenuity of the league, and it was not open to the defendants to separate the compilation or arrangement of the fixtures from the mere making of the chronological list; but, even if such separation were permissible, the preparation of the chronological list itself involved a sufficient element of work and labour to justify a claim for copyright (see p. 555, letters B to F, post).

(ii) the defendants having systematically copied week by week throughout the season that part of the chronological list relevant to the week, and having claimed a right to do so, had done what amounted in the end to a reproduction of the plaintiffs' compilation and had infringed the plaintiffs' copyright therein (see p. 556, letter F, post).

Cate v. Decon & Exeter Constitutional Newspaper Co. (1889), 40 Ch.D. 500 applied.

[As to copyright protection for compilations, see 8 HALSBURY'S LAWS (3rd Edn.) 374, para. 687; and for cases on the subject, see 13 DIGEST (Repl.) 61, 62, 93-98.]

For s. 2 (1) of the Copyright Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 72.]

Cases referred to:

- (1) *Macmillan & Co. v. Cooper*, (1923), L.R. 51 Ind. App. 109; 93 L.J.P.C. 113; 13 L.T. 675; 13 Digest (Repl.) 63, 106.
- (2) *Cramp & Sons, Ltd. v. Frank Smithson, Ltd.*, [1944] 2 All E.R. 92; [1944] A.C. 329; 113 L.J.Ch. 209; 171 L.T. 102; 13 Digest (Repl.) 61, 91.
- (3) *Walter v. Steinkopff*, [1892] 3 Ch. 489; 61 L.J.Ch. 521; 67 L.T. 184; 13 Digest (Repl.) 52, 22.
- (4) *Chilton v. Progress Printing & Publishing Co.*, [1895] 2 Ch. 29; 64 L.J.Ch. 510; 72 L.T. 442; 13 Digest (Repl.) 54, 46.
- (5) *Odham's Press, Ltd. v. London & Provincial Sporting News Agency (1929), Ltd.*, [1936] 1 All E.R. 217; [1936] Ch. 357; 105 L.J.Ch. 193; 154 L.T. 277; Digest Supp.

- A (6) *Parfey Engineering Co., Ltd. v. Sykes Borall & Co., Ltd.*, (1955), 72 R.P.C. 89; 13 Digest (Repl.) 112, 537.
- (7) *British Broadcasting Co. v. Wireless League Gazette Publishing Co.*, [1926] Ch. 433; 95 L.J.Ch. 272; 135 L.T. 93; 13 Digest (Repl.) 61, 96.
- (8) *Collis v. Cater, Staffell & Frett, Ltd.*, (1898), 78 L.T. 613; 13 Digest (Repl.) 59, 81.
- B (9) *Winterbotham for the Western Australian Turf Club v. Wintle*, (1947), 50 W.A.L.R. 58.
- (10) *Blacklock (H.) & Co., Ltd. v. Pearson (C. Arthur), Ltd.*, [1915] 2 Ch. 376; 84 L.J.Ch. 785; 113 L.T. 775; 13 Digest (Repl.) 58, 78.
- (11) *Weatherby & Sons v. International Horse Agency & Exchange, Ltd.*, [1910] 2 Ch. 297; 79 L.J.Ch. 609; 102 L.T. 856; 13 Digest (Repl.) 59, 82.
- C (12) *Cate v. Decon & Exeter Constitutional Newspaper Co.*, (1889), 40 Ch.D. 500; 58 L.J.Ch. 228; 60 L.T. 672; 13 Digest (Repl.) 132, 742.

Action.

The plaintiffs, the Football League, Ltd., claimed (i) a declaration that the plaintiffs were entitled to a subsisting copyright in the chronological fixture lists of association football matches, prepared by them; (ii) an injunction to restrain the defendants, Littlewoods Pools, Ltd., by their servants or agents or otherwise from infringing the plaintiffs' copyright in the chronological fixture lists by reproducing the same or any substantial part thereof on football pool coupons or otherwise and from distributing any such coupons or other infringing material without the consent of the plaintiffs; (iii) damages for infringement of copyright and conversion; and (iv) delivery up of infringing material. The defendants denied that any copyright subsisted or could subsist in the plaintiffs' chronological fixture lists.

The facts are stated in the judgment and are summarised in the headnote.

Sir Milner Holland, Q.C., and *F. E. Skone James* for the plaintiffs.

K. E. Shelley, Q.C., and *D. W. Falconer* for the defendants.

Cur. adv. vult.

May 13. UPJOHN, J., read the following judgment: This action is brought to restrain the defendants, Littlewoods Pools, Ltd., from copying a list of league football matches prepared by the plaintiffs, the Football League, Ltd., in which copyright is alleged to exist. The plaintiffs, whom I will refer to as "the league", are responsible for organising each year that well known series of football games known as league matches between clubs who are members or associate members of the league. Football must now be taken as the national winter sport of this country and it attracts vast crowds of followers or "fans" who watch these games. League football together with the Football Association Cup matches form the major opportunities for this interest. All members or associate members of the league are professional clubs who provide sport for the populace and at the same time have financially to make both ends meet. Seeing the use made by pools promoters of league matches through gambling activities based on the results, the league think, perhaps not unreasonably, that they might receive some contribution. The defendants and other companies who promote pools do not share that view. Hence this action. I say no more on that score, but return to a brief description of league football activities.

Nearly all league matches are played on a Saturday afternoon, that being the day on which the large section of the British public who are interested in watching football matches are free to take their recreation. The league is organised into four divisions. Formerly there were three divisions, but since the beginning of the last season (1958-59) there have been four. In each of the first two divisions there are twenty-two clubs and in each of the other divisions there are twenty-four clubs, making a total of ninety-two clubs. The essence of league competition is that each club in each division plays every other club

in its division twice in a season, once at home and once away. It is essentially a "ladder" competition. At the end of the season in the first three divisions the two at the bottom of each division are relegated to the top of the next lower division and the top two of the second, third and fourth divisions are promoted to the next higher division. In the fourth division the bottom four clubs have to stand for re-election. The club at the top of the first division holds the league championship for that year. The organisation of these matches and the arrangement of fixtures between clubs is a responsible and difficult matter. It is not a matter of drawing lots or anything of that sort, but for the reasons that I will explain in a moment the arrangement of these fixtures is a highly skilled matter.

The supreme body governing the sport in this country is the Football Association, and as is well known they have each season a competition for the Football Association Cup. The season starts in late August in each year and continues to the end of April, the final of the Football Association Cup always being played at Wembley on the first Saturday in May. The arrangements for the following season start in March with an interview between the secretary of the league, presently a Mr. Hardaker, with representatives of the Football Association. Mr. Hardaker is then informed as to what Saturdays will be available for playing league matches and on what Saturdays matches will be played for the Football Association Cup ties. This is very important, for the first two rounds of the Football Association Cup take place on Saturdays before Christmas and on those occasions the lower divisions do not play in league matches as they are playing in those rounds. The top divisions only enter the Football Association Cup in the third round, which takes place after Christmas, and on the day appointed for that round they do not play in league matches. Matches in the later rounds naturally depend entirely on the success of the clubs in the earlier rounds.

The next step is for Mr. Hardaker to send out a questionnaire to all the league clubs. In 1958 it was sent out on Mar. 31. The first question is "What club do you desire to be paired with?, that is, to be away when such club is at home." Now that shows at once the real difficulty of preparing the list of fixtures. To take a simple example, if Manchester City is playing at home on a given Saturday, it is essential that Manchester United should be playing away. If both are playing at home the gate will suffer and the clubs will not make sufficient money. If both are away, football followers, the all important customers, will be disappointed of a top class game and what perhaps is equally important may not spend any money on football that week. They must therefore "pair". I have given a simple example, but in densely populated areas the matter is more complicated. Let me give another example: Burnley pairs with Blackburn Rovers, Blackburn Rovers with Preston North End and Preston North End with Blackpool. That means that to obtain a satisfactory state of affairs (that is, to please the football followers and to obtain good gates) for any given Saturday if Burnley is playing at home Blackburn Rovers must be away, Preston North End at home and Blackpool away. So that the difficulty of preparing a really satisfactory fixture list in each division is at once apparent. That is not the only difficulty. As I have said, each club must play every other club in the same division twice, so that each club will play forty-two matches for example in the first division, but there will only be thirty-five or thirty-six Saturdays available, so that some matches must be played in the middle of the week or at Bank Holiday weekends. Some clubs are prepared to play in the evening under floodlights; others will not do so. Obviously a mid-week match must be played on the local early closing day. The questionnaire is therefore designed to find out clubs' wishes in respect of these matters. I will read the remaining questions:

- A (2) What is your best day for mid-week matches ? (3) Have you, or will you have, floodlighting installed for season 1958-59 ? (4) Are you prepared to play under floodlights ? (5) Have you any particular local holiday date when you desire to play at home ? (6) Two games will be played at Christmas on Dec. 25, 26 or 27. Which date do you prefer for a home fixture ? (7) Do you desire a home fixture on Jan. 1, 1959, instead of a mid-week fixture or a Christmas or Easter fixture ? In this respect please note that the third round of the F.A. cup will be played on Jan. 10, 1959. (8) If Jan. 1 is not a holiday in your area are you prepared to play away on this day ? (9) Do you prefer Good Friday, Easter Monday or Tuesday for your home game at Easter ? Easter Saturday is classed as an ordinary Saturday. (10) Any other relevant information, including any particular difficulty last season."
- C The clubs answer this questionnaire and a summary is prepared in Mr. Hardaker's office. The next step is for Mr. Hardaker to have a conference with a Mr. Harold Sutcliffe. Mr. Sutcliffe is a practising solicitor, but he, like his father before him, seems to have a special flair for settling league fixtures and this he does every year for and on behalf of the league and for which he is paid a fee.
- D He has no other connexion with the league. Mr. Sutcliffe and Mr. Hardaker have a discussion on the summary to try to iron out any obvious difficulties or snags. Mr. Sutcliffe is told the available Saturdays for league matches and he takes away the questionnaire and summary and prepares a draft fixture list. By this time he knows what clubs will be promoted and what clubs will be relegated. He does not know, however, which clubs will be elected or re-elected to the lowest four places at the bottom of the fourth division and he calls them A, B, C, D. As I have already said, this work of preparing the list of fixtures is one that requires much skill and hard work. It is not possible to give effect to perfect pairing in every match nor to give effect to the wishes of every club in every particular; that would be beyond human ingenuity and skill, but Mr. Sutcliffe tries, so far as his undoubted skill and ingenuity can do so, to meet the wishes of all the clubs and to observe the essential of pairing. To assist
- F him in this work he has a chart which was prepared many years ago by his father when he used to undertake this work. Mr. Sutcliffe, whose evidence I accept unreservedly, explained to me fully in the witness-box how the chart works and I shall do no more than try to make a short summary of his evidence. Let me take the chart for divisions 1 and 2 as an example. There are twenty-two
- G vertical columns because there are twenty-two clubs. The horizontal lines represent the playing days. The chart is so arranged that columns 1 and 2, 3 and 4, 5 and 6 and so on down to columns 21 and 22 form complete pairs, i.e., the club in column 1 will always "pair" with a club in column 2, the club in column 3 will pair with the club in column 4 and so on. It was then found that, if you omit horizontal columns 8 to 11, vertical columns 1, 3 and 5 each
- H pair with columns 2, 4 and 6, so that for last season Mr. Sutcliffe made Blackburn Rovers No. 2, Preston North End No. 3, making a complete pair; Blackpool No. 4 and Burnley No. 5, again making a complete pair and in addition Preston North End pair with Blackpool and Blackburn Rovers with Burnley. In addition to this the mid-week fixtures and Bank Holiday week-end fixtures have to be worked out. It is largely a matter of painstaking trial and error. Mr. Sutcliffe makes a
- I trial shot, filling in clubs on the chart in columns Nos. 1 to 22, works it out and sees how the result comes out. That operation may take nine or ten hours, but before he is fully satisfied he may make nine or ten trial shots, putting clubs in different order at the top of the chart. Finally he gets results which satisfy him and meet, so far as is possible, the wishes of the clubs. It is fair to say that in doing this work he also tries to fit in on the same principles other leagues, reserve teams and so on, and this greatly complicates his work. Nevertheless I am satisfied that his work in connexion with the four league divisions

with which I am concerned represents a vast amount of labour and a high degree of skill and ingenuity. A

He then prepares a typewritten list of club fixtures, which I shall refer to as "the clubs list". That shows on one page for each club what fixtures that club will play throughout the season. That is sent to Mr. Hardaker, who carefully checks it, and then a print containing complete series of fixtures club by club for all divisions is prepared, and a claim to copyright, rightly or wrongly, is printed thereon in large letters. Copies of this document are sent to each of the clubs. B
Last season it was sent out on May 21, 1958, together with information as to the clubs likely to be A, B, C and D. The covering letter appoints a day (last season it was May 31) for the club fixtures meeting to be held in accordance with cl. 22 of the regulations of the Football League. Each club sends its representative, probably the secretary, and any difficulties are raised and discussed and are finally decided at the meeting. Mr. Sutcliffe attends as adviser. C
According to cl. 22 the final decision on the fixture list rests with the league, but in practice resort to the league is unnecessary. There is no great controversy, the meetings are not expected to take more than half an hour because, to use Mr. Sutcliffe's words, clubs have been educated to recognise that making changes in fixtures may well upset the whole scheme. That is especially true of Saturday fixtures. D
Occasionally changes have to be made, but for the season 1958-59 out of the total number of 2,028 matches to be played in all four divisions, only seventeen changes were made at the meeting. The lists are finally agreed at this meeting and the representative of each club has to sign the list relating to his club and it is handed in to Mr. Hardaker. These documents are then handed to Mr. Sutcliffe. E
He takes them away and in two or three days produces the chronological fixture list, which I shall call "the chronological list". A claim to copyright is printed on this document. This is the document in which copyright is alleged to exist and which is allegedly infringed. It shows day by day throughout the season who is playing whom and where, for the home team is always shown first. In each division the list is arranged alphabetically. The preparation of this list from the final edition of the clubs list is, of course, automatic and requires only a painstaking accuracy. F
The chronological list is then sent out to the clubs and to the Press on payment, together with a warning against reproduction except with permission.

I can deal with the activities of the defendants very shortly. This is a test action and the defendants are sued in fact, though not in form, as being representative of the pool promoters organisation. I do not propose to give any explanation of their activities as they are so well known and so widespread that they have even attracted to themselves some statutory obligations. Suffice it to say that, as is well known, they run a system of gambling based on the results of the league matches on Saturdays. G
For this purpose they send out every fortnight "coupons" for the next two Saturdays containing lists of football matches on which the customers make their choice. The object is, e.g., to try to pick out matches which result in a draw. Basically these lists for each Saturday contain the league matches to be played on that Saturday. H
On cup tie Saturdays, the defendants use the list of cup ties, which are no concern of the league, but on every other Saturday, which form of course the great majority of Saturdays in the season, the league matches are the basis. I
Some time was expended in evidence before me about differences in the defendants' list compared to the chronological list due to the incidence of cup ties and changes of ordinary league matches, but in the end no argument was based on it and so I do not review it. Subject to these immaterial differences, it is clear that throughout the season, Saturday by Saturday, league matches are the basis of the defendants' coupons. Each week the defendants prepare coupons for the use of their customers and it is not in dispute that the list for their treble chance pool is copied directly from the chronological list of which the defendants have managed to procure a copy.

- A The selection of matches for other pools is made from the same list. This was most fairly admitted by the defendants' executive officer responsible for the production of their football pool coupons, a Mr. Clare, a most candid and fair witness. To that list there will be added some Scottish matches. The defendants have a number of agents, I think some twenty-nine in all, situate in various parts of the country who check on the matches to be played each week, because sometimes, although on the whole infrequently, the dates and places of some matches between members of the league are altered with the assent of the league. This happens more frequently towards the end of the season when a cup tie may have had unexpected results. Perhaps some third division club has survived more rounds than was expected, or, perhaps, some first division club has got knocked out unexpectedly early. In such cases changes in league fixtures have to be made to meet the situation, but on the whole they are few compared to the great body of matches and I am satisfied that substantially the defendants copy week by week throughout the season the entries for that week directly from the chronological list. Indeed the defendants have been perfectly candid about it and it is not disputed. For a short time they did transpose two matches in each division, but it is not relied on. In those circumstances I do not propose further to review the evidence (which I accept) as to how the various items on the defendants' coupons are prepared.

I conclude the facts by saying that if any copyright in any document resides in Mr. Sutcliffe he has assigned it to the league.

- E On those facts two main points arise: first, is the league's chronological list susceptible of being the subject-matter of copyright and, if so, secondly, has it been infringed by the actions of the defendants? Copyright is statutory and depends on the terms of the Copyright Act, 1956. Section 2 (1) is in these terms:

- F "Copyright shall subsist, subject to the provisions of this Act, in every original literary, dramatic or musical work which is unpublished, and of which the author was a qualified person at the time when the work was made, or, if the making of the work extended over a period, was a qualified person for a substantial part of that period."

Section 2 (5) is in these terms so far as is relevant:

- G "The acts restricted by the copyright in a literary, dramatic or musical work are— (a) reproducing the work in any material form; (b) publishing the work; . . . (f) making any adaptation of the work; . . ."

- H Section 48 defines "literary work" as including any written table or compilation. Read literally the use of the word "any" in s. 2 (5) (a) makes the definition of included material very wide indeed, wider possibly than under the Copyright Act, 1911, but in my judgment no extension was intended and the matter must be determined in accordance with the principles laid down in the authorities on the earlier Acts.

- I Compilations frequently, though not of course necessarily, consist of merely quasi-statistical reference matter such as railway time tables, horse breeding material, catalogues, indices, solar and lunar calendar events, reference directories and so on. Such material has no literary merit in the sense of having grammatical composition. The chronological list falls into this category of compilation. As to such compilations the law is clear but difficulty arises in its application.

Copyright for such a compilation can be claimed successfully if it be shown that some labour, skill, judgment or ingenuity has been brought to bear on the compilation. The amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright is a question of fact and degree in

every case. LORD ATKINSON put the matter in this way in the Judicial Committee in *Macmillan & Co. v. Cooper* (1) ([1923], L.R. 51 Ind. App. 109 at p. 125):

"What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree."

That passage was treated as laying down the law by VISCOUNT SIMON, L.C., in the House of Lords in *Cramp & Sons, Ltd. v. Frank Smythson, Ltd.* (2) ([1944] 2 All E.R. 92 at p. 94).

There are many authorities in the books, some on one side of the line, some on the other, but I am not going to refer to them for, as I have said, it is largely a question of fact and degree in each case, and this case in particular must turn on its own peculiar facts.

Counsel for the defendants has argued before me (in effect) that in the circumstances of this case the above formulation of the law has small relevance. He submits, and I agree with him, that it is clearly settled law that there can be no copyright in information or in an opinion per se. Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion. There are many cases to that effect. See amongst others *Walter v. Steinkopff* (3) ([1892] 3 Ch. 489); *Chilton v. Progress Printing & Publishing Co.* (4) ([1895] 2 Ch. 29); *Odhams Press, Ltd. v. London & Provincial Sporting News Agency* (1929), *Ltd.* (5) ([1936] 1 All E.R. 217). Counsel rightly points out that in this case the league is in the unique position of being the only person in the world who, prior to publication, is in possession of the information contained in the fixture lists. The league creates that information and it alone knows who will play whom and where on any given date. Copyright, it is submitted, cannot be claimed in respect of such information. If, says counsel, you create information, for example, as to the composition of the next M.C.C. team to try to recover the Ashes, the selectors cannot claim the exclusive right to publish it for it is mere information. One cannot, he submits, have a statutory monopoly (i.e., copyright) in the mere publication of the predetermination of future events when such events are and must necessarily be of one's own creation. So that the publication of future football fixtures is the mere announcement of information in the exclusive possession of the announcer, i.e., the league, and anyone is entitled to use that information. Counsel admits that there is some limitation on that proposition, viz., that, where the facts are represented in some special way, it then becomes a question of fact and degree whether the skill and labour involved in such special representation of the information is entitled to copyright. With these general propositions I agree. It is in their application to this case that the difficulty arises.

Those general propositions counsel applies to this case in this way. He submits that the skill, labour and ingenuity expended by Mr. Sutcliffe is directed to the production of information, it is not directed to the preparation of a fixture list at all, but to the production of a programme of football games to be carried out by members of the league; a programme designed to give the most satisfactory results to league football and to its followers by reducing clashing events to a minimum and by meeting so far as it is possible to do so the wishes of each club. So, he says, Mr. Sutcliffe's work had really nothing to do with the production of a document. He was preparing information which of necessity had to be reduced to written form, but, being purely creative information, the mere reduction into writing of that information could not give rise to any claim

A for copyright. Counsel illustrated his point by reference to *Purefoy Engineering Co., Ltd. v. Sykes Bowall & Co., Ltd.* (6) ((1955), 72 R.P.C. 89). The facts in that case were very complicated and ranged far beyond anything that I have to consider. Putting the relevant facts very shortly, the plaintiffs were makers of standard parts to be used by customers in the manufacture of jigs. The defendants copied these jigs and it was recognised that this was permissible in the absence of passing off. The plaintiffs also prepared elaborate catalogues. It was argued that the plaintiffs' goods "represented" in physical form the description in the catalogues and therefore any catalogue issued by the defendants, though not copied directly from the plaintiffs' catalogues, must infringe the plaintiffs' copyright, for both catalogues would describe the same goods and therefore the defendants' catalogues must necessarily be closely akin to those of the plaintiffs. This argument was rejected and in doing so SIR RAYMOND EVERSHED, M.R., who read the judgment of the court, said this (*ibid.*, at p. 99):

"In our judgment, Mr. Shelley's argument involves the transposition of an essential sequence in the chain. For, in our judgment, it is not true to say that the parts made and offered by the plaintiffs 'represented' in physical form the descriptions in the catalogue—at least in any sense relevant to the consideration of copyright in the latter, as a literary work. Rather, the contents of the catalogue described the parts made and offered by the plaintiffs. And the considerable skill and labour devoted by the plaintiffs in making their selection was devoted to the selection of the range of goods in which the plaintiffs were to trade and not for the purpose of bringing into existence the literary work, namely, the catalogue. No doubt skill and labour were employed for the latter purpose, but skill and labour of a different order. The selected range of goods existed or was capable of existing for trading purposes independently altogether of the plaintiffs' catalogue or of any catalogue."

F Counsel submits that the state of affairs here is analogous. The work that Mr. Sutcliffe did resulted in the preparation of the clubs list. Whether copyright could have been claimed for the clubs list is not in point here, but if counsel is right I doubt whether there would be such copyright (though counsel would not commit himself on the point) for the essence of his case is that Mr. Sutcliffe is not basically concerned with the production of documents but with information leading to real fixtures to be played. The reduction of such information into writing is a mere incidental. So the argument runs. However, whether or not copyright could have been claimed for the clubs list, counsel submits that there can be no such claim for the chronological list for insufficient labour is expended thereon to justify a claim for copyright. He submits that the only skill, labour and effort which can be called in aid in support of a claim to copyright is that involved in reproducing the chronological list from the clubs list and that requires no element of taste or selection, judgment or ingenuity and nothing more than the good offices of a clerk whose only qualifications need be painstaking accuracy. To this point I shall return later.

I The problem therefore at this stage resolves itself into the question whether, as counsel for the defendants submits, the activities of the league, its servants and agents (and that really means the activities of Mr. Sutcliffe) in producing the fundamental scheme for the following season's football programme must be regarded as being an activity directed to the production of non-copy-right information to be made readily available to the public or whether the league's activities may properly be regarded as leading to the production of Mr. Sutcliffe's documents, the clubs list or the chronological list, so that they may be regarded as compilations to which the entire energies of Mr. Sutcliffe may be attributed. If the latter be the true view, then let me say at once that I am satisfied, on the evidence, that the energies of Mr. Sutcliffe from start to

finish are of a high order judged by any standard. His work represents much skill, labour, time, judgment and above all ingenuity, and on this view therefore is entitled to copyright. A

Counsel for the league submits that, if the defendants' point is sound, a number of the earlier authorities must have been differently decided. Thus, he says, in *British Broadcasting Co. v. Wireless League Gazette Publishing Co.* (7) ([1926] Ch. 433), it was decided that the B.B.C. had copyright in the "Radio Times" which published the week's radio programmes. In that case counsel for the defendants took very much the same point as does counsel for the defendants in this case, that there cannot be copyright in a programme consisting of a bare list of items. ASTBURY, J., held that the plaintiffs' compilation was a publication involving considerable time, skill, labour and expense and, being a compilation of several advance programmes, was entitled to copyright whatever might have been the result with regard to one programme. That case certainly decides that one can have copyright in the material form in which one presents original created information, but I do not think that it decides the point which I have to decide, viz., whether the early work done by Mr. Sutcliffe in preparing the fixtures can be taken into account. When ASTBURY, J., held that the plaintiffs' publication was one involving considerable skill, labour and expense, I do not understand him as including the preliminary work (which is analogous to part of Mr. Sutcliffe's work in this case) in fixing up dates, times and artists and so on, but to be referring to the actual work of compilation after those matters had been fixed. B

The next case on which counsel for the league relied was that of *Collis v. Cater, Stoffell & Fortt, Ltd.* (8) ((1898), 78 L.T. 613). The plaintiff, who carried on a chemist's business, prepared an alphabetical list of patent and proprietary preparations which was copied by the defendants. So that again was a case where the plaintiff expended skill mainly in the way of selection and in actually preparing the list. It does not help me on this point. C D E

Finally, there is the Australian case of *Winterbotham v. Wintle* (9) ((1947), 50 W.A.L.R. 58). In that case the "race card" of runners was prepared, but it was then sent to the handicapper who after much study of the "form" allotted weights to the various horses. It was argued, as here, that the handicapper's undoubted skilled labour was directed not to the preparation of a list of entries, but to the achievement of a close race by allotting weights to the various horses, and of course that was so. It was then argued that the race card merely "eventuates" and could not be the subject-matter of copyright. WOLFF, J., held (see *ibid.*, at p. 67) that the race card was the result of sufficient skill and labour to attract a claim to copyright and, therefore, so I understand him to say, it was unnecessary for him finally to decide the point which I have to decide. He dealt with the matter very shortly and in any event the judgment does not bind me. F G

Every case must depend on its own facts. It is perfectly true that Mr. Sutcliffe was not employed to produce a work of art per se nor even a work primarily as a book of reference such as a directory or railway guide, but he was employed to produce the best possible programme of fixtures. Of necessity, however, that programme had to be reduced to writing. The league's duty is to arrange the best possible programme of games to please the football public in general and the clubs' finances in particular and they can only do that by producing a list or lists of those games. If, as a result of prolonged cogitations, Mr. Sutcliffe reaches the conclusion that it will be best if, for example, Arsenal plays Manchester City at Highbury on Sept. 20, 1958 (as indeed the programme provided), he is doing so no doubt primarily because that is best from the point of view of league football, but if as the result of the whole of his prolonged and skilled cogitations he produces in a particular form the season's list consisting of 2,028 matches or thereabouts, in my judgment he or the league (who have, by direct H I

A assignment, any copyright which might otherwise vest in him) are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the league, their servants and agents. In my judgment, on the facts of this case, it is not open to the defendants to try to dissect and break down the efforts of Mr. Sutcliffe in the way suggested.

B Accordingly in my judgment the league are entitled to copyright in the chronological list.

I return to the point made by counsel for the defendants that if, contrary to my view, he is right on his major premise and that the only work of compilation consists in the production of the chronological list from the clubs list then that, he says, does not involve a sufficient element of skill and labour to justify a claim for copyright. I should regard this as a borderline case. I accept at once that in such a compilation there is no element of skill, of selection, of taste, of judgment or of ingenuity. As Mr. Hardaker said, there is no difficulty, it is automatic. But, I would add, it involves a great deal of painstaking hard work with complete accuracy as the keynote. That was all that was required, for example, in *H. Blacklock & Co., Ltd. v. C. Arthur Pearson, Ltd.* (10) ([1915] 2 Ch. 376). I think that the matter may be tested in this way. Suppose the league did no more than issue the clubs list. Suppose an enterprising publisher conceived the idea of publishing a complete chronological list, which he thought might prove useful to football patrons, so he puts one on the market. That work proving successful, suppose it is pirated, i.e., deliberately copied by another. In my judgment, the enterprising publisher (though perhaps by the narrowest of margins) would be entitled to claim that the work involved sufficient work and labour to justify the existence of copyright therein. True there would be in that suppositious case the argument that there was competition between infringer and infringed, and there is none here, but that is not decisive (see *Weatherby & Sons v. International Horse Agency & Exchange, Ltd.* (11), [1910] 2 Ch. 297). Had it been necessary to do so, I should have been prepared to find in the league's favour on this ground also.

E The next main question is, has the defendant infringed the league's copyright? The defendants' case is that where there is a mere compilation with no true literary merit in the sense of grammatical composition there can be no infringement by copying by weekly instalments. It is submitted that, if you have some book which has true literary merit in the sense of grammatical composition (though it may be the worst journalese), to copy one instalment may well be a breach of copyright, but where that is absent, as admittedly it is here, and you are copying a mere list you must look at the plaintiffs' document and the defendants' alleged infringement and compare them. So judged there can be no infringement. No authority was cited for this and I do not think it right to bring into the realm of copyright tests appropriate and familiar in trade mark and passing off cases. Once the plaintiff establishes copyright the real question is whether the defendant is "reproducing the work in any material form", or "making any adaptation of the work". That depends on the facts of this case.

The undisputed facts fundamental to my decision in this case are that the chronological list itself is taken by the defendants and used by them line by line and division by division in exactly the same order as the league for the preparation of each of their coupons week by week throughout the season (except in the few cup tie weeks, which together with a few league match changes, as I have already pointed out, may be disregarded as de minimis) and they do this deliberately and under a claim of right so to do. True it is that in this case there is no competition between the league and the defendants, but as I have already pointed out that is not decisive of the case. If the defendants like to use the information contained in the chronological list and prepare their own lists by "scrambling" the order of matches so that the divisions were all mixed up

and so that there was no alphabetical order, it is possible that it could be successfully argued that they were using only the information and were not reproducing the compilation, but that is not a question which I decide, nor do I speculate on the defendants' customers' reactions on receiving such a list. What in fact the defendants have done each week is in substance to copy exactly the league list for that week, throughout the season. I find some assistance on this point from *Cate v. Devon & Exeter Constitutional Newspaper Co.* (12) ((1889), 40 Ch.D. 500). In that case the plaintiff published weekly a list of bankruptcies, bills of sale and so on, the names being listed by counties. The defendants took week by week such names for the county of Devon. The relevant entries pirated formed naturally a very small part of the whole. That case, while not on all fours with the present, has, however, a strong family resemblance. NORTH, J., said (*ibid.*, at p. 507):

"Then there is a further point raised by the defendants that the amount that has been taken from the copyright publication is very small. In one paper I think out of the three weeks' papers which have been put in evidence there was only one entry taken; in another there were, I think, four; in the third only a small number; but in considering these it must be borne in mind that all that is material for the defendants for the purpose of their newspaper has been taken, and that it is taken entirely—copied exactly from the paper—taken regularly, systematically, every week, and published for the purpose of giving information to the very persons to whom the plaintiffs intend their publications to give that information; and, what is more important still, the defendants now claim to do it as of right; and that of itself is quite sufficient to put them in the wrong in the action and get over any question as to the amount of matter actually taken from the particular publication which is in evidence. It seems to me, therefore, that the defendants have been wrong throughout: they had no right to take this matter in which the plaintiffs have copyright, and the action is well founded."

On the whole I have come to the conclusion that this systematic pirating by the defendants week by week throughout the season of that part of the league's list which is relevant to that week deliberately and (by their defence of this action) under a claim of right amounts in the end to a reproduction of the league's compilation and infringes their copyright accordingly. I propose to declare that the league is entitled to copyright in their chronological list. I shall further declare that by copying the league's chronological list week by week in their coupons for the football season 1958-59 the defendants infringed the league's copyright.

I shall not grant any injunction for the season 1958-59 as the season is now over, and I do not propose to grant any injunction relating to next season or to give liberty so to apply, first because I do not know what methods the defendants will employ to prepare their coupons for next year, and, secondly, because of the difficulty pointed out by NORTH, J., in *Cate's* case (12) in his judgment, immediately following the passage I have read, to the effect that it is difficult to see how the league can now claim any protection for a document which, judged by last season's dates, at the moment has no existence, though no doubt it is now in the course of preparation.

Judgment for the plaintiffs.

Solicitors: *Johnson Weatherall & Shurt*, agents for *Parker, Rhodes & Co.*, Rotherham (for the plaintiffs); *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A R. v. CAMPBELL.

[CROWN COURT AT LIVERPOOL (Judge Laski), March 10, 17, 1959.]

Criminal Law Trial Postponement—Accused committed to Crown Court at Liverpool on charge of felony—Prosecution witness out of country—Case twice previously respited to next session on application of Crown—Third application by Crown—Whether accused entitled to be discharged—Habeas Corpus Act, 1679 (31 Car. 2 c. 2), s. 6.

In December, 1958, the defendant was committed to the Crown Court at Liverpool on a charge of robbery with aggravation, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The court, which was set up under the Criminal Justice Administration Act, 1956, s. 1, sat at least eleven times a year. As the complainant, a seaman, was not in the country when the case came before the court in January, 1959, an application by the Crown to respite the case to the next session was granted and the defendant was released on bail. A similar application was granted when the case came before the court in February, 1959, and the defendant was allowed to remain on bail. When the case again came before the court in March, 1959, the Crown applied for the case to be further respited as the complainant would not be back in England until July, 1959, and the question arose whether, in the circumstances, the defendant was entitled to be discharged under s. 6* of the Habeas Corpus Act, 1679.

Held: the benefit of s. 6 of the Habeas Corpus Act, 1679, depended on the observance of the procedural conditions precedent set out in the section, and, as these had not been complied with, the defendant was not entitled to be discharged under the section; but, in the exercise of the court's discretionary power in the matter, an order would be made that the case should lie on the file and not be further proceeded with without an order of the court.

[As to applications for postponement of trial, see 10 HALSBURY'S LAWS (3rd Edn.) 409, para. 744; and for cases on the subject, see 14 DIGEST (Repl.) 287-290, 2627-2659.

For the Habeas Corpus Act, 1679, s. 6, see 6 HALSBURY'S STATUTES (2nd Edn.) 89.

For the Assizes Relief Act, 1889, s. 3, see 5 HALSBURY'S STATUTES (2nd Edn.) 916.

For the Quarter Sessions Act, 1842, s. 1, see 14 HALSBURY'S STATUTES (2nd Edn.) 762.

For the Criminal Justice Administration Act, 1956, s. 1, see 36 HALSBURY'S STATUTES (2nd Edn.) 183.

For the Central Criminal Court Act, 1834, s. 2, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18 and s. 70, see 5 HALSBURY'S STATUTES (2nd Edn.) 184, 347, 363.

* Section 6 reads: "Provided always . . . that if any person or persons shall be committed for high treason or felony plainly and specially expressed in the warrant of commitment upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted sometime in the next terme sessions of oyer and terminer or generall goale delivery after such commitment it shall and may be lawfull to and for the judges of the Court of Kings Bench and justices of oyer and terminer or generall goale delivery and they are hereby required upon motion to them made in open court the last day of the terme sessions or goale delivery either by the prisoner or any one in his behalfe to sett at liberty the prisoner upon baile unlesse it appeare to the judges and justices upon oath made that the witnesses for the King could not be produced the same terme sessions or generall goale delivery. And if any person or persons committed as aforesaid upon his prayer or petition in open court the first weeke of the terme or first day of the sessions of oyer and terminer or generall goale delivery to be brought to his tryall shall not be indicted and tryed the second terme sessions of oyer and terminer or generall goale delivery after his commitment or upon his tryall shall be acquitted he shall be discharged from his imprisonment."

For the Interpretation Act, 1889, s. 13, see 24 HALSBURY'S STATUTES (2nd Edn.) 213.]

Cases referred to:

- (1) *Anon.*, (1680), 1 Vent. 346.
- (2) *R. v. Bowen*, (1840), 9 C. & P. 509; 173 E.R. 933; 16 Digest 251, 519.
- (3) *R. v. Oliver*, [1957] 3 All E.R. 669; [1958] 1 Q.B. 250; 122 J.P. 24; 42 Cr. App. Rep. 27; 3rd Digest Supp.

Application.

This was an application by the Crown to respite further the trial of the defendant, who had been committed to the Crown Court at Liverpool on a charge of robbery with aggravation, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The case had already been twice respited to the next session of the court on the ground that the complainant, a seaman, was not in the country. As the complainant would not be in England until July, 1959, the Crown applied for a ruling whether application should be made each session for the case to be respited to the next following session until July was reached.

G. J. Bean for the Crown.

J. M. Dovener for the defendant.

Cur. adv. vult.

Mar. 17. **JUDGE LASKI:** On Dec. 11, 1958, Campbell and two others, man and wife, were committed to this court by the Liverpool magistrates on a charge of robbery with aggravation at Liverpool of one John Ball on Dec. 7, 1958, contrary to s. 23 (1) (a) of the Larceny Act, 1916. The married pair pleaded guilty and have been sentenced by me. It is the position of Campbell with which I have to deal. Campbell came before me at the January, 1959, session of this court. Application was made to respite the case to the February session as the complainant, a seaman, was out of the country. I granted this application and gave bail to Campbell. At the February sitting of this court a similar application was made for the same reason and I respited the case to this session, Campbell remaining on bail. An application has been made to me further to respite this case and I have been informed that the complainant will not be in this country until July.

The Habeas Corpus Act, 1679, was cited to me as having immediate relevance to the instant case, and I was referred to ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (34th Edn.), para. 241 to para. 243*, as providing an adequate simplified summary of the meaning of s. 6† of that Act. Under the Assizes Relief Act, 1889, s. 3, if a person committed for trial at sessions is not tried at the next sessions, the next court of assize may *on his application* try or discharge him or release him on bail, unless the delay is due to special reasons, such as the impossibility of producing the witnesses for the Crown (s. 3 (1) and s. 3 (3)). If the next court of quarter sessions has not tried him before the next subsequent assizes, the judge of assize must try or discharge him (s. 3 (2)). The offence in respect of which Campbell is indicted is not triable at quarter sessions: see the Quarter Sessions Act, 1842, s. 1.

The court in which I sit is a Janus-like hybrid in that, under s. 1 (1) of the Criminal Justice Administration Act, 1956, it has functions

“ . . . for the purpose of exercising such jurisdiction as is commonly conferred on courts of assize by the commissions of oyer and terminer and of gaol delivery . . . ”

* Paragraph 243 states (inter alia): “ Section 6 of the Habeas Corpus Act, 1679, provides for the release of persons committed for trial for high treason or felony, if they are not indicted at the latest in the second term, assizes, or sessions after their committal.”

† The terms of s. 6 are printed at p. 557, letter H, ante.

A and in that capacity it is known as "the Crown Court at Liverpool" (s. 1 (1) (a)), and under s. 3 of the same Act, it has additional jurisdiction as a court of quarter sessions for Liverpool. It is clear that I must deal with this matter in the context of s. 1 of the Act constituting this court.

B The Central Criminal Court was constituted by the Central Criminal Court Act, 1834. It took the place of the former sessions at the Old Bailey which had been held from very early times under special commissions of gaol delivery for Newgate and of oyer and terminer for the City of London and the County of Middlesex. The court now sits under a general commission of gaol delivery and oyer and terminer and has power to proceed thereunder until the commission is renewed (s. 2). The court sits twelve times each year*. In these respects the Central Criminal Court is in *pari materia* with this court. The C
(Central Criminal Court is part of the High Court of Justice: see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18 and s. 70, and see also 9 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 407, note (g). It is a court of assize also: see the Interpretation Act, 1889, s. 13 (4). In my view, the definition of "court of assize" in that subsection would include this court.

D I now turn to a consideration of s. 6 of the Habeas Corpus Act, 1679. After reading that section with care and frequency, I do not feel that it is as easily construed as the simplicity of the explanation in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE would suggest. It is true that SIR WILLIAM HOLDSWORTH in his HISTORY OF ENGLISH LAW, Vol. 9, p. 118, also gives a very simple summary of s. 6, but he fails, in my respectful opinion, to note the procedural conditions precedent, which find an echo in the Assizes Relief Act, 1889, s. 3.

E It must be remembered that the Habeas Corpus Act, 1679, is an old Act, conditioned in its terms by the law and procedure of its day. I have found an anonymous case, *Anon* (1) ((1680), 1 Vent. 346), heard in "Termino Sancti Hillarii, Anno 31 & 32 Car. 2 in Banco Regis", that is to say, in the King's Bench in Hilary Term of 1680, within a year after the passing of the Act. The report runs as follows:

F "A person who was committed to the Tower for conspiring the death of the King, was brought up by habeas corpus, and prayed to have bail taken, unless an indictment were found against her this term, according to the new Act of 31 Car. 2 for habeas corpus's. The court said, that they which would have the benefit of that Act, must pray it before the first week of the term expires; but in regard it appeared, that she had prayed G it before by her counsel, and her habeas corpus was taken out in time, the court said, the benefit of the Act should be saved to her, for the prayer is not necessary to be made in person, but Mr. C. G. was refused the advantage, he having omitted to make the prayer during the first week, either in person or by counsel."

H In STATUTES AT LARGE, Vol. 8, edited by DANBY PICKERING and published in Cambridge in 1763, the Act is printed at p. 432 et seq. The present notation, consecrated by the official STATUTES OF THE REALM, of the relevant section is 6; in STATUTES AT LARGE it is 7. It is clear that *Anon* (1) was regarded as good law, as it is therein marginally cited (STATUTES AT LARGE, Vol. 8, at p. 436). I do not regard *R. v. Bouen* (2) ((1840), 9 C. & P. 509) as of great value to me but it shows, by reason of the careful argument of Mr. Greaves of counsel, on behalf of the prisoner in that case, that at that date also it was recognised that I the benefit of the Act of 1679 depended on the observance of certain procedural conditions precedent. It may be that in the conditions of today it is difficult, if not impossible, to comply with the requirements of the statute. That may be an argument of validity and force for amending or reconstructing the law

* Under s. 1 (5) of the Criminal Justice Administration Act, 1956, the Crown Court at Liverpool is to sit at least eleven times every year, unless otherwise directed by the Lord Chancellor.

of habeas corpus, but today I must construe the Act of 1679 as it is. In the first place, this application is made to me by the Crown and not by the prisoner. In the second place, I hold that the procedural conditions precedent of s. 6 of the Act of 1679 have not been complied with. In these circumstances I hold that no case exists for the application of the Act of 1679. The preamble to the Act of 1679 makes clear the abuses aimed at—abuses which do not obtain in modern times. It is perhaps not improper to add that the decision of WILLIAMS, J., in *R. v. Bowen* (2) seems to accord with the common sense of the matter, albeit no reasons are given and it is not easy to follow the phrases (9 C. & P. at p. 512) “human law” and “humanly interpreted”.

I have looked at *R. v. Oliver* (3) ([1957] 3 All E.R. 669), which was cited to me. That case does not appear to me to assist in this matter. Despite my researches I can find no evidence of a matter arising in *pari materia* with the present matter and from which, in terms of its treatment alicunde, I could gain guidance. I note with interest that in the learned article on habeas corpus which appears in the *ENCYCLOPEDIA OF THE LAWS OF ENGLAND* (2nd Edn.), Vol. 6, p. 468 et seq., it is stated at p. 471:

“At the present day, indeed, the writ of habeas corpus is almost invariably issued by virtue of the common-law jurisdiction, and not under the statute.”

Campbell is not, however, without remedy. I conceive myself within the law to have a discretionary power to give a direction as to the future of this matter. In my opinion, the justice of the case will be met if I order that this case lie on the file and be not further proceeded with without an order of the court.

Order accordingly.

Solicitors: *Town clerk*, Liverpool (for the Crown); *K. Maxwell Brown*, Liverpool (for the defendant).

[*Reported by K. BUCKLEY EDWARDS, Esq., Barrister-at-Law.*]

PRACTICE DIRECTION

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Probate—Grant—Second or subsequent grant through solicitor—Application by post at Principal Probate Registry—Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 3 (1).

Probate—Grant—Re-sealing—Scottish confirmation or Northern Irish or colonial grant—Application by post at Principal Probate Registry.

The President has directed under para. (1) of r. 3* of the Non-Contentious Probate Rules, 1954, that, as from July 1, 1959, a person applying for a second or subsequent grant through a solicitor may apply by post at the Principal Registry in cases where the original will is registered or the original grant was made at the Principal Registry.

The President has further directed that, as from July 1, 1959, application for the re-sealing of a Scottish confirmation or a Northern Irish or colonial grant may be made by post at the Principal Registry.

B. LONG,
Senior Registrar.

May 28, 1959.

N.B.—This direction does not provide postal facilities at the Principal Registry for applications for first grants, for which postal facilities are available at all district probate registries.

* 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 287.

A

COCKERILL v. WILLIAM CORY & SON, LTD.

[COURT OF APPEAL (Morris, Sellers and Willmer, L.JJ.), April 8, 9, 10, May 6, 1959.]

B

Dock—Loading and unloading—Hatch covers removed for loading—Hatch covers not required by regulations to be provided owing to height of hatch coamings—Loading interrupted and ship moved from berth to buoys—Seaman fatally injured by falling through open hatchway—Whether shipowners under statutory duty to restore hatch covers when loading ceased—Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 45.

C

Regulation 45 of the Docks Regulations, 1934, provides: "No person shall, unless duly authorised or in case of necessity, remove or interfere with any fencing, gangway, gear, ladder, hatch covering, life-saving means or appliances, lights, marks, stages or other things whatsoever required by these regulations to be provided. If removed, such things shall be restored at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal".

D

The steamship *Corfield* was a self-trimming collier with four holds and wide hatch openings. No. 1 hold, the hatch of which was the most forward in the vessel, was about twenty-four feet deep, but, as the coamings of No. 1 hatch were about five feet in height, the requirement of reg. 37 (a)* of the Docks Regulations, 1934, in regard to the provision of hatch covers did not apply, and there was no other regulation which made the provision of hatch covering on No. 1 hatch obligatory. At 7 a.m. on Nov. 28, 1953, the vessel arrived at South Shields for the purpose of loading a full cargo, and at 7.15 a.m. loading commenced in No. 3 hold. No. 1 hold was partially opened up at about 10 a.m., only the covers from the middle and aft sections of No. 1 hatch being removed because the trim of the vessel required that No. 1 hold should be only partly loaded. At about 11 a.m. the officer in charge of the vessel was informed that no further cargo would be available after the loading of No. 3 hold was completed, and that the vessel would have to vacate the berth for the week-end and move into the river to a position at tier buoys about four hundred yards away. At about 12.15 p.m. the vessel cast off to proceed to the buoys with the aid of a tug. It was then found that the boatswain had fallen into No. 1 hold and was fatally injured. Apparently, he had climbed on to the forward section of the hatch covers of No. 1 hatch in order to uncoil some mooring wire and must have slipped or lost his balance. His widow brought an action for damages against the shipowners for breach of statutory duty under reg. 45 of the Docks Regulations, 1934, in that all hatch covers on No. 1 hatch were not restored at the end of the period during which their removal was necessary, namely, at 11 a.m. when it was learnt that no further cargo was to be loaded in that hold.

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Held: the shipowners were not in breach of reg. 45 of the Docks Regulations, 1934, because—

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(i) the words "required by these regulations to be provided" in the first sentence of reg. 45, were related to and qualified all the items of equipment previously specified in the regulation, not merely the "other things whatsoever" referred to therein.

DICTA of LORD DU PARCQ in *Grant v. Sun Shipping Co., Ltd.* ([1948] 2 All E.R. at p. 244) not followed.

(ii) since there was no provision in the Docks Regulations, 1934, which

* The terms of reg. 37 and reg. 45 are printed at pp. 565, letter B, 564, letter H, post.

required a hatch covering to be provided on No. 1 hatch in the circumstances of this case, the hatch covering of No. 1 hatch was not a hatch covering to which reg. 45 applied.

Appeal dismissed.

[For the Docks Regulations, 1934, reg. 37 and reg. 45, see 8 HALSBURY'S STATUTORY INSTRUMENTS 171, 172.]

Cases referred to:

- (1) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549; [1949] L.J.R. 727; 2nd Digest Supp.
- (2) *Mace v. R. & H. Green & Silley Weir, Ltd.*, [1959] 1 All E.R. 655.
- (3) *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.

Appeal.

This was an appeal by the plaintiff, Ivy Constance Cockerill, from a judgment of McNAIR, J., dated June 4, 1958.

The plaintiff was the widow of George Robert Cockerill, who was fatally injured on Nov. 28, 1953, when he fell through an open hatchway into No. 1 hold of the steamship Corfield, a coasting collier belonging to the defendants, William Cory & Son, Ltd. At the time of the accident the deceased was employed by the defendants as boatswain on the Corfield. The hold into which the deceased fell was about twenty-four feet deep, but, as the coamings of the hatch through which he fell were about five feet in height from the main deck level, the hatch was not required to be securely covered under reg. 37 (a) of the Docks Regulations, 1934, or under any other regulation. The plaintiff, suing on behalf of herself and her two infant children and also as administratrix of the estate of the deceased, claimed damages against the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for the death of the deceased, the claim being based on negligence and on the breach by the defendants of their statutory duty under reg. 45 of the Regulations of 1934. The allegation in regard to the breach of reg. 45 was that all the hatch covers on No. 1 hatch were not restored at the end of the period during which their removal was necessary, namely, the period during which the vessel was at a loading berth at Commissioners Staithes, North Shields. McNAIR, J., held (a) that the defendants were not negligent at common law; and (b) that reg. 45 of the Regulations of 1934 required all hatch covers which had been removed to be restored at the end of the period during which their removal was necessary, even if the covers were not required to be provided under the regulations, but that the plaintiff had failed to establish that the defendants were liable to her in damages for a breach of reg. 45; and, accordingly, he dismissed the action. The plaintiff appealed only from that part of the judgment which adjudged that the defendants' liability under reg. 45 of the Regulations of 1934 had not been established.

The facts are stated in the judgment of MORRIS, L.J.

F. W. Beney, Q.C., and *Elson Rees* for the plaintiff.

Montague Berryman, Q.C., and *W. G. Wingate* for the defendants.

May 6. The following judgments were read.

Cur. adv. vult.

MORRIS, L.J.: On Nov. 28, 1953, George Robert Cockerill, who was then employed as a boatswain on the steamship Corfield, fell to his death through an open hatchway. The ship was a coasting collier of some four thousand tons. The fatality occurred after the vessel had arrived at South Shields for the purpose of loading a cargo of small coal. The widow of the deceased brought an action against the employers alleging that the death of the deceased was caused by

A negligence on their part, and also by reason of a breach of statutory duty. The action was heard by McNAIR, J., who gave judgment for the defendants. Appeal is now brought to this court.

The deceased was thirty-three years of age at the time of his death. After many years of service in the Royal Navy terminating in 1950 he had shore employment until the end of 1952. Then he decided to return to seafaring employment. In April, 1953, he became an able seaman on the Corfield. Proving himself to be an experienced and efficient seaman, he was promoted to be boatswain some few days before his death. The Corfield is a self-trimming collier with wide hatch openings. The vessel has four holds, two of them being forward of the navigating bridge and two of them aft. The most forward of the four hatches is the No. 1 hatch, and it was through that hatch that the deceased man fell to his death. The hatch coamings are approximately of a height of five feet from the main deck level. The No. 1 hold is about twenty-four feet deep. The hatch (that is No. 1 hatch) has three thwartship sections, each one of which is sub-divided. There are, therefore, five hatch beams. On these the hatch covers are laid. The covers are about ten feet in length. The forward section of No. 1 hatch tapers slightly and the distance between the coamings of this forward section and the bulwarks was four feet six inches. The hatch at the aft end of the forward section is some thirty feet in width. Forward of No. 1 hatch the open forecastle space on the main deck is some four feet in width.

The vessel arrived at South Shields at 7 a.m. on Saturday, Nov. 28, 1953, and berthed at the Commissioners Staithes. As it was contemplated that loading would commence shortly after the vessel berthed, the hatch covers over No. 2 and No. 3 holds were removed as the vessel steamed up river. The usual order of loading the vessel was that holds No. 2 and No. 3 would first be completely loaded, then No. 4 would be partly loaded, then No. 1 would be partly loaded, and finally the loading of No. 4 would be completed. No. 1 would not be completely loaded because the trim of the vessel required that it should be only partly loaded. At 7.15 a.m. loading commenced in No. 3 hold. At about 7.15 a.m. those who were due for week-end shore leave left the vessel. They were Captain Muttit (the master), the chief officer, and three deck hands. Those who remained were the second officer, the deceased and a deck boy, aged about seventeen years, named Oliver. Two riggers from the shore came aboard. At about 10 a.m. the second officer, who was then in charge of the vessel, gave instructions that No. 1 hold should be partially opened up. As No. 1 hold would only be partly loaded, it was only necessary to remove the hatch covers from the middle and aft sections of No. 1 hatch. This was in accordance with the common practice on the vessel. All the covers from the middle and aft sections were accordingly removed, and the deceased took part in their removal. The hatch covers were placed on each side of the hatch between the coamings and the bulwarks. At about 11 a.m., the second officer was informed by the berthing master or the staithes master that after No. 3 hold had been loaded no further cargo would be available. Furthermore he was told that the vessel would have to vacate its berth for the week-end, and would have to move into the river to a position at tier buoys approximately four hundred yards away. This would involve the vessel's being moored fore and aft. The normal method of mooring was that a wire would be run out from the forecastle head, lowered to a boat, and then made fast to one of the buoys. In similar manner a wire would be run out from the stern and fastened on to another buoy. It was also the practice to run out a heavier wire, called an "insurance wire", from the bow to the forward buoy. That wire, being some four and a half inches in circumference, would be heavier than the other mooring wires. The insurance wire would normally be stowed on a reel or drum under the forecastle deck ahead of No. 1 hatch. The evidence showed that the insurance wire sometimes got kinked or rucked up. When this happened the procedure which is called

"flaking down" was adopted. This involved laying the wire on some surface, and, where necessary, giving it a twist in order to take out the kinks so that thereafter the wire could the more easily be run out through the sheaths. Captain Martin, however, expressed the view that the insurance wire would not, in fact, need to be flaked. A

The loading of No. 3 hold continued until about 11.30 a.m. Thereafter a pilot came on board, and at about 12.15 p.m. the vessel cast off from the staithe. B There was a tug to take the vessel to the buoys. The boy Oliver was up on the forecastle head. He was dealing with the coiling of the wires by which the vessel had been moored at the bows. These wires were pulled in by winches. At that precise moment Oliver did not see the deceased. The next thing that he saw was that the insurance wire was hanging down in the hold. Observing this, he looked down into the hold, and he saw the deceased at the bottom of the hold. C The deceased was lying on the port side. Oliver's evidence suggested that the insurance wire had been previously lying partly on the deck and partly under the forecastle head on the port side of the vessel. In these circumstances I agree with the learned judge that it was a fair inference that the deceased must have got up on to the forward section of the hatch covers of No. 1 hatch, and that he must have been engaged in pulling the insurance wire up on to the place D where he was standing. That inference was apparently accepted by both sides at the hearing. What happened to the deceased thereafter can only be a matter of conjecture, but, for some reason, either because he slipped, or because in handling the wire he lost his balance, he fell down to the bottom of the hold.

The claim that was made in the action on behalf of the plaintiff, who is the widow of the deceased suing as administratrix, was put forward on a twofold E basis. In the first place, it was alleged that there was negligence at common law, and, in the second place, it was alleged that there was a breach of statutory duty. In the defence it was alleged that the deceased was himself negligent in various ways, and that his negligence either solely caused or contributed to the accident. The learned judge rejected all the allegations of common law negligence, and in respect of such rejection no appeal is made. F It is not, therefore, necessary to recount or to consider the various allegations of negligence which were presented. The learned judge further decided against the plaintiff's claim that there had been a breach of statutory duty. He did, however, assess the damages that he would have awarded, had he considered that liability was established. Although he did this, the learned judge did not expressly deal with the various allegations of negligence made against the deceased. The case put forward by the plaintiff G on appeal relates solely to the allegations of breach of statutory duty. By a counter-notice, presented by leave of the court, the defendants gave notice that they would contend, in support of the judgment in their favour, that the death of the deceased was solely caused by his own negligence in the respects alleged in the amended defence.

The breach of statutory duty alleged at the hearing and on the appeal relates H to reg. 45 of the Docks Regulations, 1934. That regulation reads:

"No person shall, unless duly authorised or in case of necessity, remove or interfere with any fencing, gangway, gear, ladder, hatch covering, life-saving means or appliances, lights, marks, stages or other things whatsoever required by these regulations to be provided. If removed, such things I shall be restored at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal."

That regulation appears in Part 5 of the regulations. In para. (e) under "Duties" the regulations provide that it is the duty of all persons, whether owners, occupiers, or persons employed, to comply with Part 5 of the regulations. On a consideration of reg. 45, the question arises whether the words "required by

A these regulations to be provided " govern all that had gone before or whether they govern only the words " other things whatsoever ". It is argued on behalf of the plaintiff that the latter is the correct construction. On that basis it is said that in the present case hatch coverings were removed, and it is said that, in breach of the requirement in the second sentence of reg. 45, the hatch covers were not restored. It is said, therefore, that the defendants were in breach of

B the regulation.

In Part 4 of the regulations there is reg. 37, which is in the following terms:

" (a) If any hatch of a hold accessible to any person employed and exceeding five feet in depth, measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than two feet six inches in height, such hatch shall either be fenced to a height of three feet or be securely covered. Provided that this requirement shall not apply (i) to vessels not exceeding two hundred tons net registered tonnage which have only one hatchway, (ii) to any vessel during meal times or other short interruptions of work during the period of employment.

C (b) Hatch coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to damage.

D (c) Hatch coverings shall be replaced on the hatches in the positions indicated by the markings made thereon in pursuance of reg. 14."

It is clear that the depth from the level of the deck in which No. 1 hatch was situated to the bottom of the hold was more than five feet. Where there is such a hold and when the hatch is not in use for the passage of goods, coal or other material, or for trimming, and where the coamings are less than two feet six inches in height, the hatch must either be fenced to a height of three feet or be separately covered. That requirement is subject to the proviso in the regulation. On the steamship *Corfield*, however, the coamings of No. 1 hatch were about five feet in height. It is clear, therefore, that there was no requirement under reg. 37 which made it necessary to have hatch coverings over the hatch. Nor is any other regulation to be found which made it obligatory to have hatch coverings. If, therefore, when considering reg. 45, the proper construction is that the words " required by these regulations to be provided " extend to and include the words " hatch covering ", then on this ship there were no hatch coverings which were required by the regulations to be provided. If that were so, then no breach of reg. 45 would be shown.

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This question of construction was referred to in the House of Lords in *Grant v. Sun Shipping Co., Ltd.* (1) ([1948] 2 All E.R. 238). In his speech in that case LORD DU PARCQ said (*ibid.*, at p. 244):

" My Lords, I think that there is no doubt that these regulations imposed on the repairers the duty of replacing the hatch-covering and of leaving in place the light which was necessary for the illumination of that part of the ship in which the pursuer was working. The question was raised in argument whether the words ' required by these regulations to be provided ', in reg. 45, were to be read as qualifying only the words ' other things whatsoever ' or as qualifying all the preceding substantives. Little perhaps turns on this, since there was plainly a breach of reg. 37 on the part of the repairers, but I have no doubt that the former construction is correct. No other seems to me to be possible with due regard to the context. One of the preceding words is the general word ' gear ', and it cannot have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided."

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LORD PORTER had begun his speech ([1948] 2 All E.R. at p. 241) by saying that he had had the opportunity of reading the opinion to be delivered by LORD DU PARCQ and agreed with him in thinking that the appeal should be allowed.

LORD UTHWATT said (*ibid.*, at p. 242) that he had had the advantage of reading in advance the opinion of LORD DU PARCQ, and that he entirely agreed with his reasoning and his conclusions. In that case common law negligence was established both against shipowners and ship repairers. As LORD DU PARCQ was of the opinion that there was a breach of reg. 37, he stated accordingly that little turned on the question of the construction of reg. 45. Counsel in the present case agreed that the opinion of LORD DU PARCQ on the question of construction was merely expressed obiter.

McNAIR, J., proceeded on an acceptance of the view expressed by LORD DU PARCQ. It was, furthermore, a view which appealed to him. In his judgment he said:

"Neither counsel submitted to me, nor do I think it right, that that passage in LORD DU PARCQ's judgment was anything other than an obiter expression of opinion and was not essential to the argument in support of the view which LORD DU PARCQ was favouring. At the same time it is a view expressed by a master in this particular field of the Factories Act and the Docks Regulations, and I would be very loth not to follow it unless I was convinced by argument that the view which LORD DU PARCQ expressed must have been expressed *per incuriam*. Having considered the regulation as a whole, it seems to me that the view of construction which LORD DU PARCQ found to be quite clear is one which I should follow, and, accordingly, that I should take the view that 'hatch covering' in reg. 45 means hatch covering of any hatch whether the coamings are less or more than two feet six inches in height."

Proceeding on that basis, the learned judge then examined in detail the wording of reg. 45 and said that he found it quite impossible to assign any clear meaning to it, or to find in it any obligation which, on the facts of the case, would require that the hatch covers on No. 1 hatch should be replaced before the vessel shifted from her loading berth to the mooring buoys.

It seems to me that in this case it becomes essential to form a conclusion as to the construction of reg. 45. In considering the matter, although we are not bound by the view expressed by LORD DU PARCQ, it could only be after giving that view the most careful and respectful consideration that anyone would venture to differ from it. On the facts of this case it would, however, seem to be a strange result that, if hatch coverings were not required by the regulations, yet because they existed there was a statutory requirement to restore them if they were removed. If they need never have been there at all, it would be surprising if, after their removal, a failure to restore them would involve committing an offence. If the regulation does apply, then on the facts of this case, so far as they are established, it is by no means clear on whom the duty of restoring rested. The removal was necessary in preparation for the work of loading. The restoration has to be by "the persons last engaged in the work that necessitated such removal". That would appear to denote in this case the persons engaged in the loading. The evidence does not clearly establish who they were. It was, however, contended that there was a duty on the owners to ensure that the restoration would take place, and that this duty was imposed on the owners irrespective of the question of the identity of the persons required to do the actual work of restoration.

The question arises, therefore, of the construction of the first sentence of reg. 45. The view which I have formed is that the words "required by these regulations to be provided" govern the things mentioned in the early part of the sentence. The words "other things whatsoever" refer, in my view, to other things required by the regulations in addition to the things which are required by the regulations and are previously mentioned in reg. 45. An examination of the regulations shows that the words used in the first sentence

A of reg. 45 describe certain of the things which by the regulations had to be provided. Thus "fencing" is referred to in reg. 1, reg. 26, reg. 28 and reg. 37. "Gangway" is referred to in reg. 9. The word "gear" may cover very many things such as those denoted in reg. 13, reg. 19, reg. 27, reg. 28 and reg. 29. The word "ladder" may refer to reg. 9, reg. 11 and reg. 28. As to "hatch coverings", in addition to the requirement in reg. 37, reference may be made to reg. 14, B reg. 15, reg. 16 and reg. 38. "Life-saving means or appliances" are referred to in reg. 2. "Lights" can have reference to reg. 3 and reg. 12. "Marks" can have reference to reg. 14 and reg. 29. "Stages" can have reference to reg. 36 and reg. 40. In the light of a consideration of the regulations as a whole, I am reinforced in the view that reg. 45 has reference to things which the regulations require to be provided. LORD DU PARCQ was of the opinion that it could not C have been the intention of the Secretary of State to prohibit the removal only of such "gear" as was required by the regulations to be provided. But the word "gear" is a somewhat comprehensive one, and, if there were in fact some wholly unnecessary "gear", it would be surprising if a failure to replace after removal should be an offence. So also there might be many examples of lights on a ship other than those "required to be provided". It would again, in my D view, be strange if there was obligation to restore them after removal.

It was submitted by counsel for the plaintiff that, if the words "required by these regulations to be provided" covered the words "hatch covering", there would be a conflict between reg. 37 and reg. 45. He submitted that under reg. 37 hatch covers, when properly removed, need not be replaced during meal times or other short intervals of work during the period of employment, E whereas under reg. 45 hatch covers, if removed, must be restored at the end of the period during which their removal was necessary. I am not impressed by this consideration for it seems that the interval of meal times or other short interruptions of work would be within "the period during which their removal was necessary." After endeavouring to approach the question of construction with every caution, I have reached the conclusion that, in regard to hatch F coverings, reg. 45 refers to such hatch coverings as are required by the regulations to be provided. In the present case, because of the height of the hatch coamings, there was no requirement to provide hatch coverings on No. 1 hatch. It follows, therefore, that there was no breach of reg. 45 and that the claim fails on this ground. If I had been of the contrary opinion and had thought that reg. 45 applied to hatch coverings whether required by the regulations or not, I would not G have shared the learned judge's difficulties in applying the regulation, and I would have considered that effect could and should be given to it.

The view which I have formed makes it unnecessary to deal fully with certain other matters touched on during the arguments. Counsel for the defendants did not contend that the deceased was not one who could claim the benefit of the regulations at the relevant time, but he submitted that the process of H loading had ceased when the ship left the berth and that the regulations no longer applied. I do not find it necessary to deal fully with this submission, but I am not prepared to accept it. Had I taken a different view in regard to the construction of the regulations, the question would have arisen whether the deceased man was either wholly or partly the author of his own misfortune. [HIS LORDSHIP reviewed the evidence on this point and continued:] In view of I the evidence, it would in my view be impossible to acquit the deceased man of some measure of negligence. But all the facts lead me to the conclusion that he must have been intending to flake the insurance wire or otherwise to deal with it in such a way as was best calculated to help the work that was in hand. He may have acted hurriedly, and he may have wholly miscalculated the weight of the insurance wire, or the possibility of his losing his balance in handling it. His zeal for his work may have deflected him from realising the danger of what he was doing. If, however, at the relevant time there had been a breach of reg. 45, and

a breach for which the defendants were responsible, I would be of the opinion that such breach could not be ignored as being a contributing cause of the fatality. I do not, however, find it necessary to express any conclusion as to the proportion of responsibility to attribute to the deceased man himself. For the reasons which I have given I consider that the claim fails, and I would, therefore, dismiss the appeal.

SELLERS, L.J.: I also would dismiss this appeal from the judgment of McNAIR, J., but would decide against the claim on somewhat different grounds. It is clear that there was no common law liability, as the judge found and the plaintiff accepts, and the evidence shows that the deceased man was in fact doing a highly dangerous thing in going on the forward portion of the hatch covers, which only covered ten feet of the hatchway, with two-thirds of the hatchway open and an empty hold twenty-four feet deep below. It has to be recognised that the deceased man was never able to give any explanation why he was there, and one is reluctant to draw too harsh a conclusion. On the only evidence available, however, it is difficult to find any reasonable excuse for the deceased man climbing on to the covers. In my view, he was not justified in straightening out the insurance wire there, if that was what he was doing, which is at least doubtful. He knew that the hold was uncovered over two sections out of three, and that no cargo had been loaded. He knew that the danger could be remedied by replacing the missing covers—although, admittedly, a substantial task—and, if a duty fell on the ship to replace them, in the circumstances it fell on him to see that the duty was performed, or, at least, to consult with the second officer to that end, although the second officer was on the bridge attending the pilot as the vessel was moving out to moor at buoys in the river. Having regard to these circumstances, I doubt whether the plaintiff should have succeeded even if a breach of reg. 45 of the Docks Regulations, 1934, could be established.

The steamship *Corfield* was a self-trimming collier of some four thousand tons. She had in the forepart of the vessel a hold thirty feet by thirty feet, with deck space on each side limited to four feet six inches between the coamings and the bulwarks. No doubt because of this construction, the coamings were the unusual height of five feet. Regulation 37 of the Regulations of 1934 had no application to this hold, as it applies only where coamings are less than two feet six inches in height. This is of considerable significance in this case, as coamings five feet high might well justify the shipowner or the ship's officers regarding an open hatchway in such circumstances as no danger. Any activity on the hatch coverings, complete or partial, would appear to have to be deliberate, and no accidental use of that area would ever be contemplated. In respect of such a well guarded hatch it would appear improbable that regulations would be necessary. But it was argued that reg. 45 applied and had been infringed. On the face of it, I would regard reg. 45 as dealing with very different circumstances, namely, where safety precautions had been taken and circumstances required their removal. With due deference to the construction put by LORD DU PARCQ on this regulation in the course of his speech in *Grant v. Sun Shipping Co., Ltd.* (1) ([1948] 2 All E.R. 238 at p. 244), I would, if free so to do, hold the contrary view.

The regulation enjoins, as I would read it, that no person, unless duly authorised or in the case of necessity, shall remove or interfere with any of the things required by the regulations to be provided (most of which are enumerated) "or other things whatsoever" required by the regulations if not expressly enumerated. That is, the words "required by these regulations to be provided" qualify all the preceding requirements set out. This view is, I think, supported by reg. 46, which particularises "the fencing required by reg. 1" and then stipulates special restrictions with regard to those requirements. It is conceded that LORD DU PARCQ's observations were not essential to the decision, but, in addition to the authority of an opinion of LORD DU PARCQ, further weight is given to his view, it is said, because the other noble Lords in terms expressed

- A general agreement with the judgment without qualification. It is to be observed, however, that what the repairers had removed in that case were hatch covers and lighting equipment which were in fact "required by these regulations to be provided", and, therefore, there was no reason in that case to give the words of reg. 45 the extended meaning which LORD DU PARCQ thought the correct meaning. The other noble Lords may, therefore, have considered that reg. 45 could properly be applied without accepting LORD DU PARCQ's construction. I do not, therefore, feel that we are bound to follow the view there expressed, or that the reasoning of LORD DU PARCQ is sufficiently impelling to require us so to do. On the view which I would take, the hatch covers on No. 1 hold in the present case were not required to be provided by the regulations, and, therefore, reg. 45 cannot be applied in this case. Even if it could, I doubt if the regulation required the ship-owners to replace them. The work that necessitated their removal—which removal might have been done by the ship as the vessel was approaching the Tyne or her berth at the staithes, as was done in respect of holds 2 and 3—was the loading of coal. The shipowners, I understand, were not the persons engaged or to be engaged in the loading, and, therefore, were not the persons required by reg. 45 to restore the covers at the end of the period during which their removal was necessary. I think that this serves to show that the attempt to apply the regulation to this case is misconceived, although I would not support the view that, when properly invoked, the regulation is unintelligible. It has, I think, not infrequently been relied on, and its infringement proved, without any real difficulty.

- No question has arisen in the case whether the deceased man through whom the plaintiff claims could claim the benefit of the regulations in any event, as he was a member of the ship's crew and not a stevedore. It was submitted that the regulations would not apply in any case if the vessel had left her loading berth to proceed to moorings in the river. These are difficult points which, in general, both remain for consideration on some occasion, but, if the construction which I would put on reg. 45 is correct, they do not arise, and in any case the evidence does not appear adequately to have been directed to them.

WILLMER, L.J. [read by **MORRIS, L.J.**]: The learned judge found that it was not established

- "... that there was any negligence on the part of the defendants or any of the persons for whom they must accept vicarious responsibility in leaving the two after sections of No. 1 hatch open whilst the vessel shifted to the buoys."

- From that finding there has been no appeal. This appeal relates solely to the alternative contention put forward on behalf of the plaintiff, namely, that the defendants were in breach of their statutory duty in that they failed to comply with reg. 45 of the Docks Regulations, 1934. This regulation, which appears in Part 5 of the regulations, is in the following terms:

- "No person shall, unless duly authorised or in case of necessity, remove or interfere with any fencing, gangway, gear, ladder, hatch covering, life-saving means or appliances, lights, marks, stages or other things whatsoever required by these regulations to be provided. If removed, such things shall be restored at the end of the period during which their removal was necessary by the persons last engaged in the work that necessitated such removal."

It is not in dispute that at about 10 a.m. on the day of the accident the two after sections of the hatch covers over No. 1 hold were removed, leaving only the forward section in place; nor that by 12.15 p.m., when the vessel started to move from her berth—by which time no cargo had been loaded into No. 1

held—no attempt had been made to replace the hatch covers which had been removed. The fair inference, accepted by both sides, is that the deceased, prior to falling through the open part of the hatch, had climbed up to the platform formed by the forward section of hatch covers, and that he did so for the purpose of preparing the insurance wire, which would have been required for use in mooring the vessel when she reached the buoys to which she was proceeding. The contention for the plaintiff is that, by failing to restore the hatch covers which had been removed from No. 1 hatch as soon as it was known that no cargo was to be loaded that day in that hold, the defendants or their servants were in breach of the obligation imposed on them by the second sentence of reg. 45. That regulation, it is contended, by its terms applied to any hatch covering, so that the mere failure to restore the hatch covers which had been removed was sufficient to constitute a breach. On this view, the words “required by these regulations to be provided” are to be construed as qualifying only the words “other things whatsoever”, and not any of the other items of equipment, such as hatch coverings, previously enumerated in the regulations.

On the other side, the defendants contend that the words “required by these regulations to be provided” must be read as qualifying not only the words “other things whatsoever”, but also all the particular items of equipment previously enumerated. If so, it is said, there was no requirement in any of the regulations whereby this hatch was required to be covered. The only regulation requiring the covering of a hatch is reg. 37 (a). [HIS LORDSHIP read reg. 37 (a) and continued:] Since the coamings of No. 1 hatch in this vessel were five feet in height, there was no requirement under reg. 37 (a) that it should be either fenced or covered. Accordingly, the defendants contend, reg. 45 had no application to the hatch covers of No. 1 hatch, since these did not amount to a “hatch covering . . . required by these regulations to be provided”.

The learned judge preferred the plaintiff's construction of reg. 45, and held that the phrase “hatch covering” in that regulation meant the covering of any hatch, whether the coamings of that hatch were less or more than two feet six inches in height: that is, in his view it was not limited to a hatch covering “required by these regulations to be provided”. It followed, therefore, that in the learned judge's view reg. 45 applied directly to the hatch covers of No. 1 hold in this case. He proceeded to point out, however, that the application of reg. 45, so construed, would lead to anomalous results, more particularly having regard to the obligations imposed by reg. 37 (a). In view of these anomalies, and in view of certain illogicalities which he detected in the provision of reg. 45 itself, he held that the language of the regulation did not convey, either to a lawyer or to a seafaring man, what its plain meaning is, and he refused to find that in the circumstances of this case there had been any breach of the regulation. He concluded by saying:

“I find it quite impossible, after, I hope, a serious and proper effort to assign any clear meaning to reg. 45, to find in it any obligation which on the facts of this case would require that the hatch covers on this No. 1 hatch should be replaced before the vessel shifted from her loading berth to the mooring buoys.”

Given the premises from which he started, I should, for my part, find it quite impossible to follow the learned judge to the conclusion at which he arrived. If reg. 45 applied to the hatch covering of No. 1 hatch, its meaning would, in my judgment, be plain enough. It would clearly require that the hatch covers removed should be restored at the end of the period during which their removal was necessary, and that moment would come, I apprehend, as soon as it was learnt that no cargo was to be loaded in that hold before the vessel shifted. If the regulation applies, the duty of the court is to apply it, and that duty is not to be shirked merely because, in the view of the court, the application of the regulation

- A may lead to anomalous or illogical results. On the authority of the cases* cited by the learned judge—to which may be added the recent decision of LORD PARKER, C.J., in *Mace v. R. & H. Green & Silley Weir, Ltd.* (2) ([1959] 1 All E.R. 655)—I think that there can be no doubt that at the material time the process of loading was still going on within the meaning of the regulations†. If, therefore, reg. 45 was applicable at all, it was applicable at the time of the accident, and on that basis
- B I am satisfied that the facts proved would constitute a breach of it. I do not think, therefore, that the learned judge's decision can be supported on the grounds which he stated.

- The real question, to my mind, is whether reg. 45 ever applied at all to the facts of this case. That depends on whether it is right to hold, as the learned judge held, that only the words "other things whatsoever" are qualified by the
- C succeeding words "required by these regulations to be provided", so that the previously enumerated items of equipment—fencing, gangway, gear, and so forth—are left completely unqualified. In reaching his conclusion on this point, the learned judge based himself largely on the dictum of LORD DU PARCQ in *Grant v. Sun Shipping Co., Ltd.* (1) ([1948] 2 All E.R. 238 at p. 244). This has already been quoted, but I think it useful to set out once more the actual words
- D used by LORD DU PARCQ, which were as follows:

- "The question was raised in argument whether the words 'required by these regulations to be provided', in reg. 45, were to be read as qualifying only the words 'other things whatsoever' or as qualifying all the preceding substantives. Little perhaps turns on this, since there was plainly a breach of reg. 37 on the part of the repairers, but I have no doubt that the former
- E construction is correct. No other seems to me to be possible with due regard to the context. One of the preceding words is the general word 'gear', and it cannot have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided."

- The other learned Lords who concurred in LORD DU PARCQ's conclusion did not deal with this matter specifically, but at least it can be said that they did not
- F express any dissent from the view expressed by LORD DU PARCQ. Clearly, however, LORD DU PARCQ's expression of view was not necessary to the decision of that case, for in that case the hatch covering in question was indubitably one to which the provisions of reg. 37 (a) applied. This court is, therefore, free to examine the question de novo, although it will naturally pay the greatest possible respect to an expression of view coming from so high an authority. Speaking
- G for myself, it is only after the most anxious consideration that I have come to the conclusion that the construction put on the regulation by LORD DU PARCQ was erroneous, and I do so only because, as it seems to me, that construction produces a nonsensical result, which cannot have been intended.

- In order to appreciate this, I think that it is desirable to look at the scheme of the regulations as a whole. They were made in pursuance of s. 79 of the Factory
- H and Workshop Act, 1901—but are now deemed to have been made in pursuance of s. 60 of the Factories Act, 1937—and are expressed‡ to have been made

"... in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour, or canal . . ."

- I Part I, which is to be complied with§ by the person having the control of a dock, provides for the installation of various safety devices in and about the dock, for

* The cases cited by McNAIR, J., on this point were *Manchester Ship Canal Co. v. Director of Public Prosecutions* ([1939] 1 K.B. 547) and *Hackins v. Thames Stevedore Co., Ltd.* ([1936] 2 All E.R. 472).

† See letter H, *supra*.

‡ In the preamble to the regulations; see 8 HALSBURY'S STATUTORY INSTRUMENTS 162.

§ See the introduction to the regulations under the heading "Duties": 8 HALSBURY'S STATUTORY INSTRUMENTS 163.

example, fencing of the dock, provision of life-saving appliances and first-aid boxes. Part 2, which is to be complied with by the owner, master, or officer in charge of a ship, provides for such things as safe means of access to a ship in dock, and to its holds, for proper lighting, for the maintenance and marking of hatch coverings, and for the provision of suitable gear for lifting them. Part 3, which is to be complied with by the owner of any machinery or plant used in the processes (which, of course, includes a shipowner so far as concerns any plant or machinery on board the ship), provides for the testing and examination of lifting gear, the marking of safe working loads, the fencing of working parts and of crane platforms, and such like matters. Part 4, which is to be complied with primarily by those carrying on the processes, that is, stevedores, but which in certain circumstances, in relation to reg. 37, must be complied with by the owner, master or officer in charge of the ship*, provides in substance for safety precautions to be observed during the carrying on of the processes. Part 5, of which reg. 45 is the first provision, is of universal application and must be complied with by all persons, whether owners, occupiers or persons employed†. Regulation 45 and reg. 46 deal with removal of, or interference with, certain specified appliances. Regulation 47 prescribes that the means of access provided shall be used; and reg. 48 prohibits all persons from going on to the hatch beams for the purpose of adjusting the gear for lifting them.

Bearing in mind the scheme of the regulations, one would expect that *prima facie* reg. 45, when it refers to removal of, or interference with, the various appliances or items of equipment, would refer to those previously prescribed in the preceding regulations. But for the contrary view expressed by LORD DU PARCQ, I should, without hesitation, have said that that was the plain and ordinary meaning of the words used. I should have thought that the phrase "other things" in the first sentence was to be construed as *eiusdem generis* with the specifically enumerated items previously referred to, the genus being those things which are "required by these regulations to be provided". That this view is correct is, I should have thought, reinforced by the use of the words "such things" in the second sentence.

It is necessary, however, to examine the contrary view expressed by so high an authority as LORD DU PARCQ. It seems to me that, unless the words "required by these regulations to be provided" are held to govern *all* the items of equipment previously enumerated, the regulations would have to be construed as of universal application, that is, as applying to *any* fencing, *any* gangway, *any* gear, *any* ladder, and so forth, without geographical limitation, and without regard to whether they had anything to do with carrying on the processes to which the regulations refer. Thus, to use the illustrations given in argument, the expression "ladder" would have to be construed as including any ladder, for example, a painter's ladder that happened to be in use on the dock side. The expression "lights" would have to be construed as including any light, whether on shore or on board ship, regardless of whether it had any relation to the processes to which the regulations refer. A cabin light, for instance, would apparently be within the regulation—and, to push the matter to its logical conclusion, since this part of the regulations must be complied with by the owner, even the light in the owner's office in London would not escape. Such a result would, of course, be palpably absurd. But if the scope of the regulation is not to be limited by applying the words "required by these regulations to be provided" to all the items previously enumerated, what other limitation, it may be asked, is to be imposed? LORD DU PARCQ singled out the word "gear", and expressed the view

* See para. (d), under the heading "Duties."

† See para. (e), under the heading "Duties".

A that it could not have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided. I venture to ask, why not? Unless so limited, the word "gear" is wide enough to include any gear of whatsoever nature, and wheresoever situated, regardless of whether it has any relation to the processes to which the regulations are directed. Again, what construction is to be put on the words "marks" and B "stages", unless they are held to refer to the marks required by reg. 14, and to the stages prescribed by reg. 36 and reg. 40?

The fact is that all the items of equipment enumerated in reg. 45 are items which form the subject of one or more of the preceding regulations. There would be every reason of good sense for enacting in reg. 45 that those items, the provi- C sion of which had been required by the preceding regulations, should not be removed or interfered with except by a person authorised, or in case of necessity. Thus the reference to ladders becomes intelligible if it refers to ladders required by the preceding regulations, for example, reg. 9, reg. 11 and reg. 28. Similarly the prohibition against removing or interfering with lights is good sense if the lights referred to are those prescribed by reg. 3 and reg. 12. But unless reg. 45 is D construed as limited in this way, it clearly goes far beyond anything required for the protection of persons engaged in the processes with which the regulations are intended to deal, and leads inexorably to utterly absurd results such as I have already mentioned, and such as were referred to by the learned judge in the course of his judgment.

E Let me now examine the construction of reg. 45 contended for by the plaintiff in relation to the matter of hatch covering. By way of preface I may perhaps be permitted to remark that the primary purpose of hatch covers is to protect the cargo and prevent water from entering the ship. They are not designed in the first instance for the protection of personnel, whose safety is ordinarily cared for by the provision of proper hatch coamings. With regard to the particular hatch F in question here, it is clear that there was no regulation which required the provision of any hatch covering at all while the vessel was in port. Nor was there any reason, from the point of view of safety of personnel, why there should have been any such regulation, seeing that the particular hatch was in fact permanently "fenced" by coamings five feet high. What then would be the object of a regulation prohibiting the removal of something that need never have been there G at all? It cannot be said that there could be any reasonably foreseeable danger in leaving the covers off such a hatch, for, if there were, the learned judge would clearly have been wrong to find that there was no negligence at common law in leaving the covers off this hatch—yet there has been no appeal with regard to that part of his judgment. If reg. 45 is limited in its application to hatch coverings H required by the regulations to be provided, there is clearly good reason for it: for, where the regulations have provided that, for reasons of safety, certain hatches should be either fenced or covered, it is obviously sensible to provide that such covering or fencing shall not be removed or interfered with. But on the construction contended for by the plaintiff, reg. 45 goes far beyond this, and prohibits the removal of, or interference with, any hatch covering, appar- I ently without regard to whether any question of safety is involved. In other words, the argument involves that a regulation has been made which goes far beyond anything required for the safety of persons engaged on the processes. For my part, unless constrained by authority, I would decline to hold that a regulation made by the Secretary of State is to be construed in such a way. Since I am not constrained by any binding authority to hold otherwise, I prefer to construe reg. 45 in accordance with what I conceive to be the ordinary and natural meaning of the words used, and to hold that the words "required by

these regulations to be provided" are related to and qualify all the items of equipment previously enumerated.

If that view be right, it is conclusive of this case. The only hatch covering required by the regulations to be provided is that specified in reg. 37, which, admittedly, would have no application to the hatch in question in this case. It follows, therefore, that there could be no breach of reg. 45 in failing to replace the hatch covers on this hatch, seeing that such hatch covers were not required by the regulations to be provided. Accordingly, I arrive at the same conclusion as that reached by the learned judge, although for different reasons, namely, that no breach of statutory duty has been proved against the defendants.

Although it is unpleasant to have to say it of a man who is dead, I think that there can be no doubt but that the sole cause of this unfortunate accident was the failure of the deceased man to exercise proper care for his own safety. There was abundant evidence from experienced seafaring witnesses on both sides that what the deceased man must be presumed to have been doing was a dangerous and a wrong thing to do. Although the learned judge in his judgment made no express finding against the deceased man, it is implicit in his reasoning that his view must have been that the deceased man was in fault. In view of the absence of any statutory duty on the part of the defendants, the point is of only academic interest. But had the plaintiff succeeded in satisfying us that there had been a breach of statutory duty, a question of vital importance would have arisen whether such breach was a cause of the accident. The absence of any hatch covering over two-thirds of the hatch was, of course, a *causa sine qua non*, for without the open hole thereby created it would not have been possible for the deceased man to fall into the hold. But the accident happened in broad daylight. The deceased man knew that the hatch covers were not in place, for he was one of the men who removed them, and it was he who would have had to take charge of replacing them if they were to be replaced. The open hole was, therefore, in no sense a trap for a man in the position of the deceased, who was an experienced seaman and must be presumed to have known what he was doing. In such circumstances, although the matter has not been fully argued before us, I should have been disposed to take the view that, even if breach of statutory duty had been proved against the defendants, this would have been one of those cases described by Viscount Birkenhead, L.C., in *Admiralty Comrs. v. S.S. Volante* (3) ([1922] 1 A.C. 129 at p. 144), where a clear line could be drawn between the prior fault of the defendants and the subsequent negligence of the plaintiff. It would be difficult to imagine a clearer case than this of a person knowingly (and wrongly) taking the risk of a danger of which he was at all times well aware. In such circumstances I think it would be difficult to say that the mere existence of this open hatch, even if it did constitute a breach of statutory duty, was, in any sense cognisable by the law, a cause of this unfortunate accident. For these reasons, I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *E. B. V. Christian & Co.* (for the plaintiff); *Botterell & Rees* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

HOOPER (or. HARRISON) v. HOOPER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Stevenson, J.), May 6, 1959.]

Nullity Declaration—Void marriage Banns not published—Marriage abroad between two British subjects according to rites of Church of England—Marriage Act, 1949 (12, 13 & 14 Geo. 6 c. 76), s. 25.

B

The parties went through a ceremony of marriage according to the rites of the Church of England in a Church of England Church in Baghdad. The parties knew that no banns had been published and the petitioner now sought a declaration that the marriage was null and void by virtue of the Marriage Act, 1949, s. 25.

C

Held: the declaration would be made.

[**Editorial Note.** In this case the court made a declaration that the marriage was null and void instead of granting a decree nisi of nullity. Unlike a decree nisi, a declaration would not require to be made absolute. The power of the Divorce Court to make declaratory orders was considered by the Court of Appeal in *Har-Shefi v. Har-Shefi* ([1953] 1 All E.R. 783). For a discussion on the effect of a nullity decree, see JACKSON ON THE FORMATION AND ANNULMENT OF MARRIAGE, pp. 61 et seq.

D

As to the validity of marriages of British subjects contracted abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 95, para. 172, note (g), and 19 HALSBURY'S LAWS (3rd Edn.) 810, para. 1317; and for cases on the subject, see 11 DIGEST (Repl.) 465, 989-992.

E

As to parties "knowingly and wilfully" marrying without publication of banns, see 19 HALSBURY'S LAWS (3rd Edn.) 777, para. 1246, note (k); and for cases on the subject, see 27 DIGEST (Repl.) 48-50, 258-271.

As to petition for a declaration, see 7 HALSBURY'S LAWS (3rd Edn.) 111, para. 197, and 12 HALSBURY'S LAWS (3rd Edn.) 223, para. 417; and for cases on the subject, see 11 DIGEST (Repl.) 478, 1071.

F

For the Marriage Act, 1949, s. 25, see 28 HALSBURY'S STATUTES (2nd Edn.) 673.]

Petition.

This was a petition by Shelagh Valerie Hooper (otherwise Harrison) for a declaration that a ceremony of marriage celebrated between herself and the respondent Oliver George Hooper be declared null and void. The parties, who were British subjects, met in England in 1952. In July, 1954, just after she had attained the age of twenty-one, the petitioner gave notice at the Harrow register office of her intention to marry at the British Embassy in Baghdad, and the respondent gave a corresponding notice at the embassy in Baghdad. The marriage was fixed to take place on Sept. 2, 1954, at the British Embassy, but on that date the British consul informed the parties that the notice of marriage had not been received from England and that they could not be married at the embassy on that day. Thereupon the parties went to St. George's Church, Baghdad, which church was part of the Church of England, and there went through a ceremony of marriage performed by the archdeacon. The petitioner now sought to have that marriage declared null and void, pursuant to the Marriage Act, 1949, s. 25, on the ground that she and the respondent had "knowingly and wilfully" intermarried according to the rites of the Church of England without banns having been duly published. The petitioner prayed in the alternative for a divorce on the ground of cruelty. The petition was not defended.

H

I

J. Sarch for the petitioner.

STEVENSON, J.: The relevant statutory provision is contained in s. 25 of the Marriage Act, 1949, which reads as follows:

"If any persons knowingly and wilfully intermarry according to the rites of the Church of England . . . (b) without banns having been duly published . . . the marriage shall be void."

[HIS LORDSHIP stated the facts and continued:] Before the parties went to St. George's Church they told the British consul that in the circumstances they would dispense with any ceremony that he would perform. The consul told them that they would be married but that a civil ceremony would be necessary, and he made an observation, which I do not think the petitioner clearly understood, about the statute law of England. The petitioner has told me that she did, however, clearly understand that it was suggested that they should have a civil ceremony in the British Embassy and the consul made it clear that the marriage would not be registered in England if they did not have that civil ceremony in the embassy. The archdeacon, however, said that they would be married according to the law and in the eyes of the Church of England and so the matter went forward.

At the church the parties went through a ceremony of marriage which the petitioner, who had attended many such ceremonies before and no doubt since, told me was carried out according to the rites of the Church of England with which she is familiar. She said in evidence, and I accept every word that she has said, that she understood what banns were, she understood them to be a notice of marriage given by an intending spouse, and that they were announced and put on a board in a public place at intervals before the ceremony. She said that no banns were published with regard to her intended marriage at St. George's Church, Baghdad, and that she knew that they were not. She said also that she was quite satisfied that her intended husband had the same knowledge; she said: "My husband knew no banns had been published". She also gave evidence to the effect that a few days after the marriage, the consul telephoned and announced to her that the notice of marriage had been received at the British Embassy in Baghdad from London and they could now have their civil ceremony at the embassy. The husband said that he would ask the archdeacon about that but both came to the conclusion that they did not want a marriage at the embassy because, as the petitioner put it, "They could not marry us on the day and we felt they had let us down". She said:

"We consulted Archdeacon Roberts and we both accepted from him that we were already legally married and we both accepted it and so we never had a civil ceremony of marriage."

Those are the facts to which the petitioner has deposed. I am satisfied on the evidence that these two persons knowingly and wilfully intermarried according to the rites of the Church of England without banns having been duly published. I am satisfied that the requirement that they did that knowingly and wilfully is evidenced by the warning which they received from the consul as to the necessity of a civil ceremony. I am satisfied that the wife knew in fact that no banns had been published duly or at all and I therefore grant the declaration that this marriage was null and void in the terms of the prayer of the petition. The petition asks in the alternative that the marriage should be dissolved on the ground of the respondent's cruelty, but in view of the conclusion I have reached on the first part of the prayer of the petition the second part need not be considered.

Declaration accordingly.

Solicitors: *W. G. R. Saunders, Son & de Wolfe* (for the petitioner).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

**DEAN AND ANOTHER v. DISTRICT AUDITOR FOR
ASHTON-IN-MAKERFIELD.**

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, JJ.),
May 5, 1959.]

Local Government Audit Surcharge—Appeal—Relief—Refusal by district auditor to surcharge—Appeal to Minister by aggrieved elector allowed—Consequent surcharge by district auditor pursuant to instructions of Minister—Appeal against such surcharge—Application for relief against such surcharge—Jurisdiction of High Court—Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 229, s. 230.

Appeal to the High Court does not lie under s. 229 (1)* of the Local Government Act, 1933, against a surcharge made by a district auditor acting on the directions of the Minister given pursuant to s. 229 (2), that is, given on appeal to the Minister under s. 229 (1); but a person so surcharged may apply to the High Court for a declaration and relief under s. 230.

[As to appeals and applications for relief against surcharges by a district auditor, see 24 HALSBURY'S LAWS (3rd Edn.) 588-590, paras. 1082, 1083. For the Local Government Act, 1933, ss. 228-230, see 14 HALSBURY'S STATUTES (2nd Edn.) 474, 475.]

Appeals and Applications for relief against surcharges.

The appellants, Frank Dean, the clerk to the Ashton-in-Makerfield Urban District Council, and Frank Burrows, the chief public health inspector of the council, appealed to the High Court against, and also applied to the High Court for relief against, surcharges imposed on them by the district auditor for Ashton-in-Makerfield in accordance with instructions given to the district auditor by the Minister of Housing and Local Government on an appeal to the Minister by Robert Whitter, a local government elector aggrieved by the previous refusal of the district auditor to surcharge the appellants.

The facts are stated in the judgment of LORD PARKER, C.J. The case is reported only on the questions whether the High Court had jurisdiction to hear the appeals and the applications for relief.

N. F. Stogdon for the appellant clerk, Dean.

J. M. Rankin for the appellant public health inspector, Burrows.

C. R. Hurle-Hobbs for the respondent district auditor.

J. R. Cumming-Bruce for the Minister of Housing and Local Government.

The respondent Whitter, the aggrieved local government elector, did not appear and was not represented.

LORD PARKER, C.J.: These proceedings come before the court by way of an appeal by Mr. Frank Dean, who is the clerk to the Ashton-in-Makerfield Urban District Council, and Mr. Frank Burrows, the chief public health inspector of that urban district council, against an alleged decision of the district auditor for the No. 2 Audit District which includes the urban district of Ashton-in-Makerfield whereby they were surcharged, together with one Richard Lloyd Hughes who does not appeal to this court, in the sum of £118 14s. 2d. They also apply for relief under s. 230 (1) of the Local Government Act, 1933.

The short facts, so far as they are necessary for the purposes of the preliminary point which has arisen, are these. Apparently a certificate of disrepair was prepared by the appellant, Frank Burrows, and signed by the appellant, Frank Dean, under the Housing Repairs and Rents Act, 1954, s. 26, in respect of premises, No. 1, Shaw Street, Ashton-in-Makerfield. That was done at a time when they had no authority to issue such a certificate of disrepair. That

* Section 229 is printed in full at p. 579, letters A to D, post.

certificate of disrepair in the hands of the tenant of the premises enabled him to defeat an application for an increase in rent. When the landlord discovered, as he thought, that the certificate of disrepair was invalid, he started proceedings and the urban district council had to expend a certain amount of money, namely, in all, this sum of £118, before the claim was compromised. When the district auditor came to draw up his audit, an objection was made by a Mr. Whitter, a local government elector, that those responsible for the issue of that certificate of disrepair and the subsequent costs ought to be surcharged. The district auditor decided to the contrary, and thereon Mr. Whitter, as a party aggrieved by the decision of the district auditor, appealed to the Minister, the Minister in question being the Minister of Housing and Local Government. The Minister in due course, after holding an inquiry through his representative, decided that the £118 odd was a loss or deficiency caused by the negligence or misconduct of the three people whom I have mentioned, and he remitted the matter back to the district auditor with instructions to surcharge that amount in equal proportions against those three gentlemen. Two of them, Mr. Dean and Mr. Burrows, now appeal to this court against the surcharge which has now been made by the district auditor. The third gentleman, Councillor Hughes, has in fact appealed, as he claims he has the right to do, not to this court but to the Minister himself, and that appeal, as I understand it, is standing over until the decision of the court in the present case.

At the opening of the appeal objection was taken that this court had no jurisdiction in the matter; in other words, that the Minister's decision was final. It was also said that not only did this court have no jurisdiction in regard to entertaining an appeal, but also it had no jurisdiction to entertain an application for relief under s. 230.

It is necessary now to look at a few sections of the Act in order to see the scheme. Matters of accounts and audit are dealt with in Part 10 of the Local Government Act, 1933. Provision is made for the appointment of district auditors, for the audit of accounts by the district auditor and for the deposit of accounts. By s. 226 it is provided:

"(1) A local government elector for the area to the accounts of which the audit relates may be present or may be represented at the audit and may make any objection to the accounts before the auditor.

"(2) The district auditor shall, on the application of any person who is aggrieved by his decision on any matter with respect to which that person has made an objection, or of any person aggrieved by a disallowance or surcharge made by the auditor, state in writing the reasons for his decision."

It was pursuant to that section that Mr. Whitter objected at the audit that the district auditor ought to have made a surcharge of this sum of £118. The district auditor, having refused to do so, was required to and did state in writing the reasons for his decision. Then by s. 228 (1): "It shall be the duty of the district auditor at every audit held by him", and there follow some six items of what he shall do. It is sufficient to refer to only two or three of them. It is his duty

"(a) to disallow every item of account which is contrary to law; (b) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure; ... (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred."

Pausing at para. (d), which is the relevant one in this case, it seems to me that the district auditor has to come in the course of the audit to certain decisions; he has to decide in the case of an objection whether it is valid or not, and he has to decide under s. 228 whether any sum has to be disallowed or surcharged under

A any one of the paragraphs to sub-s. (1) of that section. Section 229 goes on in this way:

B “ (1) Any person who is aggrieved by a decision of a district auditor on any matter with respect to which he made an objection at the audit [that in this case would be Mr. Whitter] and any person aggrieved by a disallowance or surcharge made by a district auditor may, where the disallowance or surcharge or other decision relates to an amount exceeding £500, appeal to the High Court, and may in any other case appeal either to the High Court or to the Minister.

C “ (2) The court or Minister on such an appeal shall have power to confirm, vary or quash the decision of the auditor, and to remit the case to the auditor with such directions as the court or Minister thinks fit for giving effect to the decision on appeal, and if the decision of the auditor is quashed, or is varied so as to reduce the amount of the surcharge to £500 or less, the appellant shall not be subject to the disqualification by reason of the surcharge imposed by Part 2 of this Act, or by the corresponding provision of any enactment relating to London.

D “ (3) Where an appeal is made to the Minister under this section, he may at any stage of the proceedings, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the court any question of law arising in the course of the appeal, but save as aforesaid the decision of the Minister shall be final.”

E The preliminary point taken arises on those sections to which I have referred. It is said that in this case the surcharge that in fact was physically made by the district auditor as a result of directions made by the Minister was not made by him within the meaning of sub-s. (1), and that therefore an appeal will not lie by the party aggrieved to the High Court or to the Minister. It is also said that in any event Mr. Whitter having gone to the Minister, as he was entitled to as a person aggrieved by the district auditor's refusal to comply with his objection, and the Minister having determined it, the Minister's decision by virtue of sub-s. (3) is final, and that accordingly there is now no appeal to this court. F The point comes down to a very narrow question: what is meant in sub-s. (1) by the expression “any person aggrieved by a surcharge made by a district auditor”? Does that include a surcharge made, as in this case, at the direction of the Minister, or is it to be confined to a surcharge made pursuant to the district auditor's duty under s. 228?

G The first thing to observe is that once the district auditor has come to his necessary decisions and the audit is made, he is functus officio so far, at any rate, as his judicial duties are concerned and his only duties thereafter are such as can be found in the statute, which in this case is to obey a direction of the Minister, if the matter has been before the Minister or of the court if the matter has been before the court. H That seems to me to be an administrative duty as opposed to a judicial duty. Looking at s. 229 it seems to me that all the rights of appeal there set out are rights of appeal from what the district auditor has done in the exercise of his judicial duties. Thus the opening clause

I “Any person who is aggrieved by a decision of a district auditor on any matter with respect to which he made an objection at the audit”

is clearly referring to, and can only refer to, the decision that is made under s. 228 in the course of the exercise of his judicial function. Similarly, it seems to me that a disallowance or surcharge made by the auditor is again referring to what he has done pursuant to s. 228 in the exercise of his judicial duty. Indeed, the very words which follow assimilate the disallowance or surcharge to a decision because it says “may, where the disallowance or surcharge or other decision relates to an amount exceeding £500”, thereby clearly showing that appeal in

that subsection are appeals from decisions or actions taken in the course of his judicial duties.

Subsection (2) really points to the same conclusion where it says that

“The court or Minister on such an appeal shall have power . . . to remit the case to the auditor with such directions as the court or Minister thinks fit for giving effect to the decision on appeal”,

that is the decision of the Minister or of the court. Contrast that with the following words “and if the decision of the auditor”, because it says “and if the decision of the auditor is quashed, or is varied”, then certain things follow. On that short ground alone, as a pure matter of construction, there is no appeal to this court in the circumstances of this case where the only surcharge made was one by the district auditor administratively on the directions of the Minister.

However, the matter does not rest there because, as I have already said, sub-s. (3) provides that subject to a special case the decision of the Minister shall be final. If those words do not mean what they say, the position would be rather extraordinary. There would be in a sense no end to the possibilities of litigation and the absurdities that would arise. Take the present case. Mr. Whitter instead of appealing as a person aggrieved to the Minister might have appealed to this court and this court might have done what the Minister did. Is it then to be said that these appellants could go to the Minister and in effect ask the Minister to reverse the decision arrived at by this court? It seems to me the words “the decision of the Minister shall be final” mean what they say. It is said: but that only means final as between the appellant in this case, Mr. Whitter, and, I suppose, the district auditor and possibly the local authority. The decision whether Mr. Whitter's objection is right and whether the appellants are liable to be surcharged is really all one and indivisible, and it seems to me that sub-s. (3) is an added reason for saying that there can be no appeal in this case. It is said, and said with some force, by counsel for the appellants Mr. Dean and Mr. Burrows that no machinery is specifically laid down for the people liable to be surcharged to appear before the Minister or his representative to defend themselves, or to be represented by counsel and matters of that sort. It is curious that there is no provision made in the Act itself or by rules to that effect, but the words of s. 229 are much too clear to be influenced by considerations of that sort. I have no doubt myself that at such an inquiry the Minister should, and no doubt does, take every possible step to see that those on whom the surcharge may fall will be present, will hear the accusations made against them and will in effect be able to defend themselves. So much for the appeal.

As regards the application for relief, that depends on the wording of s. 230 (1) which is in these terms:

“In the case of a surcharge, the person surcharged may, whether or not he appeals under the preceding section, apply to the tribunal (whether the High Court or the Minister) to whom he appeals or, if he does not appeal, to the tribunal (whether the High Court or the Minister) to whom he might have appealed, for a declaration that in relation to the subject matter of the surcharge he acted reasonably or in the belief that his action was authorised by law, and the court or Minister, if satisfied that there is proper ground for doing so, may make a declaration* to that effect.”

The important words there are that if the person surcharged does not appeal he may apply to the tribunal, whether the High Court or the Minister “to whom he might have appealed”. Counsel for the appellant Dean, the clerk, took up the attitude at the outset, an attitude that helped him really on his construction of s. 229, that if he did not have a right of appeal under s. 229, he was also debarred from appealing under s. 230 because he was not a person who ought

* Section 230 (2) empowers the court or Minister to give relief to a person who is granted a declaration under s. 230 (1).

- A have appealed, and he invoked that argument for saying, therefore, that the construction which I have just suggested as the correct construction of s. 229 must be wrong because it would be a most extraordinary position if a man in these circumstances not only had no right of appeal but no right of claiming relief. It was said on the other side, not by the Minister but on behalf of the district auditor, that not only was there no right of appeal, but that there was no right of application, again because of those words "to whom he might have appealed".
- B I cannot think that those words in this subsection were ever intended to provide a condition which, if not complied with, debarred a man from relief. What the subsection is doing is to try to identify the tribunal to whom the application is to be made, whether it is the High Court or the Minister. Which it is depends on the amount of the surcharge: if the amount of the surcharge is over £500,
- C then the application has to be made to the High Court; if it is under £500 it can be made either to the Minister or to the High Court. Accordingly I think that those words "to whom he might have appealed" are not intended to be a condition of an application being made but are intended merely to identify the particular tribunal that the application has to be made to: in other words, the tribunal to whom, if there was a right of appeal, he would have appealed.
- D In my view the present appellants have a right to apply to this court for relief under s. 230. The question whether, when a surcharge is being made pursuant to s. 228 (1) (d) it is possible to say that the applicant has acted reasonably or in the belief that his action was authorised by law is a matter which the court at this stage does not decide. It is enough to say that there is jurisdiction to entertain an application. Whether it is possible for the applicants to bring themselves within those words, having regard to the nature of the surcharge, is a
- E matter which will fall to be determined later.

DONOVAN, J.: I agree and for the same reasons.

- F SALMON, J.: I agree. I only desire to add this. The persons surcharged (the appellants Mr. Dean and Mr. Burrows and Mr. Hughes) were present at an inquiry held by the Minister's representative and it is not suggested, and could not be suggested, that they were denied the right of putting forward anything which they desired to put forward on their behalf. In the unlikely event of an inquiry of this sort being held and the Minister's representative denying a person, against whom allegations of negligence are being made, the right to be heard in
- G his own defence, I am far from satisfied that such a person would not have any remedy in this court. I am convinced, however, that that remedy would not be by way of appeal under s. 229.

- H [Their Lordships then heard applications for relief made under s. 230 (1) of the Local Government Act, 1933, which they dismissed because, on the facts they were not satisfied that either applicant acted reasonably or in the belief that his actions were authorised by law.]

Appeals and applications dismissed.

Solicitors: *J. G. Haley* (for the appellants); *Jaques & Co.*, agents for *Barker & Midgley*, Blackpool (for the respondent district auditor); *Solicitor, Ministry of Housing and Local Government.*

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

TRUSTEES OF TOLLEMACHE SETTLED ESTATES v. COUGHTRIE (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Upjohn, J.), May 8, 11, 1959.]

Income Tax—Profits—Lease—Sand pit—Rent received by lessors in accordance with Sch. A assessment—Whether royalties rent—Computation of excess rent—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 175 (1) (a), s. 82, Sch. A, para. 2.

A sand pit was let to tenants on a lease for twenty-one years from March, 1946, at a surface rent of £10 per annum plus £5 per acre for each additional acre of land occupied (five acres were occupied), and a royalty of 6d. per ton for all sand worked. The royalties payable under the lease rose from just under £100 in 1946-47 to £850 in 1955-56, averaging about £390 per annum over the period. Following the decision of the House of Lords in *Russell v. Scott* ([1948] 2 All E.R. 1), the sand pit was assessed for the first time in 1953-54 to Sch. A in the sum of £3 5s., and an assessment of excess rents was made under Sch. D pursuant to s. 175* of the Income Tax Act, 1952. This assessment, as amended and allowed on appeal to the Special Commissioners of Income Tax, was in the sums of £25 in respect of the fixed rents and £646 in respect of royalties actually received in that year less the amount of the Sch. A assessment in that year, the net figure on that basis, after amendment, being agreed at £577. On appeal,

Held: (i) by virtue of s. 175 of the Income Tax Act, 1952, the lessors of the sand pit were chargeable to tax under Case VI of Sch. D in relation to the royalties and the fixed rents.

(ii) the assessment should be for a rent, computed on Sch. A principles, which would not include the amount of the actual receipts by way of royalty but would be a notional figure ascertained either by averaging the variable rent comprising the royalty payments and fixed rents (*Inland Revenue Commrs. v. Dickson* (1928), 14 Tax Cas. 69, applied) or by estimating the rack rent under s. 82, para. 2 (b) of the Act of 1952.

(iii) the royalties were rent for the purpose of these provisions (*R. v. Westbrook* (1847), 10 Q.B. 17, applied).

Appeal allowed. Case remitted to the commissioners to determine the assessment on the basis indicated.

[As to excess rents chargeable to tax, see 20 HALSBURY'S LAWS (3rd Edn.) 291, para. 530; and for cases on the subject, see 2nd and 3rd Digest Supp.

For the Income Tax Act, 1952, s. 82, Sch. A, paras. 1 and 2, and s. 175 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 80, 172.]

Cases referred to:

(1) *Russell v. Scott*, [1948] 2 All E.R. 1; [1948] A.C. 422; [1948] L.J.R. 1265; 30 Tax Cas. 394; 2nd Digest Supp.

(2) *Barron v. Littman*, [1952] 2 All E.R. 548; [1953] A.C. 96; 33 Tax Cas. 373, 398; 3rd Digest Supp.

(3) *Fry v. Salisbury House Estate, Ltd.*, [1930] All E.R. Rep. 538; [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.

(4) *Stroh v. Tomiston*, (1953), 34 Tax Cas. 528; 3rd Digest Supp.

(5) *Inland Revenue Commrs. v. Dickson*, 1928 S.C. 752; 14 Tax Cas. 69; Digest Supp.

* The relevant terms of s. 175 are printed at p. 584, letters E and F, post.

- A (6) *R. v. Westbrook, R. v. Everist*, (1847), 10 Q.B. 178; 16 L.J.M.C. 87; 9 L.T.O.S. 21; 11 J.P. 277; 116 E.R. 69; 31 Digest (Repl.) 235, 3704.
- (7) *Daniel v. Gracie*, (1844), 6 Q.B. 145; 13 L.J.Q.B. 309; 115 E.R. 56; 31 Digest (Repl.) 235, 3703.

B **Case Stated.**

C The taxpayers appealed to the General Commissioners of Income Tax for the Drayton Division of Shropshire against an assessment to income tax made on them under Sch. D to the Income Tax Act, 1952, for 1953-54 in the sums of £5 in respect of excess rents and £1,000 in respect of royalties, as lessors of a sand pit at Beeston in the county of Chester under a lease for twenty-one years from Mar. 25, 1946. The lease reserved a surface rent of £10 annually together with a further £5 per acre for additional land taken: five acres of additional land were taken. For the year 1953-54 an assessment of £3 5s. under Sch. A was made on the tenants of the sand pit in respect of the area originally demised, the additional five acres being covered by a separate assessment on the farm of which the land then formed part. The taxpayers, the lessors, contended that there was no provision of the Income Tax Act, 1952, under which an assessment in respect of royalties could be made and that the only rent to which they were entitled in respect of which an excess rent assessment could be made under s. 175 of the Act was the fixed surface rent of £10 payable under the lease and any additional surface rent: the section did not justify an assessment being made after the end of the year of assessment by reference to royalties actually paid in that year and could only operate where the rent payable under a lease could be quantified at the beginning of the year of assessment. If s. 175 were applicable, it required a notional Sch. A assessment to be made in accordance with para. 2 (1) of s. 82 of the Act, and such notional assessment should be on the footing that the rack rent did not exceed £292. The Crown contended that the royalties payable under the lease were rent for the purposes of s. 175 and that an assessment fell to be made under that section by reference to the rent paid including royalties, and the other terms of the lease. Alternatively if the value of the taxpayers' rights had to be ascertained before the beginning of the year, it should be estimated afresh at the beginning of each year in the light of the facts then known; or, if an annual value over the whole term of the lease had to be ascertained, that value should be £500.

G The commissioners held that the royalties were covered by s. 175 of the Income Tax Act, 1952, and should be taxed as excess rents under Case VI of Sch. D. The assessment would be the excess received above the Sch. A assessment. The amount of this excess was £35 (the amount of the fixed rent received) plus £646 actual royalties received during the tax year, less the Sch. A assessment. A further assessment under Sch. A having, however, been raised on the sand pit in respect of additional land occupied, the aggregate figure at which the assessment should stand on the basis determined by the commissioners was agreed at £577.

Hubert H. Monroe for the taxpayers.

R. O. Wilberforce, Q.C., and A. S. Orr for the Crown.

I **UPJOHN, J.:** This is an appeal from the General Commissioners for the Drayton Division of Shropshire against an assessment of tax under Sch. D for 1953-54. The assessment was an assessment in the sum of £5 in respect of excess rents and £1,000 in respect of royalties. The matter arises in this way. The appellant taxpayers, the Trustees of the Tollemache Settled Estates, have estates in the county of Chester, and included in those estates is the Peckforton estate, which has on it a sand pit. By a lease dated Dec. 17, 1946, the trustees let the sand pit to certain persons trading as the Tarvin Supply Co., for a term of twenty-one years from Mar. 25, 1946. The demised area

was two acres and nine perches. The lease is annexed to the Case and therefore I propose to summarise its terms very briefly. There was liberty to the tenants to enter on and occupy the land and to dig, raise and get by open surface workings the sand in the demised land. There was to be a surface rent of £10 per annum and a royalty of 6d. per ton for all sand worked. There was provision that the tenants might enter and remove sand from certain additional land, when they had worked out all that could reasonably be worked from the land originally demised, and pursuant to that liberty the tenants occupied an additional five acres of this sand-bearing land from Sept. 29, 1953. In former years the sand pit was not separately assessed to Sch. A, but for the year with which I am concerned an assessment under that schedule was made on the tenants for the small sum of £3 5s., and, although it does not directly emerge from the Case, it appears that there was an additional assessment for the five acres of land which they took in addition, and I think the whole of the Sch. A assessment was something in the neighbourhood of £11 or thereabouts. Sand, after the war, was a valuable commodity and it is plain from the figures set out in the Case that the tenants have made much use of their powers under the lease. In the first year, 1946-47, the royalties payable were just under £100. That has gone up fairly steadily until in 1955-56 it amounted to some £850, an average of about £390 per annum.

The assessment is made pursuant to s. 175 of the Income Tax Act, 1952, which provides by sub-s. (1):

"If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Sch. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the provisions of Part 3 of this Act) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection . . . ;"

I need not read (b) because it is admitted that this is a sub-para. (a) case. I need not read sub-ss. (2) and (3). Subsection (4) defines the lease to which the section applies and it is admitted that this lease is such a lease. The section became applicable to it when the separate assessment was made in respect of the year 1953-54.

The question is whether an assessment can be made under this section, in effect, on the rent and royalties which the taxpayers received under the demise. Until the decision of the House of Lords in *Russell v. Scott* (1) ([1948] 2 All E.R. 1), it was generally thought that the profits from licences or leases of sand and gravel and other minerals of that sort were assessable to tax under Sch. D (if I may for convenience refer to the Income Tax Act, 1952, which replaced the relevant provisions of earlier Acts) because of the proviso to s. 82. Until 1948 they were so taxed, then the House of Lords in *Russell v. Scott* (1) held that that was wrong and accordingly assessments under Sch. D ceased. In the case before me nothing was done about Sch. A until 1953-54.

Section 175 admittedly hits the taxpayers in this case, and it does so admittedly by chance or mistake. The reason for s. 175, formerly s. 15 of the Finance Act, 1940, is set out in the speech of Lord Asquith of Bishopstone, in *Burton v. Littman* (2) ([1952] 2 All E.R. 548 at p. 560):

"The activity on which the taxpayer was engaged was that of acquiring property—freehold or leasehold—with the design of letting or re-letting

A it at a commercial profit to himself. Under [*Fry v. Salisbury House Estate, Ltd.* (3), [1930] All E.R. Rep. 538] it had been established that profit resulting from a transaction of this kind and consisting of the difference between net outlay and net return could not be taxed as such under Sch. D, and that the only income tax liability which could attach in such a case was one on the annual value of the property under Sch. A. This was held to exhaust the tax gatherer's rights. The system worked fairly so long as Sch. A value was frequently revised and so kept in step with commercial value. But when, during the war, quinquennial revaluations under this schedule were suspended, an increasing disparity declared itself between the old Sch. A values and the rents which the premises in fact commanded in the market, and therewith an increasing tax-free commercial profit

B lodged in the hands of the entrepreneur."

No one thought s. 175 had any application to the case of a lease such as I have before me, for the simple reason that it was thought that such a lease would be subject to tax under Sch. D, as I have already explained. LORD ASQUITH continued ([1952] 2 All E.R. at p. 560):

D "Section 15 of the Act of 1940 was clearly designed to 'catch' this profit. It might have provided—I leave aside, for the sake of simplicity, freeholds—that in the case of property acquired on lease and re-let the subject-matter of tax should be simply and in all cases the difference between rent payable and rent receivable, less expenses. It did not in fact so provide. The new, and the only new, subject-matter of tax was

E what may be called for short 'excess rents'; a figure arrived at by the application of an arbitrary formula laid down in the section. Excess rent (again leaving freeholds for simplicity out of account) would very frequently be the excess of the rent at which the premises were re-let over the Sch. A value, a figure which might be almost unrelated to actual commercial profits. (The wording of the section is complex but I do not think this statement is a dangerous over-simplification of its gist at least on the facts of this case.) The section provided that 'excess rent', computed according to this formula, should be 'chargeable under Case VI of Sch. D'. Case VI deals, and deals solely, with 'profits or gains' in the income tax sense of those terms, and it is impossible to suppose that the section would have operated differently if it had provided in terms that excess rents

F should be 'deemed to be "profits or gains" within Case VI' and chargeable as such."

The respective contentions may be summarised in this way. Counsel for the taxpayers says first that rent in the section includes only the fixed rent. From his point of view, whether that is so or not is not of prime importance, because he admits that, when the lease is looked at in accordance with s. 175, the section

H directs one to look at the rent and other terms of the lease, and one of the other terms which one has in mind is the fact of large royalty payments. However, he submits on the first point first that the assessment has to be an assessment only on the flat rent and, alternatively, on the flat rent and royalties. He submits that in order to achieve that result Sch. A principles must be applied.

I Schedule A is now s. 82 of the Income Tax Act, 1952. Paragraph 2 provides:

"The annual value for the purposes of this schedule shall, in the case of all lands, tenements, hereditaments or heritages, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, be understood to be—(a) if they are let at a rack rent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding Apr. 5 next before the time of making the assessment, the amount of the rent by the year at which they are let; or (b)

if they are not let at a rack rent so fixed, then the rack rent at which they are worth to be let by the year."

He submits that s. 175 works in this way. Admittedly it creates a charge under Case VI of Sch. D but for the purpose of computing the amount of that charge one must apply Sch. A principles. He submits that in a case such as this, if royalty is included as rent, it is not a letting at a rack rent but it is a para. 2 (b) case, "the rack rent at which they are worth to be let by the year," and, therefore, it is the duty of the commissioners to look at the terms of the lease and nothing else, and hear evidence on the matter and fix a rent at which the properties are worth to be let by the year. Such evidence was, in fact, given before the commissioners. On behalf of the taxpayers it was stated that such a rent was £292 a year, and on behalf of the Crown it was stated that the value was £500 per annum. Whatever the quantitative result, he submits that that is the proper computation to be made. The amount of the Sch. A assessment is then deducted and on the balance an assessment is made under Case VI of Sch. D.

The Crown's case is this. An assessment is made year by year on the basis of the actual receipts, because the charge is admittedly a charge under Case VI of Sch. D. The section makes that abundantly plain and it was, indeed, pointed out in all the speeches in the House of Lords in *Barron v. Littman* (2). Therefore, the Crown submits that each year the actual receipts by way of royalty should be taken. There is a small additional point, whether these should be taken at the beginning of the year and an estimate be made of royalties likely to be received for the year or whether one should wait until the end of the year and take the actual figures, but that is only a minor point; the actual receipts or prospective receipts should be taken, and treated as the rent. It is said that that figure is then inserted in the Sch. A machinery. One-eighth is deducted under the general provisions applicable to Sch. A cases; there may be maintenance payments to be allowed, and a figure is obtained from which the amount of the actual Sch. A assessment is deducted, but the whole basis of the Crown's claim is that the figures of the royalties are taken year by year.

Which of those is right? As pointed out, it is difficult to make the section fit this case, because it was never directed to fit such a case. It is reasonable to talk of Sch. A when dealing with the sort of case the House of Lords had in *Barron v. Littman* (2), but it is difficult to make it fit the case before me. However, it is not an unfamiliar task in these courts to make sections of Revenue Acts fit circumstances that they were never designed to meet.

Section 175 begins:

"If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease . . ."

It is said that that indicates, especially as the assessment is to be under Sch. D, that there is to be an annual assessment, and that the rent and royalties for each year must be taken. It was submitted that the word "entitled" really meant no more than "receive" or "receivable". I do not feel able to accept that view, which is contrary to that expressed by VAISEY, J., in *Strick v. Longsdon* (4) (1953, 34 Tax Cas. 528). If the word "entitled" meant receive, so that actual profits were to be taken, that case must have been decided in another way but it seems to me that these introductory words do no more than provide the background necessary to establish a liability to taxation. There must be an immediate lessor who is entitled to gain under some lease. Nothing in the section entitles one to take the amount of that rent and use it as the basis, as it has been expressed, for feeding it into Sch. A machinery. Indeed, the words of Lord ASQUITH already quoted would seem to make it difficult to do that and to go some way, at all events, to negating that view.

If it is found that the lessors are entitled to rent, they are chargeable to tax

A under Case VI of Sch. D. That imposes a liability on them, but the computation to reach the amount of the liability, omitting immaterial words, is this:

“the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A . . . if the annual value of the unit had been determined . . . by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a)

B . . . Sch. A . . . or (b) . . .”

I leave out the words “as reduced for the purpose of collection”, which refer only to repairs, allowances and so forth, and I leave out the words in brackets, although, in fact, I know that Part 3 is the Part which deals with the machinery of Sch. A and Sch. B, and not with Sch. D. However, what the court directs the commissioners to do is to find out what would have been the amount of the assessment of the unit for the purpose of Sch. A by reference to the rent and the other terms of the lease or leases, and it seems to me that that is a notional figure. That is plain from the speeches in *Barron v. Littman* (2), but it seems to me that it drives the person making the computation straight into Sch. A, and I cannot see how he can be justified in taking the actual rent and then making Sch. A computations. It seems to me that the whole figure for computation purposes has to be assessed by Sch. A principles and one therefore turns to Sch. A to see whether it is a para. 2 (1) (a), or a para. 2 (1) (b) case.

In this particular case I do not know that there will be much difference, but it seems to me that the essence of the matter is that a computation must be made either by treating this variable rent as a rack rent and averaging it out, as was done in *Inland Revenue Comrs. v. Dickson* (5) ((1928), 14 Tax Cas. 69), or by treating it as a para. 2 (1) (b) case, looking at all the terms of the lease and finding out over the term of twenty-one years what would be the proper rack rent. I am not going into the question whether that process can be repeated every year and different results reached. I say nothing about that, but the essence of the matter is to make a computation of a notional figure of rent and that is the process which the commissioners should have gone through. However, they did not do that. They accepted the view of the Crown that the royalties in each year must be taken. In my judgment that was wrong and the case must be remitted to them to go through the process which I have described.

Now, of course, they will desire to have a direction on the meaning of the word “rent”, although I do not think that it will make very much difference. That question was really determined over one hundred years ago in *R. v. Westbrook* (6) ((1847), 10 Q.B. 178) when LORD DENMAN dealt with royalties very fully. He came to the conclusion in a rating case that royalties should be treated as part of the rent, and that seems to me to be applicable in this case. In coming to that conclusion, LORD DENMAN followed his own earlier decision in *Daniel v. Gracie* (7) ((1844), 6 Q.B. 145) and it seems to me that that case covers this and that for the purpose of rent royalties must be included.

For those reasons the matter must be remitted to the General Commissioners to assess the proper rent at which the demised property should be held. It seems to me that they must look at the matter as at the moment of assessment—i.e., in the year 1953-54—and they can look at the royalties which had then been received. They can then look into the future generally, but not at the figures of royalties subsequently received, and, aided, no doubt, by expert evidence, they will come to a conclusion what the royalties are likely to be in the future, and then will make some assessment as to the rent. The matter being remitted, the Crown must pay the costs of this appeal.

Appeal allowed. Case remitted to the commissioners with directions.

Solicitors: Peake & Co. (for the taxpayers); Solicitor of Inland Revenue.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WALSH v. ALLWEATHER MECHANICAL GROUTING CO., LTD.

[COURT OF APPEAL (Lord Goddard, Romer and Pearce, L.J.J.), April 30, May 1, 8, 1959.]

Factory—Definition—“Close or curtilage or precincts” of a factory—Place used for purpose other than processes carried on in factory—Concrete surface forming apron of aircraft hangar—Apron and hangar in occupation of licensee—Hangar used by licensee as factory—Concrete surface being renewed by contractors—Accident to workman employed by contractors—Whether the place of accident was part of a factory—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 151 (1), (6).

The plaintiff was employed by the defendants as a ganger in charge of a small group of men while the defendants, under a contract with the Air Ministry, were breaking up and relaying a large area of the concrete surface at an airfield, including an area adjoining No. 6 hangar. The hangar was occupied by an aviation company as a factory within the meaning of the Factories Act, 1937. The annual payment made by the aviation company to the Air Ministry for the licence to use the hangar included the right to use a portion of the concrete surface adjoining the hangar, being the eastern apron of the building. Two large sliding doors on the eastern side of the hangar opened on to this apron, which was used by the aviation company to bring its aircraft in and out of the hangar and, from time to time, for testing aircraft. The apron was protected by a security fence (a removable wooden fence), and, under the terms of the licence, if the existence of the fence necessitated the construction of a new road round it, the aviation company was to pay the cost thereof. In order not to interfere with access to and from the hangar, the work of breaking up and relaying the concrete on the eastern apron was done in pre-arranged strips, that is to say, the defendants worked only on one half of the apron at a time, leaving the other half untouched so that aircraft could move in and out of the hangar over that half. While the defendants' men were breaking the concrete on one half of the eastern apron, the plaintiff was struck in the eye and severely injured by a flying piece of concrete as he was passing near a man using a pneumatic drill. In an action for damages against the defendants, the plaintiff claimed that the place where the accident happened was within the close or curtilage or precincts of a factory, so as to be within the definition of “factory” in s. 151 (1)* of the Factories Act, 1937, and that the defendants were in breach of statutory duty under s. 49 and the Protection of Eyes Regulations, 1938, in failing to supply him with goggles.

Held: (i) the eastern apron of No. 6 hangar was “within the close or curtilage or precincts” of the hangar within the meaning of s. 151 (1)* of the Factories Act, 1937, the limit of the close, etc., being the fence, because, under the terms of the licence granted to the aviation company by the Air Ministry, the company was entitled to use and enjoy the privacy of the apron for its own purposes of testing aircraft and had a right to exclude unauthorised persons.

(ii) notwithstanding (i) above the place where the concrete was being broken was not a factory because—

(a) it was a “place . . . solely used for some purpose other than the processes carried on in the factory” and, therefore, was deemed by s. 151 (6)† of the Factories Act, 1937, not to form part of the factory (viz., No. 6 hangar), and

* The relevant terms of s. 151 (1) are printed at p. 590, letter D, post.

† The terms of s. 151 (6) are printed at p. 591, letter C, post.

- A (b) not being "otherwise . . . a factory" within s. 151 (6), it was not constituted a "separate factory" by that subsection.

Appeal dismissed.

[For the Factories Act, 1937, s. 49, s. 139, and s. 151 (1), (6), see 9 HALSBURY'S STATUTES (2nd Edn.) 1039, 1109, 1113 and 1115.]

- B Cases referred to:

- (1) *Thorogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 24 Digest (Repl.) 1023, 13.
 (2) *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 24 Digest (Repl.) 1022, 11.
 (3) *Street v. British Electricity Authority*, [1952] 1 All E.R. 679; [1952] 2 Q.B. 399; 24 Digest (Repl.) 1023, 14.

- C

Appeal.

This was an appeal by the plaintiff from a judgment of GLYN-JONES, J., dated June 20, 1958, dismissing the plaintiff's claim for damages against the defendants for negligence and breach of statutory duty. The plaintiff was employed by the defendants as a labourers' ganger at Northolt aerodrome, where the defendants were breaking up and relaying the concrete surface of a large area of the airfield under a contract with the Air Ministry. On Mar. 10, 1954, while the servants of the defendants were working on part of the eastern apron of No. 6 hangar, the plaintiff was struck in the left eye by a flying fragment of concrete as he was passing near a man working a pneumatic drill. As a result of the accident the plaintiff became blind in that eye. The plaintiff brought an action for damages against the defendants, alleging that his injuries were caused by their negligence in failing to provide him with goggles and their breach of statutory duty under s. 107 and s. 49 of the Factories Act, 1937, the Protection of Eyes Regulations, 1938 (made under s. 49 of the Act), and reg. 84 of the Building (Safety, Health and Welfare) Regulations, 1948. At the hearing of the action, the defendants conceded that No. 6 hangar (which was occupied by Fairey Aviation Co., Ltd., under a licence from the Air Ministry) was occupied as a factory within the meaning of the Factories Act, 1937, but they contended that the place where their men were working at the time of the accident was not a factory or part of a factory within the meaning of the Act.

- D

- E

- F

GLYN-JONES, J., held (a) that the defendants were not in breach of the Factories Act, 1937, because the place where the plaintiff was working at the time of the accident was not a factory; (b) that the Building Regulations, 1948, did not apply to the work which the defendants' men were doing; and (c) that the defendants were not negligent at common law in failing to provide the plaintiff with goggles. The plaintiff appealed only from the decision on (a) above, that is from that part of the judgment which dismissed his claim under the Factories Act, 1937, s. 49 and the Protection of Eyes Regulations, 1938.

- H

J. F. F. Platts-Mills for the plaintiff.

Martin Jukes, Q.C., and *Bernard Caulfield* for the defendants.

Cur. adv. vult.

May 8. ROMER, L.J.: The judgment which PEARCE, L.J., is about to read is the judgment of the court.

- I

PEARCE, L.J., read the following judgment: The plaintiff appeals from the judgment of GLYN-JONES, J., dismissing his claim for damages in respect of an accident that happened to him when he was working for the defendants at Northolt airfield. The defendants had contracted with the Air Ministry to break up and relay a very large area of concrete on the airfield. On some days the workmen broke up the concrete in certain pre-arranged areas, and on other days they relaid it. On the day of the accident concrete was being broken up in the vicinity of hangar 6, which was occupied by Fairey Aviation Co., Ltd., as a

factory within the meaning of the Factories Act, 1937. The plaintiff was a ganger in charge of ten or twelve men. Two of these were breaking the surface with pneumatic drills, two were pulling the broken surface to pieces with mat-tocks, and two teams of about four men each were engaged in loading the pieces on to two lorries for removal. The plaintiff had to walk around to see that the work was being properly done. Unfortunately, when he was passing near a man using a pneumatic drill a flying fragment of concrete injured his eye. Had he been wearing goggles, the accident would not have happened. He complains that the defendants wrongly failed to supply him with goggles. His claim is based on negligence at common law, on breach of the Building (Safety, Health, and Welfare) Regulations, 1948, and on breach of the Factories Act, 1937. The learned judge held that there was no negligence at common law and that the Building Regulations did not apply to the work in question. Against these findings there is no appeal. He further decided that the Factories Act, 1937, had no application. The plaintiff contends that he erred in so deciding.

The appeal turns on whether the place where the accident happened was a "factory" within the meaning of the Factories Act, 1937. The plaintiff's argument runs thus. Section 151 (1) of the Act defines a factory as follows:

"Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control . . ."

Hangar No. 6 was admittedly a factory. The work was being done by the defendants on the apron of Hangar No. 6. The learned judge, it is said, should have found that this apron was within "the close or curtilage or precincts" of hangar No. 6 and was, therefore, part of the factory. Section 139 provides:

"Where in a factory the owner or hirer of a machine or implement moved by mechanical power is some person other than the occupier of the factory, the owner or hirer shall, so far as respects any offence under this Act committed in relation to a person who is employed in or about or in connexion with that machine or implement, and is in the employment or pay of the owner or hirer, be deemed to be the occupier of the factory."

The result of that section is that a man who hires out his machine and his employee to be used in a factory is put in the same position as if he himself occupied the factory in which his machine and employee work. Presumably the section was inserted to prevent the evasion of duties under the Act by the employment in factories of machines and men hired from independent contractors who would not, apart from this section, be bound by the provisions of the Act.

If the place where the accident occurred was part of a factory, the defendants are deemed to be occupiers of it and all the duties imposed by the Act have to be complied with. Admittedly, if the Act is applicable in this case, it produces an anomalous and artificial result: for, when the bulk of the work is being done on the rest of the airfield, the precautions imposed by the Factories Act, 1937, are not necessary; but, when a small part of precisely similar work comes within a certain distance of hangar No. 6, those precautions have to be observed.

Among the duties laid down by the Act, s. 49 provides:

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the

A process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

The Protection of Eyes Regulations, 1938, apply s. 49 to certain scheduled processes, one of which is, "Breaking or dressing of stone, concrete or slag."

B Therefore, if the place of the accident was part of a factory, it seems clear that the Protection of Eyes Regulations, 1938, apply s. 49 to the work that was being done by the defendants at that place.

C The defendants, however, contend that the place of the accident was not within the close, curtilage or precincts of the factory. Alternatively, they argue that the provisions of s. 151 (6) apply to the circumstances of this case and thereby the place is deemed not to form part of the factory, although it would otherwise do so. The words of s. 151 (6) are:

"Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

D The place of the accident would clearly not otherwise be a factory and was not a separate factory. The defendants further argue that the plaintiff was not within s. 49, since he was not employed in the process of breaking concrete but was a ganger supervising an operation, part of which was the process of breaking concrete. On the view that we have formed it is not necessary to decide that question. The first question is whether the place of the accident was within the close, curtilage or precincts of hangar No. 6.

E The undisputed facts are these. Hangar No. 6 was in the occupation of Fairey Aviation Co., Ltd., under licence from the Air Ministry on terms contained in letters. The relevant terms of the letters are these. The Air Ministry agrees to the "company's occupation of certain buildings and facilities". The licence fees in respect of hangar No. 6 are £4,900 per annum. As to hangar No. 6:

"... it is understood that the above quoted £4,900 includes for the apron now within the security fence, that you [the company] will keep locked the western door save for occasional entry, but if any continued use is made of the western apron, additional charges will be raised therefor. Additionally if the existence of the fence necessitates the construction of a new road or pathway round it your company will pay the cost thereof."

G The "apron now within the security fence" was the eastern apron and it was there that the accident happened. The security fence was a removable fence of chestnut palings put up in order to prevent unauthorised persons from seeing what was being done when the company was testing aeroplanes on the apron, as it did from time to time.

H The defendants contend that the apron was merely a part of the continuous and vast stretches of concrete that ran around and about the airfield. It had, of course, to be used by the company to bring its aeroplanes into and out of the hangar, but the company had no exclusive occupation and its licence to use the apron was, the defendants argue, in the nature of a right of way. The portion of concrete that adjoined the hangar did not, it is said, by mere proximity, or by the fact that aircraft were taken there for testing, become part of the close, curtilage or precincts of the hangar. These contentions were accepted by the learned judge. While we appreciate the force of the arguments which weighed with him, we feel unable to come to the same conclusion, for the following reasons. The annual payment "includes for the apron now within the security fence", and if the western apron is used there are to be extra charges. The company is, therefore, receiving and paying for special rights of use in respect

of "the apron now within the security fence". The company was clearly intended to have a right of way to and fro over so much of the main area of concrete as was necessary to bring material to the factory, but the company has a specified right to the apron over and above any right of way. That apron is regarded as something separate and apart from the main run of concrete further from the hangar and its use is expressly mentioned as included in the annual payment. The security fence is set there to give the company privacy from unauthorised persons. Moreover, the security fence, though on occasion removable, is regarded as of sufficient importance and permanence to justify the insertion of a term that the company must pay for the construction of any new road round it, if that were made necessary by the existence of the fence. It is true that the form of the company's occupation is described as a licence, and no doubt the Air Ministry always reserve to themselves full rights as an owner who has granted a mere licence. But the normal meaning and common sense of the agreement seems to us to be that the company is to use and enjoy the privacy of the apron for its own purposes of testing with a right to exclude unauthorised persons.

Neither side relied on any dictionary for the meaning of the words "close", "curtilage" or "precincts", or on any case defining those words with precision. It was conceded that the words "close" and "precincts" import the notion of a boundary surrounding an inclosure, but that the boundary might be a line or notional surround. The first meaning of "precinct" given in the *SHORTER OXFORD ENGLISH DICTIONARY* is:

"The space enclosed by the walls or other boundaries of a particular place or building, or by an imaginary line drawn around it; esp. the ground immediately surrounding a religious house or place of worship."

The word can also be used to mean "the environs". With all respect to the learned judge's contrary opinion, we think that this apron was within the close, curtilage or precincts of the hangar, and that the position of the fence at the time when the licence was given (whether thereafter it was in situ or temporarily removed) must be regarded as the limit of the close, curtilage or precinct.

One must next consider whether the place in question, although it would otherwise be within the precincts of a factory, is, by virtue of s. 151 (6), deemed not to form part of the factory. In order to satisfy the requirements of s. 151 (6), the place where the concrete was being broken must be shown to be "a place . . . solely used for some purpose other than the processes carried on in the factory". That question must be largely a question of fact and degree. The learned judge did not make any finding on it, since on the view that he took it was unnecessary. It was, therefore, contended by the plaintiff that there should be a new trial on this issue. But, in our opinion, a new trial is unnecessary since the facts on which the point has to be decided sufficiently emerge and are not really in dispute. The facts are these. In order not to interfere with access to and from the hangar, the work was done in pre-arranged strips. The aeroplanes obviously could not move in or out over a part where the concrete was being broken or a part where it was being relaid. The whole of the east end of the hangar could be opened by sliding doors. There was a central girder with two sliding doors on each side of it. The defendants worked on areas that left a line of access to and from each half of the hangar: that is to say, opposite each half of the whole eastern side of the hangar there would be a strip that was being interfered with by the defendants' work opposite one sliding door and a strip that was fit to carry aircraft opposite the other sliding door. Thus the place where the concrete was being broken by the defendants was being used solely for some purpose other than assembling or testing aircraft. For no aircraft could go on to it for any purpose.

A Counsel for the plaintiff contends, however, that the words "the processes carried on in the factory" include the incidental and necessary processes of repairing machinery, and that they also include the repair of the apron as incidental to the processes. He relies on *Thorogood v. Van Den Berghs & Jurgens* (1) ([1951] 1 All E.R. 682), a case in this court, where it was held that a place to which machines in a factory were taken for repair and testing was not "used
B for some purpose other than the processes carried on in the factory". But that case is no guide in the matter before us. The testing and repair of machines is a normal incident of factory life, and a repairs department of a factory is one of its ordinary adjuncts. On the other side, counsel for the defendants relied on *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.* (2) ([1948] 2 All E.R. 665), also a case in this court, where a clear analysis of the subsection was
C given by WYNN-PARRY, J., in which he pointed out that the "place" under s. 151 (6) might be any part of the factory area as defined by s. 151 (1), and concluded ([1948] 2 All E.R. at p. 673):

"At the time of the accident, the western land was being used for the purpose of reconstructing the gas holder, and, in my judgment, that was a purpose within the meaning of sub-s. (6)."

D That judgment was cited and approved by SINGLETON, L.J., in *Street v. British Electricity Authority* (3) ([1952] 1 All E.R. 679). In that case a part of a factory was already operating but part was still under construction, and the latter part was held to be a place within s. 151 (6). In each case it must be a question of degree whether a part of a factory is a place within s. 151 (6). In *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.* (2) the reconstruction of the part in
E question was more radical than in the case before us, but, following the reasoning of that case, we think that the place of the accident in this case was within s. 151 (6). The place where concrete was being broken up was a place clearly set apart and devoted by arrangement to the separate purpose of breaking up and relaying concrete. The renewal of the apron was not an incident of the processes
F of aeroplane assembly and testing. It is true that one could foresee that at some time or another the concrete apron would wear out and have to be relaid. One could also foresee that the hangar itself would at some time or another wear out and have to be rebuilt. But such radical replacements are not, normally speaking, recurring matters. They cannot be said to be incidental to the processes of the factory. Therefore, in our judgment, s. 151 (6) applies to the place of the accident
G and excludes it from the operation of the Factories Act, 1937. The appeal, therefore, fails.

Appeal dismissed.

Solicitors: *Pearce & Sons* (for the plaintiff); *J. F. Coules & Co.* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

GUERRINE (otherwise ROBERTS) v. GUERRINE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), May 13, 1959.]

Divorce—Costs—Execution—Sequestration—Sequestration of moneys credited to husband's account with bank—Practice—R.S.C., Ord. 43, r. 6.

[As to sequestration for costs in the Divorce Division, see 12 HALSBRURY'S LAWS (3rd Edn.) 470, para. 1053.]

[As to sequestration generally, see 16 HALSBRURY'S LAWS (3rd Edn.) 71, para. 107, note (u), para. 108; and for cases on the subject, see 21 DIGEST 597-600, 1817-1857.]

Cases referred to:

- (1) *Miller v. Huddleston*, (1882), 22 Ch.D. 233; 52 L.J.Ch. 208; 47 L.T. 570; 21 Digest 600, 1851.
- (2) *Wilson v. Metcalfe*, (1839), 1 Beav. 263; 8 L.J.Ch. 331; 48 E.R. 941; 21 Digest 598, 1834.

Motion.

This was a motion by the wife, at whose instance a writ of sequestration had been issued to enforce an order for costs made against the husband, for an order that his bank, Barclays Bank, Ltd., should verify and admit the balance standing to the credit of the husband in their books and should pay the sum into court to the credit of this action, sequestration account.

On July 14, 1958, the wife obtained a decree of nullity and the husband was ordered to pay the costs of the suit. On Sept. 24, 1958, £100 was paid into court as security for these costs. On Oct. 15, 1958, the decree was made absolute. On Feb. 25, 1959, Mr. Registrar RUSSELL ordered the wife's costs to be taxed at the sum of £480 0s. 3d., and further ordered that the sum outstanding, namely, £380 9s. 3d. be paid by the husband within seven days after Mar. 2, 1959, the date when the order was served on his solicitors. The money was not paid. On Apr. 30, 1959, a writ of sequestration issued out of the Divorce Registry that four named commissioners sequester all the estate, both real and personal, of the husband. Barclays Bank, Ltd., having been notified of the writ, declined to pay funds in their possession to the sequestrators without an order of the court. The notice of motion was served on the husband's solicitors (he having gone abroad) and on the bank.

J. B. Mortimer, for the wife. A bank balance is a chose in action and no part of it can be paid away by the bank without an order of the court (see 16 HALSBRURY'S LAWS (3rd Edn.) 71, note (u)). A balance in a bank is liable to sequestration; see notes to R.S.C., Ord. 43, r. 6 (ANNUAL PRACTICE, 1959, p. 1062) and *Miller v. Huddleston* (1) ((1882), 22 Ch.D. 233). In that case, Fry, J., held (ibid., at p. 234) on the authority of *Wilson v. Metcalfe* (2) ((1839), 1 Beav. 263) that he had jurisdiction to make the order. The amount standing to the credit of the husband's account having been admitted at the Bar the bank was ordered to pay the sum due into court to satisfy the sequestration. The taxing master was directed to tax the costs and fix the amount due to the sequestrators.

R. B. Willis, for the bank. The bank neither assents to the wife's motion nor opposes it. The bank admits that the credit balance standing to the husband's account is £2,162 18s. 11d. If there should be an order it should be in the *Miller v. Huddleston* (1) form.

The husband did not appear and was not represented.

MARSHALL, J.: There will be an order in this case that Barclays Bank, Ltd., having admitted £2,162 18s. 11d. standing to the credit of Stephen John

- A Guerrine [the husband] in their books, shall pay that sum into court to the credit of this action sequestration account. The order will provide for the costs of the sequestrators of and incidental to the sequestration to be taxed by the taxing master and for him to fix their remuneration and to tax the costs of Barclays Bank, Ltd., and that the amount so taxed and found due shall be paid out of the fund so to be paid into court. I am quite satisfied that Barclays Bank, Ltd.,
 B acted properly in every way.

Order accordingly.

Solicitors: *T. D. Jones & Co.* (for the wife); *Durrant Cooper & Hambling* (for Barclays Bank, Ltd.).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

KNOWLES v. ZOOLOGICAL SOCIETY OF LONDON

- D [COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), March 19, 20, 1959.]

Corporation—Bye-laws - Amendment. Proposed amendment to be confirmed by majority of fellows entitled to vote—Whether “majority” meant the majority present, personally or by proxy, at the particular meeting—Society incorporated by charter.

- E A society was incorporated by royal charter, which conferred power to make bye-laws for the management of its business and for meetings, etc., and to alter or repeal such bye-laws and to make new bye-laws provided that they were not repugnant to the charter. By a supplemental charter the charters could be amended (subject to the approval of Her Majesty in Council) by a special resolution passed by a three-fourths majority of the fellows present at a meeting and entitled to vote thereat. The bye-laws enabled new bye-laws to be made by giving notice at an ordinary general meeting, followed by screening the proposal and then submitting it to the next ordinary general meeting of fellows; and Ch. 13, s. 3, of the bye-laws provided that the proposal should be deemed to be carried “if the majority of fellows entitled to vote” should vote in its favour. Fellows whose
 G addresses were outside the British Isles were not entitled to notice of the meeting and fellows who were in arrear with their subscriptions were not entitled to vote. At a time when there were about 7,900 fellows a proposal for new bye-laws was put at a meeting where 3,034 fellows voted in person or by proxy, and there was a majority of about 560 votes in favour of the resolution. On the question whether the majority required by the bye-laws was a majority of all the fellows,

H **Held:** the words “majority of fellows entitled to vote” in Ch. 13, s. 3, meant “majority of fellows present at the meeting and entitled to vote thereat”; because this was a possible construction of the words in the context of s. 3, which was directed to a particular ordinary meeting, and should be adopted because it avoided inconvenience (for it would not be practicable to know which fellows were disqualified by absence from the country or unable to vote by being in arrear with subscription) and avoided inconsistency with the charters (for the supplemental charter conferred power on a three quarters majority of those present at a meeting to alter the provisions of the charter which was a document of far greater consequence than the bye-laws).

I *Re. v. Governors of Darlington School* ([1844], 6 Q.B. 682) considered.
 Appeal allowed.

[As to the powers of a corporation being exercisable by a majority present at a meeting, see 9 HALSBURY'S LAWS (3rd Edn.) 50, para. 98, text and notes (1)-(o); and for cases on the subject, see 13 DIGEST (Repl.) 257, 834-837.]

Cases referred to:

- (1) *R. v. Darlington School (Governors)*, (1844), 6 Q.B. 682; 14 L.J.Q.B. 67; 4 L.T.O.S. 175; 115 E.R. 257; 13 Digest (Repl.) 229, 518.
- (2) *Clay v. Grand Junction Water Works Co.*, (1904), 21 T.L.R. 31; 10 Digest (Repl.) 1246, 8781.
- (3) *Re Rothmere, Mellors Basden & Co. v. Coutts & Co.*, [1943] 1 All E.R. 307; 168 L.T. 201; 17 Digest (Repl.) 280, 869.

Appeal.

This was an appeal by the defendants, the Zoological Society of London, from a judgment of VAISEY, J., dated Dec. 5, 1958, in an action by the plaintiff, a fellow of the society (suing on behalf of himself and all other the fellows of the society). In the action the plaintiff claimed (a) a declaration that the bye-laws of the society which were in force immediately before the ordinary general meeting of the society held on Apr. 16, 1958 (and which are referred to hereinafter as "the original bye-laws") were not modified or abrogated by the resolution for the adoption of new bye-laws which was voted on at that meeting; (b) a declaration that the new bye-laws were not effectually adopted as the bye-laws of the society at that meeting; (c) a declaration that, on the true construction of the charter and the supplemental charter of the society and the original bye-laws, no resolution for the making of new bye-laws or for the alteration or repeal of any bye-law would be effective for any such purpose unless a majority of all the fellows of the society for the time being entitled to vote on such resolution, whether actually voting thereon or not, should vote in favour of such resolution.

By Chapter 1, s. 8, of the original bye-laws the fellows had the right to be present and to vote at all general meetings. By Chapter 1, s. 9, no fellow was entitled to vote who was in arrear with his subscription for previous years or (except during the period between the beginning of the year and the date of the annual general meeting) whose subscription for the current year had not been paid, or remitted by the council. By Chapter 13, s. 3*, any proposal for the making of new bye-laws or for the alteration or repeal of any bye-law "shall be deemed to have been confirmed if the majority of fellows entitled to vote shall vote in its favour and for this purpose voting may be in person or by proxy".

On Apr. 16, 1958, the total number of fellows was over seven thousand, and about 3,034 were present at the meeting, in person or by proxy. Of these, 1,788 voted in favour of the proposal for adopting the new bye-laws, and 1,227 voted against the proposal.

VAISEY, J., held that the words "the majority of fellows entitled to vote", in Chapter 13, s. 3, meant the majority or greater number of the whole "electorate", whether they voted or not, and he made the following declarations: (a) that the bye-laws of the society were those which were in force immediately before the meeting of Apr. 16, 1958, and (b) that, on the true construction of the society's charters and bye-laws, no resolution for the making of new bye-laws or for the alteration or repeal of any bye-law would be effective unless there should vote in favour of the resolution the majority in number of all the fellows for the time being of the society other than fellows who, under Chapter 1, s. 9, of the said bye-laws were not entitled to vote.

Charles Russell, Q.C., and *Arthur Baynall* for the defendants, the society.
R. B. S. Instone for the plaintiff.

LORD EVERSHED, M.R.: The question which is raised may be shortly stated, for it consists only of construing a very few words, which on the face of

* The terms of s. 3 are printed in full at p. 599, letter C, post.

A them are simple words, that occur in the existing bye-laws of the Zoological Society of London. The words which must be construed are these:

"Any such proposal shall be deemed to have been confirmed if the majority of fellows entitled to vote shall vote in its favour . . ."

B The proceedings were started by writ dated July 8, 1958. By that writ the plaintiff, who is respondent to this appeal, sought a declaration that the bye-laws of the society which were in force on Apr. 16, 1958, were not modified or abrogated by the resolution for the adoption of new bye-laws on which a meeting held on that date voted.

C The facts were as follows. A total of some 3,034 fellows of the society were present in person or by proxy at the meeting of Apr. 16, 1958. When the votes were taken, it appeared that there were 1,788 votes in favour of the resolution for adopting the new bye-laws, and 1,227 against the resolution. There were eighteen fellows who did not vote at all, and there was one who used a voting paper but whose vote was disallowed. It follows from the figures that there was an appreciable, though not an overwhelming, majority in favour of the new bye-laws. The vital fact for the purposes of this case, however, is that on Apr. 16, 1958, the total number of fellows of the society was over seven thousand; of those an unascertained number was almost certainly disqualified from voting; moreover, some of the fellows, by reason of the terms of the existing bye-laws*, were not entitled to receive, and had not received, any notice of the meeting.

D VAISEY, J., accepted the contention of the plaintiff that the formula "... the majority of fellows entitled to vote . . ." meant as a matter of construction the majority of the total number of fellows of the society at the relevant date who were entitled to vote, that is to say, who were not for any reason disqualified from voting. What the figure of the "majority" so taken would have been is, for reasons already indicated, uncertain; but it may be taken to have been somewhere in the region of three thousand five hundred, a number in excess of the total who were represented in person or by proxy at the meeting. A point F rightly stressed and much stressed by counsel for the society is that, if that view of the construction is correct, it results in an absurdity--since it would, for practical purposes, be impossible to ascertain what the exact arithmetical figure of the "majority" would be, and almost certainly hardly less possible ever to achieve such a vote.

G I should first read certain relevant parts of the charter of the society and of the bye-laws. The original charter is dated Mar. 27, 1829. After providing that there should be a council of the society consisting of twenty-one fellows, the charter ended thus:

H "And We do further declare and grant that the council of the said society for the time being . . . shall and may from time to time nominate and appoint such persons as they shall think proper to be officers . . . And also shall and may have power according to the best of their judgment and discretion to make and establish such . . . bye-laws as shall appear to them useful for the regulation of the said society for the management of the estates . . . and businesses thereof and for fixing and determining the times and places of meeting of the said society . . . and the same orders and bye-laws from time to time as they may see occasion to alter suspend or repeal and to make such new orders and bye-laws in their stead as they I shall think most proper and expedient so as [the bye-laws] be not repugnant to these presents . . . Provided that no bye-laws to be made or alteration . . . of any bye-law shall be considered to have passed and be binding on the said society until notice of such bye-laws or such alteration . . . of any bye-law shall have been publicly given at a general meeting nor until the same shall have been hung up in writing in some conspicuous place in

* See p. 598, letter I, to p. 599, letter B, post.

the common meeting room of the said society during the space of three calendar months nor until the same shall have been confirmed by method of ballot by the fellows of the said society or any eleven or more of them at the next general meeting of the said society to take place after such notices shall have been given as aforesaid."

I shall have to come back to say something of the meaning which I give to those last words; but it may be taken that the procedure there indicated was followed in the case, viz., the council having resolved on the new bye-laws, those new bye-laws were screened in the way prescribed and came up for confirmation at the next general meeting after that process of screening. It was at that meeting that the resolution received the support of the votes which I have mentioned.

There was a supplemental charter, granted by His late Majesty King George the Sixth in May, 1948, which contained powers for the society, by a special resolution passed at a general meeting of fellows (the special resolution being of a kind following the well-known concept of special resolutions in company law, viz., being passed by a three-fourths majority of those present at the meeting and voting thereat, to amend the charter subject to the approval of His Majesty in Council of the amendment.

I now come to the bye-laws which, we were informed, were brought into operation at or about the same time as the supplemental charter, namely, in 1948. Chapter 1 of the bye-laws bears the heading "Fellows" and states, in brief, how one may become a fellow, the obligations in the way of subscription, and so forth. Section 8 of that Chapter says this: "The fellows have the right to be present and to vote at all general meetings . . ." I interpret that to mean that they have the right to be present at, and to vote at, all general meetings. Section 9, however, provides that "No fellow shall be entitled to vote who is in arrear with his subscription" for a certain specified period. It follows, therefore, that the fellow who is entitled to vote means, *prima facie*, a fellow who has not been disqualified from voting by the terms of s. 9 of Chapter 1. Chapter 2 deals with honorary fellows, and that I pass over. Chapter 3 deals with the annual general meeting and the business which it will transact, and I note that by s. 7 (4) of that Chapter, if there is a contested election, provision is made for a postal ballot. Chapter 4 deals with the offices of president and vice-president; Chapter 5 with treasurer and accounts; Chapter 6 with the secretary, and Chapter 7 with employees. Chapter 8 deals with ordinary meetings and distinguishes ordinary general meetings from scientific meetings, and it is true to say that in s. 2 there is reference to the quorum expressed as follows: "Eleven fellows present in person and entitled to vote shall be a quorum". The figure eleven as a quorum obviously reflects a similar reference to the number eleven at the end of the original charter. There follow Chapters on other matters (namely, publications, council, committees, and such like), and so we come to Chapter 13, which is headed "Bye-laws". Section 1 of Chapter 13 provides:

"The council shall give notice at an ordinary general meeting of its intention to propose the making of new bye-laws or the alteration or repeal of any bye-law after which a copy of such proposal shall be suspended . . . in the meeting-room . . . for three calendar months [the words following *which* had been forecast by the charter] and then submitted to the next following ordinary general meeting for confirmation by method of ballot."

This again is plainly a reflection of the final language in the charter. Section 2 provides:

"As soon as practicable after the meeting at which notice as provided by s. 1 of this Chapter is given and at least twenty-one days before the

- A date of the meeting at which the ballot is to take place, a copy of the proposal together with a notice stating the place, the date and the hour of the last-mentioned meeting and a form of proxy shall be sent through the post to all fellows . . . whose registered or last-known places of address are within the British Isles. The accidental omission to give notice to . . . any such fellow shall not invalidate the proceedings at the meeting."
- B I refer to that section because a fellow who has not an address within the British Isles is clearly not entitled to receive a notice of a meeting for amending the bye-laws and, presumably, therefore, would be unlikely to know anything about it. Section 3 provides:

"A proposal for the making of new bye-laws or for the alteration or repeal of any bye-law shall be either confirmed or rejected and the president or other fellow in the Chair shall refuse to accept any amendment to the proposal. Any such proposal shall be deemed to have been confirmed if the majority of fellows entitled to vote shall vote in its favour and for this purpose voting may be in person or by proxy."

- D Section 4, the last section of Chapter 13, deals with the form of proxy. It will be noticed about s. 3, and particularly about its first sentence, that, although it speaks of the proposal being either confirmed or rejected and what the president or the fellow in the Chair is to do, it does not in terms state "at the second above-mentioned meeting". It is quite plain, however, to my mind that the whole of that section is dealing with what takes place at the second meeting, of which notice has been given in accordance with s. 1 of Chapter 13, and that matter of context is, to my mind, of great importance. The last Chapter (Chapter 14) deals with the matters relating to the charter, and I can pass it over.
- E

The view of the learned judge, as I have already stated, was that the words "the majority of the fellows entitled to vote", in s. 3 of Chapter 13, meant exactly what they said, namely, the arithmetical majority of all the fellows entitled to vote, that is, not disqualified from voting. If this sentence appeared bereft of its actual context, I should agree that that was what, on its face, it meant; that would be in conformity with the language in Chapter 1 which I have read*, about all fellows being entitled to vote save those disqualified by the terms of s. 9 of that Chapter. The formula which we have to construe, however, is in this special context which is related to a particular meeting. The submission of the society is that, having regard to the context, what is meant by the words "majority of fellows", in the phrase "if the majority of fellows entitled to vote shall vote," is the majority of fellows entitled to vote on the particular resolution by the fact of their being in attendance at the meeting, just as the earlier part of s. 3 of Chapter 13 is only made intelligible by assuming it to be related to the transactions at the meeting.

H There is an alternative view of the meaning of these words which would limit the phrase "the majority of fellows entitled to vote" to the majority of fellows in fact voting, as distinct from those entitled by attendance to vote. The learned judge appeared clearly, I think, to have treated, in his judgment, the only alternatives before him as being the second alternative put by counsel for the society (namely, the majority of fellows actually voting), on the one hand, and what I will call the construction of counsel for the plaintiff, on the other hand, and between those two he decided in favour of the latter. It may well be that if, in truth, those were the only two alternatives, that should be the right answer; but what the learned judge has not noticed in his judgment is that the first suggestion of counsel for the society, at any rate as counsel put it in this court, is that the true meaning of this phrase is neither the one nor the other of those two alternatives. Counsel concedes that "entitled to vote" is a qualification of the word "fellows" and means what it says, viz.,

* See p. 598, letter E, ante.

that he is not disqualified from voting; but the majority which is indicated, so counsel contends, is the majority of those not disqualified who, by being there (as later appears, either in person or by proxy), are entitled to vote on the particular resolution at the particular meeting. In support of that view counsel has also raised two, as I think, very formidable arguments. The first is what may be called the argumentum ab inconvenienti which, it is true, the learned judge did notice, although slightly. The second and further argument is that the view for which counsel for the plaintiff contends would, in truth, be repugnant to the terms of the charter, and, if it were right, therefore, the result presumably would be that the bye-law was *ultra vires*.

In support of that last submission counsel for the society cited to us *R. v. Darlington School (Governors)* (1) ((1844), 6 Q.B. 682), to which I will presently allude and which was not in fact brought to the attention of VAISEY, J. I am, therefore, somewhat comforted by thinking that perhaps, if the learned judge had seen that case and had considered the matter which counsel has put before us on that authority, he might well have arrived at the same conclusion as that which I have felt clear in reaching.

I will, therefore, first say something about the argument as to inconvenience, for the inconvenience is by no means slight; it is grave. In the first place, as I have indicated, it would really be impossible to ascertain at any given moment for any practical purpose who the fellows were who were entitled to vote. Many of them, under the terms of the bye-laws*, will have become life members, and there will be no means of ascertaining whether at any point of time they are still alive. Nor would it be at all easy at any given time to discover who exactly of those that were still living had fallen into the necessary amount of arrear in payment of their subscriptions. As a practical matter, it must, I should have thought, be plain enough to anyone who has some experience in collecting votes that to obtain more than half of the total votes in favour of a particular resolution would be not only difficult, but virtually impossible. I note that even the most trivial alteration to a bye-law, an alteration such as was indicated by PEARCE, L.J., altering for obvious convenience the date of the financial year, would require this remarkable procedure, which would be difficult and, as I think, virtually unattainable. Then there is the further difficulty which, though not going to practicability so much, goes to the obvious sense of it, that many of those fellows who might well have been entitled to vote would, in the ordinary course, not have had notice of the meeting, and would not have been entitled to have had it, because they would not have addresses in the United Kingdom; and there might have been others who would not, for one reason or another, such as accident, have received notice. These matters seem to me to be more than just difficulties; they are, I think, difficulties of so great a magnitude as to justify the word "absurdity" which counsel for the society used. They are so great that, applying common-sense standards, I think that the court should be slow to impose them on the society unless the construction of the words in question is so plain as to leave any other course impossible. I would add under this head a reference to the provisions about altering the charter. It is true that no alteration to the charter can be made without the Sovereign's approval, but it is made plain enough that a special resolution carried in the ordinary way by three-quarters of those present at a particular meeting will suffice to alter the charter, given that the Sovereign's approval follows†. It seems to me highly unlikely that the majority of fellows required to approve or confirm a proposal should be so vastly greater in the case of a simple bye-law than it is for an amendment of the charter itself.

So I come back in the end to the last point previously mentioned, that of

* Under s. 5 of Chapter 1.

† See p. 598, letter C, ante.

A repugnancy. It will be recalled that by the terms of the charter* the council was given power to make and alter bye-laws subject to the proviso or limitation that the proposed bye-laws, or proposed alterations, must be

“ . . . confirmed by method of ballot by the fellows of the . . . society or any eleven or more of them at the next general meeting of the . . . society to take place after [the notice].”

B Counsel for the plaintiff addressed some argument to us about the meaning of the word “ballot”, but, with the greatest respect to him, I cannot think that it helps. It seems to me to be quite plain from the language of the charter that it contemplates that confirmation may be given to an alteration at a meeting at which no more than eleven fellows are present, that being made
C (as later appears from the bye-laws†) the quorum for a fellows’ meeting. It is true that this appears in a proviso, but the point of the proviso is to place a particular qualification or limitation on the otherwise unlimited powers of the council to amend or make bye-laws. If the bye-law which we have to construe means what counsel for the plaintiff and the learned judge say, then I cannot see any answer to the point that it would be inconsistent with the language at
D the end of the charter; it would place far more severe limitations on the council’s power to amend the bye-laws than the charter contemplates or states. It will be remembered that by the earlier passage in this part of the charter the power to make bye-laws, and these were made in 1948, is also subject to the limitation that they must not, when made, be repugnant to the charter‡.

The result, therefore, of this argument based on inconvenience and repugnance
E comes to this, as I think, that the court will not and should not construe s. 3 of Chapter 13 in a sense which creates inconsistency and repugnancy unless it is really compelled by the language so to do. I find no such compulsion in the language. Indeed, once the premise is granted, as it must be granted, that the whole of this section is dealing with what takes place at a particular ordinary meeting, all else, as a matter of common sense and meaning of words, falls into
F place. I agree that the language is not chosen with that perfection which wisdom after the event would dictate; but, none the less, the references to the proposal being confirmed or rejected and the president or other fellow in the chair refusing amendments, and the like, are all related to what is going on at a meeting. So I find no difficulty in the way of construing this language, “if the majority of fellows entitled to vote shall vote”, as meaning “if the majority of fellows
G who attend this meeting in person or by proxy and are not disqualified from voting shall vote.”

A number of cases was cited to us, but I do not think it necessary to cite more than one or two. I should refer to *Clay v. Grand Junction Water Works Co.* (2) (1904), 21 T.L.R. 31, because it was a case that was much relied on by
H VAISEY, J. The words which were weighed and construed in that case were quite different from those with which we are concerned. The words were “a majority in value of the shareholders, or of the shareholders of a particular class”. By the requisite statutory provision§ it was provided that, if certain schemes of arrangement were to be effective, then they must not be, in effect, vetoed by a majority in value of the shareholders, or shareholders of a particular class; and if such a majority of shareholders, or shareholders of a
I particular class, voted adversely to the proposal, then provision was made for going before a Chancery judge. I agree with counsel for the plaintiff that the case is more relevant on what I have called the alternative suggestion of counsel for the society, the suggestion with which the learned judge dealt and which

* See p. 597, letter G, to p. 598, letter A ante.

† Under s. 2 of Chapter 8 of the bye-laws; see p. 598, letter G, ante.

‡ See p. 597, letter I, ante.

§ The Metropolitan Water Act, 1902, Sch. 4, cl. 1. Schedule 4 was repealed by the Statute Law Revision Act, 1927.

he rejected, viz., the suggestion that "fellows entitled to vote" meant, or was limited to, the fellows actually voting; but there are other substantial differences in the present case from *Clay v. Grand Junction Water Works Co.* (2) which are, I think, worth a brief mention. In the first place, the arithmetical question posed in that case was the "majority in value of the shareholders" and that by itself, no doubt, meant what it said. Nor is there any comparable inconvenience in so doing. There is no difficulty in ascertaining at any given point of time what is the majority in value of the issued shareholding or the issued shareholding of a particular class. Moreover, this was not a provision required to give effect to something, but a provision which enabled the majority in value to put a stop to a scheme going through without the intervention of the courts.

On the last point, that of repugnance with the charter, I have derived assistance from *B. v. Darlington School (Governors)* (1), which VAISEY, J., did not, I think, have the advantage of seeing. In that case there was a charter and there were bye-laws, and the substance of the matter was that the governors of the school were entitled by the charter, among other things, to appoint and dismiss, if they thought fit, the head master of the school. Certain bye-laws were introduced which required that, before a head master was dismissed, a written statement of the adverse view of the governors to the head master's conduct of the school should be submitted to the head master, and that, in fact, had not been done. The relevant part of the judgments of the courts* show that such a bye-law, if effective, would have been an added fetter to what the charter authorised the governors to do and, on that ground, must be rejected. Thus I find this passage in the judgment of the Court of Queen's Bench delivered by LORD DENMAN, C.J. (6 Q.B. at p. 695):

"But another plea set forth a bylaw, made in the year 1748, declaring certain qualifications to be requisite for a master, and prescribing a certain process for removing any, giving the master a fair opportunity of being heard in his defence, whenever he may be accused with a view to his removal, with an averment that such process had not been followed nor such opportunity given to the prosecutor. Issue having been taken on this plea, a verdict was found on this also for the prosecutor. But the defendants have moved for judgment notwithstanding the verdict on these points, arguing that the bylaw is invalid in law, because inconsistent with the trust and power vested in the governors by the letters patent . . . We are clearly of opinion that this objection is fatal to the validity of the bylaw . . . [The governors] are bound to remove any master whom, according to their sound discretion, they think unfit and improper for the office: and, as that discretion may possibly be well exercised for defects of various kinds not amounting to misconduct, so there may be misconduct, incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty."

The prosecutor having brought a writ of error in the Exchequer Chamber, TINDAL, C.J., delivering the judgment of the court, said (6 Q.B. at p. 717):

"But we think the governors for the time being had no authority under the letters patent to make such bylaw so as to bind their successors in the execution of their duty: nothing can be better established than that a bylaw by a corporation, which alters the constitution of the corporation, is void; and upon the same principle a bylaw which restrains and limits the powers originally given to the governors by the founder himself we think must be bad."

I have indicated previously that the court should very strongly lean against

* The judgment of the Court of Queen's Bench (delivered on Feb. 8, 1843) was affirmed in the Exchequer Chamber on Nov. 27, 1844.

A a construction of the bye-law which leads both to repugnance with the charter and also to absurdities. I feel no doubt, therefore, that the court should construe this bye-law in the sense for which counsel for the society contends unless the language is compelling to the contrary. In my judgment, it is not so compelling and, therefore, I would allow the appeal.

B ROMER, L.J.: I agree, and I add a word or two of my own only because we are taking a different view of this matter from that which commended itself to the learned judge.

C In his main submission on the question of construction, counsel for the society contended that the phrase "the majority of fellow-entitled to vote", whatever it might mean in other contexts and in other sections, meant, for the purposes of s. 3 of Chapter 13, fellows who were entitled, by reason of being at the particular meeting in person or by valid proxy, and not disqualified through being in arrear of subscription, to vote, and the same result would be arrived at by reading the phrase as "fellows entitled to vote at the meeting". It seems to me that there is to be found in s. 3 itself support for that view. As LORD EVERSHERD, M.R., pointed out in the course of argument, there is a reference, D among other things, to "the president or other fellow in the Chair", and that obviously means the president of that particular meeting or other fellow in the Chair at that particular meeting. In other words, the draftsman of this section was, as it were, projecting his mind forward to a meeting which had been already convened and was taking place. Therefore, there is not very much difficulty in reading into this part of the section, after the word "fellows", E such words as "at the meeting and", so that the phrase reads: "if the majority of fellows at the meeting and entitled to vote". For my part, I think that there is force in that way of looking at it.

F The contrary view submitted by counsel for the plaintiff, that it meant the whole of the fellows of the society, would appear to be negatived to some extent by certain other considerations. For example, the meeting at which the question of confirmation was to be brought up was an ordinary general meeting*, and by Chapter 8, s. 2, it is provided that at ordinary general meetings "Eleven fellows present in person and entitled to vote shall be a quorum", which is an echo of that part of the charter which LORD EVERSHERD, M.R., has read†. It would appear, at all events at first sight, that at such a meeting, a meeting at which this question of confirmation was to be brought up, effective business could be G done, provided that eleven fellows were there; that one did not need to have the presence, in person or by proxy, of all the fellows of the society; and that such was the position which was in the contemplation of the draftsman of s. 3 of Chapter 13. I think, too, that the view of counsel for the plaintiff is also to some extent negatived by a further consideration to which LORD EVERSHERD, M.R., referred in the course of argument, namely, that it is perfectly plain from H the terms of the supplemental charter and from Chapter 14, s. 1, that (with the approval of the Privy Council) the charter itself or the supplemental charter, documents of far greater consequence than the bye-laws, could be amended by a special resolution passed by three-quarters of the fellows present and voting at that meeting. It would seem rather extraordinary to think that far greater formalities and far greater difficulties should have to be observed in, or should be put in the way of, altering the bye-laws themselves than are necessary in the case J of altering the charter. Taking all these considerations into account, I have little doubt that the construction which counsel for the society seeks to put on the relevant words in Chapter 13, s. 3, is the right one. Even if that view of this matter be wrong, however, I am at least convinced that it is a possible construction of Chapter 13, s. 3, and, if it be a possible construction, then it is permissible for, and indeed obligatory on, the court to consider the consequences

* Under s. 1 of Chapter 13; see p. 598, letter H, ante.

† See p. 598, letter A, ante.

of applying the one possible construction or the other. Such cases as *Re Rothermere, Mellors Basden & Co. v. Coutts & Co.* (3) ([1943] 1 All E.R. 307) show that in such a case the court will prefer the construction which avoids an absurdity involved in adopting the other construction.

Counsel for the society referred to a number of what he described rightly as absurdities involved in adopting the view put forward by counsel for the plaintiff. He referred to the virtual impossibility of getting over half of the seven thousand fellows to bestir themselves in any matter, and, in particular, in matters which might constantly arise of the most trivial importance. In connexion with that, he pointed out that, in order to make the calculation which is involved in the plaintiff's contention, it would be necessary to take into account people who had no address in the British Isles and who, consequently, would not receive notice of the meeting at all; also people who had not received a notice through an accidental omission. Finally, counsel for the society said that it was absurd to have a system which involved exact knowledge by the council, or the secretary or other official, at any given point of time, of how many members there were. Some of them might be abroad or their addresses might be unknown, and the cumulative effect of such considerations as those would drive the court, so counsel submitted, if the alternative construction be possible, to reject that which was submitted by counsel for the plaintiff. I think that there is very great force also in that submission. So whether I am right in thinking that the construction which counsel for the society suggests is the right one, or whether the true view is that the matter is open to doubt and that the construction which counsel suggests is a possible one, one arrives at the same result.

With regard to the question of repugnancy, there is nothing that I desire to add to what LORD EVERSHED, M.R., has said, with which I entirely agree. *R. v. Darlington School (Governors)* (1) ((1844), 6 Q.B. 682) is very much in point when one considers the terms of the charter and compares them with the construction which the plaintiff seeks to put on Chapter 13, s. 3. It seems to me to be almost impossible to deny that, on the true construction of the relevant part of the charter, the interpretation which the plaintiff desires to attach to Chapter 13, s. 3, is inconsistent with the charter, at least to the extent that it adds, and adds very materially indeed, to the fetters on the exercise by the council of the powers which are vested in them by the charter itself. To that extent, on the authority of *R. v. Darlington School (Governors)* (1), if authority be needed, it appears to me to be quite plain that s. 3, if it means what the plaintiff says that it means, cannot be given any effective force. I, accordingly, agree that the appeal should be allowed.

PEARCE, L.J.: I agree. Section 3 of Chapter 13 of the society's bye-laws deals with what shall happen at the meeting at which the new bye-laws are to be considered. To my mind the natural meaning, in that particular context, of the words "the majority of the fellows entitled to vote" is the majority of the fellows present, personally or by proxy, at the meeting when the proposal is put to it, who at that meeting can properly vote. Absentees who have not appointed proxies are not included in the words. Even if the words can be said to be ambiguous, that is by far the more sensible and workable interpretation of the words and should, therefore, be preferred. Moreover, that construction makes the bye-laws consistent with the charter while the construction put forward by the plaintiff would, in my view, make the bye-law repugnant to the charter and, therefore, invalid.

I have not dealt in greater detail with the arguments because my Lords have stated them in clear terms, with which I agree.

Appeal allowed.

Solicitors: *Slaughter & May* (for the defendants, the society); *Blakemore & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WHITE v. ELMDENE ESTATES, LTD.

COURT OF APPEAL (Lord Evershed, M.R., Ormerod and Willmer, L.J.J.), April 22, 23, 24, 28, 1959.]

Rent Restriction—Premium—Payment—Third party receiving benefit—Tenant required by landlord, as condition of grant of tenancy, to sell house, owned jointly by him and his wife, to third party at undervalue of £500—Whether sale at undervalue constituted payment of premium—Whether landlord liable to repay £500 to tenant—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6 c. 40), s. 2 (1), (5), s. 18 (2).

In 1952 the plaintiff and his wife wished to sell a house, which they owned jointly, and to move into a flat. The defendant company was the landlord of a flat which was subject to the Rent Restrictions Acts. An estate agent, acting on behalf of the defendant company, offered to grant a tenancy of the flat to the plaintiff and his wife, at a rent of £1 15s. a week, if they would sell their house to another company, P. Ltd., for £500 less than its market value at the time. The plaintiff and his wife accepted the offer, sold their house to P. Ltd. for £1,800 (its market value at the time being £2,300), and were granted a tenancy of the flat by the defendant company. The defendant company received no direct benefit from the sale of the house being at an undervalue. The plaintiff now sought, under s. 2 (1)* and s. 2 (5)* of the Landlord and Tenant (Rent Control) Act, 1949, to recover the sum of £500 from the defendant company, on the ground that that sum was a premium (as defined in s. 18 (2))* which the defendant company had, as a condition of the grant of the tenancy, required the plaintiff to pay, contrary to s. 2 (1). No objection was taken to the plaintiff's wife not being joined as a plaintiff.

Held: the plaintiff was entitled to recover the £500 from the defendant company for the following reasons—

(i) the £500 was a premium within s. 2 (1) and s. 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, since that amount of pecuniary consideration, given by way of sale of the house at an undervalue, had been required by the defendant company as a condition of granting the tenancy, and

(ii) payment of the premium had been required within s. 2 (1) notwithstanding that the pecuniary consideration had been given by reduction of the purchase price of the house, and

(iii) there had been a payment within s. 2 (1) notwithstanding that the pecuniary consideration was given to a third party, P. Ltd., by the order of the person who required the payment, the defendant company (dictum of Lord GODDARD, C.J., in *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.*, [1951] 1 All E.R. at p. 202 not followed), and

(iv) a person who required a premium to be paid contrary to s. 2 (1) could be ordered to refund it to the tenant who paid it, although the premium had been paid to a third party, and,

(v) as the house sold by the plaintiff and his wife had belonged to them jointly, the plaintiff could recover the whole £500, as no objection had been taken to the non-joinder of his wife as co-plaintiff.

QUAERE whether the amount of the premium could have been recovered by the plaintiff from P. Ltd. (see p. 615, letters D to F, post).

Appeal allowed.

* The relevant terms of s. 2 (1), s. 2 (5), s. 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, are printed at p. 608, post.

[As to premiums on the grant of a tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 798, 804, paras. 1576, 1583.]

For the Landlord and Tenant (Rent Control) Act, 1949, s. 2 and s. 18 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1097, 1110.]

Cases referred to:

- (1) *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.*, [1951] 1 All E.R. 198; [1951] 2 K.B. 54; 115 J.P. 45; 3rd Digest Supp.
- (2) *Remington v. Larchin*, [1921] 3 K.B. 404; 90 L.J.K.B. 1248; 125 L.T. 749; 85 J.P. 221; 31 Digest (Repl.) 688, 7795.
- (3) *Woods v. Wise*, [1955] 1 All E.R. 767; [1955] 2 Q.B. 29; 119 J.P. 254; 3rd Digest Supp.

Appeal.

This was an appeal by the plaintiff, William Alfred White, from a judgment of His Honour JUDGE LEON, given at Willesden County Court on Oct. 29, 1958, whereby he adjudged that the plaintiff was not entitled to recover from the defendant company, Elmdene Estates, Ltd., the sum of £500 as a payment made in contravention of s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and recoverable by the plaintiff, under s. 2 (5) of the Act. The plaintiff and his wife were the tenants of a flat of which the defendant company was the landlord. The tenancy was granted on or about Aug. 12, 1952, and the flat was at all material times a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied. As a condition of granting the tenancy, the defendant company required the plaintiff and his wife to sell a house, of which they were the joint owners, to another company, Pegasus Training Estates, Ltd., at a price £500 less than the market value of the house.

The plaintiff having given notice of appeal, the defendant company gave a respondent's notice by which, among other matters, the defendant company gave notice that in the event of the appeal being allowed and of it being held that the plaintiff had paid a premium which could not lawfully be required and was recoverable from the defendant company under s. 2 of the Act of 1949, the defendant company would contend that the plaintiff was not entitled to recover more than £250.

H. Heathcote-Williams, Q.C., and *Henry Palmer* for the plaintiff (the tenant).
C. F. Dehn for the defendant company (the landlord).

Cur. adv. vult.

Apr. 28. **LORDE EVERSHED, M.R.**: The question in this case is whether, if a proposing landlord, as a condition of the grant of a tenancy by him, requires the proposing tenant to sell his own [the tenant's] property at a stated amount of undervalue, not to the landlord himself but (the landlord being a limited company) at the landlord's demand to another company closely associated with the landlord, that amounts to requiring the payment of a premium within the terms of s. 2 of the Landlord and Tenant (Rent Control) Act, 1949; and further, if it does, whether the tenant, who paid it, can now recover the premium from the landlord who required it.

The transaction which we have to consider is not an attractive one, and might well (as the learned judge thought) be said to be within the mischief aimed at by the Act; but the question is whether it is within the Act's language. The dramatis personae in the case are as follows. The plaintiff, Mr. White, is a joiner by trade. The defendant company (which is of a kind known as a property company) is controlled by one van Dooren and his family. The allowance (to use a neutral word), the benefit of which was "required", was received by another company, known as Pegasus Training Estates, Ltd., which is concerned with (the training, not of flying horses (as might be supposed from its name), but of terrestrial horses, and is also a property-owning company. This company, like the defendant company, is controlled by van Dooren and his family. Admitted

A piquancy is provided to the case by the circumstance that the estate agents
concerned in this transaction are a limited company known as Clifford & Clifford,
Ltd., a company of which, once more, van Dooren and also his wife are share-
holders, and van Dooren is also a director. But it should be stated at once,
as the learned judge found, that no part of the benefit which was ultimately
B Pegasus Training Estates, Ltd. (referred to hereinafter as "the
Pegasus company") reached the pockets of the defendant company.

I will now read a passage from the judgment which contains the material
findings, omitting only two sentences in which the learned judge expressed a
view of the intention of the Act. He said:

C "The facts, as I found them to be, were as follows. At the relevant time
the plaintiff and his wife were joint owners of 174 The Heights, South
Harrow (hereinafter called '174') where they lived. The house was subject
to a mortgage, payments under the mortgage deed were in arrear and the
plaintiff and his wife decided that the only way out was for them to sell 174,
repay the mortgage money out of the price obtained and obtain a flat.
They had nowhere to go, they were compelled to leave their own house . . .
D During their quest for a flat they passed the window of Clifford & Clifford,
Ltd. (hereinafter called 'Clifford'), who were estate agents, and they saw
advertised in the window a self-contained flat to let unfurnished. They went
in and asked if the flat was available and if they could see it. Clifford's
representative, a Mr. Williamson, replied to their question, with, 'Have you
got a house to sell?' They said 'Yes' and Mr. Williamson then said
E that he would take them over the flat, 108 Welldon Crescent. They went
to see it and liked it. It was conceded on behalf of the [defendant company]
that the tenancy offered and subsequently granted was one to which the
Rent Restrictions Acts and in particular the Act of 1949 applied. Mr.
Williamson then made it plain to the plaintiff and his wife that they could
not have the tenancy of the flat unless they were prepared to sell 174 at £500
F less than its fair market value. I was satisfied that the fair market value
of that house was, at the time, between £2,300 and £2,400 and that Clifford
knew this very well and on behalf of the [defendant company] required
the plaintiff and his wife to sell it to purchasers who turned out to be Pegasus
Training Estates, Ltd. (hereinafter called 'Pegasus'), at £500 less than its
value. The plaintiff and his wife thought it over and, as they had nowhere
G else to go, they felt they had no alternative but to agree. They accordingly
sold 174 to Pegasus for £1,800 and received in return from the [defendant
company] a tenancy of 108 Welldon Crescent at a weekly rent of £1 15s.
I hold that the sale by the plaintiff and his wife to Pegasus of 174 at an under-
value amounting to £500 was required by Clifford acting for the [defendant
company] as a condition of the tenancy being granted by the [defendant
H company] to the plaintiff."

To that statement of the learned judge I add two further matters. First, it is
quite clear that, at the interview which the plaintiff and his wife had with
Mr. Williamson, the value of the house was stated and assumed and accepted
as being £2,300; so that, if the condition were complied with, it meant that the
I sale price would be £1,800—as was later the fact. Secondly, it is also clear
that the plaintiff and his wife were joint owners, although it appeared, from
certain questions which were, quite properly, put in cross-examination to the
plaintiff, that he (at any rate) regarded the interests of himself and his wife in
equity as being equal; so that the plaintiff, in answer to a specific question put
by counsel for the defendant company, said that, if they had received the full
value, £2,300, "there would have been £250 for [himself] and £250 for [his]
wife". The learned judge, in a very full and clear judgment, would have con-
cluded, on the facts which he had found, in favour of the plaintiff but for the
decision in *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment*

Trust, Ltd. (1) [1951] 1 All E.R. 198), to which I shall later refer: but he felt bound by that decision to hold that the transaction was one outside the scope of the Act of 1949.

Counsel for the defendant company, in this court, conceded, in accordance with the findings of the judgment, (i) that the tenancy of 108, Welldon Crescent, with which we are concerned, was within the ambit of the Rent Acts; (ii) that what Mr. Williamson required, at the interview described by the judge, was in truth a condition of the grant of the tenancy; and (iii) that the requirement made by Clifford & Clifford, Ltd., was made by that company as agent for the defendant company. In those circumstances, the two principal questions presented to us are as follows. Question (i): Is the allowance (and I again use a neutral term) which was required at this interview, and which was accepted, a payment of a premium within the relevant sections of the Landlord and Tenant (Rent Control) Act, 1949? It is the argument of counsel for the defendant company that it is neither the one nor the other—that is, neither a “payment” nor a “premium”. Question (ii) (if the answer to the first is in the affirmative): Is the premium, £500, recoverable now from the landlord who required it, although he did not receive it or any part of it? If both these questions should be answered in favour of the plaintiff, there arises a third question: Having regard to the particular beneficial interests of the plaintiff and his wife, according to the plaintiff's evidence, is the plaintiff entitled to recover the full amount of £500 or is he limited to half that figure, £250?

At this stage I must refer to the relevant parts of the Landlord and Tenant (Rent Control) Act, 1949. The vital section is s. 2, and it is inevitable that I must read quite a substantial part of that section:

“(1) A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium *in addition to the rent*.

“(2) Subject to the provisions of Part 2 of Sch. 1 to this Act, a person shall not, as a condition of the assignment of a tenancy to which this section applies, require the payment of any premium.”

I need not refer to sub-s. (3)—nor, indeed, to sub-s. (4), although counsel for the defendant company did draw attention to it. Section 2 (5) reads thus:

“Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section . . . the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be, shall be recoverable by the person by whom it was paid . . .”

There is then a proviso relating to cases which have arisen or might have arisen under earlier legislation. Section 2 (6) reads:

“A person requiring any premium in contravention of this section shall be liable on summary conviction to a fine not exceeding £100, and the court by which he is convicted may order the amount of the premium, or so much thereof as cannot lawfully be required under this section, to be repaid to the person by whom it was paid.”

Then, in s. 2 (7), there is a repeal (subject to a qualification) of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Finally, s. 2 (8) reads:

“For the avoidance of doubt it is hereby declared that nothing in this section shall render any amount recoverable more than once.”

The word “premium” is in this Act extended, by way of definition, in s. 18 (2) as follows:

“ . . . the expression ‘premium’ includes any fine or other like sum and any other pecuniary consideration in addition to rent . . .”

Schedule 1 to the Act is headed “Transitional provisions as to premiums”.

A and Part 1 of that schedule deals with adjustments for premiums paid before the commencement of this Act. It is sufficient, I think, to state that the sense of this Part of the schedule is that such a premium may be converted, by the necessary arithmetical calculation, into a rent, for certain purposes which then follow. The point of my having stated it in that form is that, as counsel for the defendant company rightly pointed out, it is clear that Sch. 1, Part 1, requires that the relevant so-called "premium", if it is to be capable of arithmetical calculation, must at least be expressed as a money sum in one form or another.

It is necessary that I should also refer back to the previous legislation on this matter. Before doing so I draw attention to the long title of the Act of 1949. So far as relevant, it reads thus:

"An Act . . . further to restrict the requiring of premiums in connexion with tenancies to which those Acts [the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939] apply . . ."

I go back to the fons et origo of these "premium" provisions, which is found in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.

D Section 1 (2) of that Act stated:

"A person shall not in consideration of the grant . . . of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, or other like sum in addition to the rent, and where any such payment has been made in respect of any such dwelling-house after [a stated date], then the amount shall be recoverable by the tenant by whom it was made from the landlord . . ."

I observe that in that subsection the definition of "premium" now found in s. 18 (2) of the Act of 1949 is somewhat curtailed: for one finds here only "the payment of any fine, premium, or other like sum": there is no reference to "any other pecuniary consideration". It will also be noted that, by the express terms of s. 1 (2) of the Act of 1915, the amount recoverable is stated to be recoverable "from the landlord".

In 1920 that section was replaced by s. 8 of the Act of 1920, which is referred to in s. 2 (7) of the Act of 1949. As re-stated in s. 8 (1) of the Act of 1920, the prohibition about premiums is as follows:

"A person shall not, as a condition of the grant . . . of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given . . . the amount or value thereof shall be recoverable by the person by whom it was made or given . . ."

It will be observed that in this section there is added to the prohibited subject-matter (if I may so describe it) the giving of any pecuniary consideration. On the other hand, the words "from the landlord", which were found in s. 1 (2) of the Act of 1915, defining the person from whom the premium could be recovered, are omitted.

In the present Act, the Act of 1949, the prohibition, or series of prohibitions, in s. 2 is shorter. All that one finds is "payment of any premium": and then the scope and extent of the prohibition is shown by the expanded use of the word "premium", as stated in s. 18 (2), so as to include "any fine or other like sum and any other pecuniary consideration in addition to rent". It was the argument of counsel for the defendant company that under the present Act, and according to a proper construction of the English words used, the "payment" which is prohibited is limited to a cash sum, or at any rate to its strict equivalent: for example, perhaps payment by cheque in the ordinary way, or perhaps also a set off in account against another sum expressed in money. It is further (as

contention that the "premium", even as expanded in the definition, is limited to something payable to and received by the landlord.

Counsel for the defendant company cited to us a great number of cases, but, having considered all these cases, I do not think that they provide any assistance in solving our problem, although I am grateful for having had the opportunity of seeing them. Thus, I do not, for my part, think it helpful, in the context of this legislation, to consider relatively old cases relating to the use of the word "premium", unexpanded by any definition, in its old strict conveyancing sense, or as used (for example) in certain taxing statutes. We were referred, for example, to statutes, of the reign of King George the Third, intended to prohibit or limit the sale of life annuities, and, although we have examined these cases, I cannot think that they really assist in construing the provisions of this modern legislation; but there are some modern cases, to two of which I shall refer. Here, however, we are concerned with the effect, first, of the definition in s. 18 (2) of the Act of 1949. It was the submission of counsel for the defendant company that "other pecuniary consideration" must be construed *eiusdem generis* with "fines" and "premiums"—which (for reasons already indicated) he sought to confine to the kind of usage in which those words are found in connexion with older conveyancing language, where the "fine" or "premium" is, in effect, equivalent to, or in substitution for, a part of the rent and intended to reduce the annual amount payable by way of rent accordingly. I do not think that "other pecuniary consideration" ought to be, or can properly be, so limited. After all, the words in the definition are "any other pecuniary consideration"—which means, presumably, according to the ordinary sense, any pecuniary consideration other than (inter alia) fines or other sums like fines. It seems to me, therefore, that the phrase "any other pecuniary consideration" (although I am not suggesting that it covers other than pecuniary considerations) is a formula of fairly wide import. It is quite true that the word "giving", which was found, in relation to pecuniary consideration, in s. 8 (1)* of the Act of 1920, is not found in s. 2 or s. 18 (2) of the Act of 1949. I am not saying that counsel for the defendant company would go so far as to concede, if it were found that the word "giving" were somewhere included in these statutory provisions, that on this part of the case he was thereby defeated; but I think that he was prepared to say that the case against him would be stronger had the word "giving" been repeated in the Act of 1949. In all the circumstances, however, I do not think that the absence of the word "giving" is significant. As I have pointed out, the purpose of this Act, according to its long title—and it is manifest in many other ways—is further to restrict the taking of premiums. It is quite true that it brings in (and brings in, I think that I am right in saying, for the first time) the exaction of a premium, not only on the grant or renewal of a tenancy, but also on an assignment—a point which is of significance on another aspect of the case. None the less, it would be a very surprising thing if, in the face of the Landlord and Tenant (Rent Control) Act, 1949, and its long title, one could take it that the effect was to render permissible types of so-called "premiums", types of "pecuniary consideration" exacted, which had been prohibited by earlier legislation. I think that what Parliament has done has been, for the purpose of abbreviating the operative section, to put in a form of definition of the word "premium", but not thereby to limit the enacting part to a scope narrower than under the earlier legislation. I, therefore, conclude that, where a specific sum is to be deducted from a known or assumed sale price as a condition of the grant of a tenancy, that is a "pecuniary consideration" within the scope of the definition, and amounts, therefore, to a premium. If I am right, it must follow that the exaction of such a deduction must amount to a "payment"; and I find, indeed, no difficulty in so concluding for the word "payment" in itself is one which, in an appropriate context, may cover many ways of discharging obligations. It may even (as is well known,

* See p. 609, letter G, ante.

A although it does not arise in this case) include a discharge, not by money payment at all, but by what is called "payment in kind". It follows, therefore, that if, in the present case, the defendant company had required, as a condition of the grant of a tenancy, that the plaintiff should sell to the defendant company his own house, 174, The Heights, for £500 less than the known or assumed value of £2,300, that would have been the requiring of the payment of a premium, within
B the scope of s. 2 (1) of the Act of 1949.

There arises, however, the second part of the question—already adumbrated—on which I have found more difficulty: Is the "payment" contemplated by s. 2 (1) of the Act of 1949 confined to one made to the landlord? It is on this question that *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (1) ([1951] 1 All E.R. 198), *ex facie*, is in support of the argument of

C counsel for the defendant company and is such as to have compelled the learned judge to have decided this case as he did. It is, perhaps, an odd feature of the Act of 1949 that nowhere in terms does it state to whom the required payment is to be made. Originally, s. 1 (2) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was so expressed as to be limited to the case of a payment to the landlord. But the reference to "the landlord" was dropped in
D 1920; and it was pointed out* in *Remington v. Larchin* (2) ([1921] 3 K.B. 404), to which I shall later come, that one possible reason for that was that s. 8 (1) of the Act of 1920 comprehended the requirement of a premium on the grant, not only of a tenancy, but also of a sub-tenancy. If that is so, then it seems to follow that the dropping of the reference to "the landlord" was deliberate: in other words, that the intention of the amending legislation was not confined to pay-

E ment to the landlord. It is quite true that, on this view, one might well have expected Parliament to have substituted for the words "the landlord" some words like "the person who received it". That, they have not done. Nevertheless, I think (if I am free to do so) that the dropping, in the Act of 1920, of the words "the landlord" was significant. A contrary view (as is quite plain) would very gravely limit the effectiveness of the legislation.

F There is no doubt—and counsel for the defendant company conceded—that payment to a mere nominee, a mere alter ego of the landlord, would be payment to "the landlord"; and, if one pays a debt of the landlord which he owes to some third party, the same might equally be true. But even in the case where the payee was a pure nominee or alter ego, it would by no means be easy in every case for a tenant so to prove. If the object of the legislation was, and is, to prevent tenants
G being charged excessive rents because of the economic pressure of a housing shortage, and if it was to achieve, or to assist in achieving, that end that it was made unlawful to charge a premium in addition to the rent, then why, as a matter of logic, should a premium paid to the landlord, direct or to his mere nominee, be unlawful, and one paid, to the landlord's order, to some other person whom the landlord nominated—say to a friend, to his son, to a trustee, or (as here) to an

H associated company—be lawful? If counsel for the defendant company is right, this further must be added, that some words ought to be written in: one would have, in other words, to write into the legislation the words "to the landlord" in a case like this, or (having regard to s. 2 (2) of the Act of 1949) "to the person requiring the payment". Those words are not in fact there, and, by well-established principles of construction, words should not be written into an Act of
I Parliament unless the sense of the Act plainly requires that to be done.

Counsel for the defendant company further relied on other language in s. 2 of the Act of 1949. For example, he referred to the phrase in s. 2 (1) on which I laid emphasis in reading the section, "in addition to the rent". He referred to the word "recoverable" in s. 2 (5). He referred (and this is perhaps stronger still) to the word "repaid" in s. 2 (6), where the court before whom a landlord may

* *Per BANKES, L.J.* ([1921] 3 K.B. at p. 408).

appear for making an unlawful charge may order that the premium be "repaid to the person" who paid it. A

Apart, however, from *R. v. Birmingham (West) Rent Tribunal* (1), to which I will come in a moment, I am for my part satisfied, and treating this matter as res integra would conclude, that these considerations to which I have alluded and which counsel for the defendant company much pressed on us in argument, are not sufficient to limit the cases under the Act to those in which the payment has been made to the person "requiring". No doubt, that sort of case, if one looks at the history of the legislation, is the one which would most commonly spring to the mind; but the words "in addition to the rent" in s. 2 (1), I think, only tend to show that this is something which is not the rent capitalised (as did occur in one of the cases* which came before the court); nor, indeed, is it necessary after all (though it would normally be the case) that the rent should be paid to the landlord. Again, the word "recoverable" in s. 2 (5), I think, in this context, only means that the premium, the sum paid, would be the proper subject of a claim which these courts would recognise. And finally, the word "repaid" in the relevant phrase in s. 2 (6) is, I think, used only in relation to the person who paid it, making the point that that person may get back what he himself paid. It remains equivocal from whom he may be able to get it back. C D

I must now turn to *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (1), which came before the Divisional Court on an application for an order of certiorari. The case was a somewhat exceptional one on its facts. It was a case in which the tenants were anxious to get flats in a building which, at the time when the agreement was entered into, did not contain or consist of flats, and the agreement that was made was of a tripartite nature, the parties to it being the owners of the premises, called the landlords, who were going to let to each of the tenants a flat when the flat had come into existence; the builders, who were going to do the conversion and were going to create the subject-matter on which alone the tenancy agreements could operate; and the tenants themselves. Thus, one finds that the agreement first sets out that the landlords and the tenants agree with the builders that the builders will do the necessary conversion of these dwelling-houses into a block of flats, to the satisfaction of the named surveyor of the landlords, for a sum of £18,000, of which the landlords are going to pay half and the tenants between them are going to pay half. Next, the builders agree that they will do that work and will look to the landlords for half the £18,000 and to the tenants, in the proportions later stated, for the remaining £9,000. Then, in the third clause of the agreement, it is provided that, if the building and works should be completely finished to the satisfaction of the surveyor, the landlords will grant and each of the tenants will accept and execute a counterpart of a good and sufficient lease of one of the flats for a term from a certain date there mentioned, at a yearly rent, there being no further reference to the amount paid to the builders which, ex hypothesi, when the agreement for a lease comes to be executed, will have been already discharged. In those circumstances, however, the rent tribunal decided that the sum which a given tenant paid as his proportion of the builders' charges for doing the conversion was a premium. On the facts of that case, the Divisional Court held that it was not a premium; and, if I may respectfully say so, I think that that was a correct decision, because it seems to me that it could not be said, with any fair use of language, that the payment of this sum to the builders was a requirement or condition of the grant of the tenancy, as the Act contemplates. There was a bargain made that, first, a subject-matter had to be created: the proposing landlords and the proposing tenant agreed that they would bear in certain proportions the cost of creating the subject-matter; and, when that had been E F G H I

* See *Woods v. Wise* (3) ([1955] 1 All E.R. 767) and compare *Sainsbury Properties Ltd. v. Gibbard* ([1958] 1 All E.R. 302).

A done to the satisfaction of the surveyor, then there was an agreement that a tenancy would be granted.

Thus, it was concluded that the case was in truth outside the scope of the Act of 1949. But there is no doubt that, in the course of his judgment, Lord GODDARD, C.J., used language which went, as I think, further than was necessary to dispose of the case on the lines which I have indicated. Thus, LORD GODDARD, C.J., is reported as saying ([1951] 1 All E.R. at p. 201):

C "The whole question here depends on whether or not, on its true construction, this Act [the Act of 1949] has any application to a case where the sum of money alleged to be a premium is paid, not to the landlord, but to some other person . . . in our opinion, this Act can only apply to premiums which are paid to the landlord."

LORD GODDARD, C.J., then dealt with the substance of the case, and I will read this part of his judgment because it seems to me that here should be found the true basis of the decision. He said (*ibid.*):

D "Here, under the terms of the agreement, it is clear that [the builders] were willing to convert these premises for £18,000 and only looked to the landlords for half that sum. It is abundantly clear from that agreement that [the builders] could never have sued the landlords for anything more than £9,000. For the balance they had to look to the tenants, each of whom had agreed to pay them £500. Each tenant had to pay that money, not to the landlords, but to [the builders]. The landlords never had any claim against any tenant for the £500, although, I think, we may take it that the landlords would not have granted a lease to anybody who had not agreed to sign the agreement of July 31, 1948. [The builders] could only recover the balance of the £9,000 from the various tenants up to £500 each. When the tenant paid that money, he paid it before the Act came into force. Supposing this had been a case after the Act came into force, from whom could the tenant have recovered the money. He could not have recovered it from [the builders], because the consideration which supported the premium was, not the grant of the lease, [and note those words] but the work which the builders did in converting the premises, and he could not recover it from the landlords because the landlords had not received it."

Later in his judgment, LORD GODDARD, C.J., said (*ibid.*, at p. 202):

G "Here I prefer to base my judgment on the ground that on the true construction of this Act it is clear that it was intended to apply to a pecuniary consideration paid to the landlord."

H This was the passage which was quoted by the learned judge, and which he felt particularly pressing on him. It is quite plain (if I may respectfully say so) that that statement, on the face of it, cannot be right. No reference had been made in the argument, so far as I can see, to s. 2 (2) of the Act of 1949, which deals with the case of the demand of a premium as a condition of an assignment. In such a case it would be difficult to suppose that the only person of whom it was intended to say "he received an unlawful premium" would be, not the assignor, but the landlord. To that extent, in my judgment, therefore, the view of the Divisional Court must require qualification. Apart from that matter, however, I have concluded that the language in *R. v. Birmingham (West) Rent Tribunal* (1) went further than was necessary or justifiable. The true view of the case, I think, is that it was not one of a demand, as a condition of a lease, of the payment of a particular sum at all: it was a case of a quite distinct commercial arrangement, outside the scope of the Act. If, therefore, LORD GODDARD, C.J., meant by his language that the Act was intended to apply only to a payment to the landlord as distinct from a payment to the landlord's order—and I am not sure that he did, for the limitation was unnecessary to his reasoning—I am unable, with all

respect, to agree with him. I cannot agree that the Act of 1949 should be construed as though the words "not, " to the landlord ", but " to the person requiring the payment " had been (as they are not) inserted in the relevant section.

That, however, is still not the end of it, because (and this argument was much pressed on us by counsel for the defendant company, and has, indeed, caused me some anxiety) it is, no doubt, true that the view apparently expressed by the Divisional Court in *R. v. Birmingham (West) Rent Tribunal* (1) in 1951 may well have been acted on in other cases since. Other landlords may have said, on that authority, " It is all right so long as I tell the tenant not to pay me but to pay my friend, or my son, or some other person whom I nominate "; and it is, after all, true that the unlawful demanding of a premium amounts, on the part of the landlord, to a criminal offence.

Such considerations were expressed in *Remington v. Larchin* (2), in 1921. That again (as is true of so many of these cases) was a case of a somewhat special character on its facts. There, a tenant with a short term left of his lease to run—they were rent-restricted premises—said, in effect, to another person " If you will pay me X pounds I will surrender my lease and get the landlord to grant you a new one at the protected rent "; and that bargain was made. It was quite clear that the landlord never knew, from first to last, anything about this payment which the old tenant had extracted from the new: and (as is, I think, clear from the judgments in this court) one reason for the decision against the view that this was a premium which could be recovered from anybody was that it was not a payment of a premium as a condition of the grant of a tenancy but the payment of a premium in consideration of somebody procuring the landlord to grant a tenancy—which is, of course, a different thing. But in the course of the judgments the point was debated and stressed by all the judges of this court that, if there are two fair constructions of a penal Act, one should tend to prefer that construction which does not extend but rather limits the penal consequences of the legislation. ATKIN, L.J., indeed, went a little further: for, speaking of s. 1 (2) of the Act of 1915, he said ([1921] 3 K.B. at p. 411):

" Therefore, it is plain what was meant by the use of these words in that Act. They meant the payment of a sum to the landlord in consideration of a grant by him . . . "

It was conceded that that was, in the circumstances, a mere dictum. That expression of opinion by ATKIN, L.J., that the prohibited payment must be limited to a payment to the landlord is not found in the judgment of BANKES, L.J., or of SCRUTTON, L.J. Nevertheless, it is a point of substance, and, I think, of difficulty, whether now, in 1959, we should hold that *R. v. Birmingham (West) Rent Tribunal* (1), though rightly decided, contains statements, as reasons, which were erroneous. On the whole I have come to the conclusion that we ought not now to hold that *R. v. Birmingham (West) Rent Tribunal* (1) governs the present action. That the learned judge felt so compelled to hold is plain. But the reasoning of the Divisional Court in the *Birmingham* case (1) is not binding on us, and I am not satisfied that there is, on a true construction of the plain words of s. 2 of the Act of 1949, such a sufficient doubt as would justify me, contrary to my own view, in saying that the reasoning, or part of the reasoning (because that is all it amounts to), in the *Birmingham* case (1) ought to be sustained by this court, and that the matter is one which Parliament, if it thinks fit, ought to remedy. After all, I cannot, for my part, think that many landlords, seizing on these observations of LORD GODDARD, C.J., in the *Birmingham* case (1) would have said " Well, it is all right: we can require payment of a premium so long as it is not to us ", or that, if they had done so, they would have done so with a very clear conscience. I, therefore, answer both parts of the first question formulated earlier

A in this judgment in favour of the plaintiff, and adversely to the defendant company.

B There then arises the second question—also, I think, a difficult one: From whom is the premium which, on my construction, has been paid, recoverable? Again, the Act of 1949 is perhaps strangely silent, save for the necessary inference from s. 2 (6). If I may refer to it again by way of reminder, s. 2 (6) provides that

“ . . . and the court by which he is convicted may order [it is, of course, discretionary] the amount of the premium, or so much thereof as cannot lawfully be required under this section, to be repaid to the person by whom it was paid.”

C That subsection at least shows plainly, if my view is so far right, that the person requiring the premium, even though he has not received it, may be ordered to repay it.

D Counsel for the defendant company said that, if he was wrong on the first question, then it must follow that the premium was repayable from anybody, both him who required it and him who received it. I am not satisfied that that is so. Nor, indeed, is it necessary for this decision that I should express any view about it. I do not, therefore, express any view whether, if the Pegasus company had been sued, they might have been liable to repay. This much, however, is clear, that the Pegasus company would not be within the terms of s. 2 (6), for the Pegasus company did not “ require ” the premium, within the contemplation of the section, since that company was not, and was never intended to be, a party to the grant of the tenancy. But it is also possible (as appeared from examples taken during the course of the argument) that there might be a recipient of a premium, of a pecuniary consideration, who was himself quite innocent of its being a result of any requirement by a landlord as a condition of granting a tenancy. In those circumstances, I am not, as at present advised, prepared to say, and do not say, because it is unnecessary to say, whether anybody but the landlord is liable to pay back (in the sense in which I have used that phrase) the premium. But I do say that, having regard to the general context of the section, and sub-s. (6) in particular, I am satisfied that a landlord who required a premium is liable to pay it back even though he himself did not receive it.

G In the circumstances, there remains only the third and subsidiary question, already indicated: Is the plaintiff entitled to recover the full £500 or only half that sum, £250? I note that the point with which I am now dealing was not specifically taken in the defendant company’s pleading, though I am prepared to assume, particularly having regard to the plea in the defence, denying that the plaintiff paid a premium “ of £500 or any premium ”, that it is open to the defendant company to take the point. The result, however, of the absence of any specific plea is that all the evidence available to show what were the exact H beneficial and other interests in the property, 174, The Heights, of the plaintiff and his wife has to be derived from the statement by the plaintiff in cross-examination in which he certainly assumed (and there is no reason to suppose that he wrongly assumed) that the beneficial interests in the house were as between himself and his wife equal. But the conveyance from the plaintiff and his wife to the Pegasus company was not produced. I think, however, that I counsel for the defendant company conceded that the purchase price of £1,800 was in fact paid to the plaintiff and his wife jointly and that, as owners, they jointly conveyed the property to the Pegasus company.

I The matter is not one that admits of long or elaborate argument; but, on the whole, I conclude that the right answer must be that the plaintiff and his wife are to be treated as having jointly paid the premium of £500 by way of deduction from the sum of £2,300 which otherwise would have been paid to them jointly, and, therefore, they are jointly entitled to recover it from the landlord. In the circumstances it follows, as I think, that the plaintiff is entitled—in the absence

of any objection (and there has been none) to his wife not being joined as co-plaintiff - to recover the full sum of £500. What he does with the £500 as between himself and his wife is a matter with which the defendant company is not in the least concerned. It follows, for the reasons which I have stated, that, in my judgment, the right answer to this case is that which the judge himself (apart from this last point, with which he did not deal) would have directed, had he felt himself free so to do: in other words, I think that the plaintiff is entitled to judgment for £500, being repayment to him of a premium, payment of which was unlawfully required by the landlord, the defendant company, as a condition of the grant of a tenancy.

ORMEROD, L.J.: I agree that this appeal should be allowed. Counsel for the defendant company has conceded that the premises in question are premises to which s. 2 of the Landlord and Tenant (Rent Control) Act, 1949, applies. He also agrees that whatever was required of the plaintiff was required as a condition of the grant of a tenancy, and that it was required by the defendant company through the company's agents, the firm of estate agents. There are two main questions, therefore, to be decided. The first is: Did the defendant company, in requiring the plaintiff to sell his house at £500 less than the agreed value as a condition of granting him a tenancy, require him to pay a premium in addition to the rent? The second question is: If so, was it any less a premium because the plaintiff was required to sell to Pegasus Training Estates, Ltd., and not to the defendant company?

Counsel for the defendant company argued, with considerable force, that the answer to the first question must be in the negative. He submitted that there was nothing in the nature of a payment in the transaction and, therefore, it could not come within the section. He drew attention to s. 8 (1) of the Act of 1920 (to which LORD EVERSHED, M.R., has already referred*), where the words were, "the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent". He argued that the effect in the Act of 1949 of leaving out the word "giving" and relating the word "payment" to the words "pecuniary consideration" as well as "premium" must be taken as meaning that "pecuniary consideration" was intended to mean nothing more than some form of payment, such as handing over a cheque or perhaps some similar negotiable instrument. I cannot, for my part, agree that it was the intention of the legislature to narrow the scope of the expression "pecuniary consideration" in this way. As has already been pointed out, the purpose of the Act was "further to restrict the requiring of premiums", and not to ease the restrictions already imposed. According to s. 18 (2) of the Act of 1949, the expression "premium" includes "any other pecuniary consideration in addition to rent". There can be no doubt that, on the facts found by the learned county court judge, there was consideration. The plaintiff was required to do something which he was under no legal obligation to do: he was required to sacrifice a sum of £500 on the sale of his house. That, in my view, must be as much a "pecuniary consideration" as if he had been required to make the actual payment of £500 in cash.

Although it is in no way conclusive, it is interesting to see from the evidence how the parties themselves regarded this transaction. It happened that, some time after the plaintiff had been in possession of his flat, he went to see the agent about some repairs to the premises which he had asked should be done, and he saw Mr. Williamson, the agent, in his office. Mr. Williamson apparently denied that the plaintiff had asked for repairs to be done, and the plaintiff said:

"I cannot understand you people. You have already had £500 out of me. I think you are a pack of swindlers."

Mr. Williamson, not unnaturally, said: "You cannot talk like that. You must

* See p. 609, letter G, ante.

A get out of the office ". In his evidence, the plaintiff went on to say: " When I mentioned the £500, he [Mr. Williamson] said ' I did not have it ' ". It is clear that, whatever the legal effect of the transaction, the parties themselves were regarding it as being one where the sum of £500 had been paid by the plaintiff to somebody, and Mr. Williamson, the agent, was saying " It was not paid to me ". That is, as I have said, in no way conclusive, but it does point, I think, to what
B the reality of the transaction was in the minds of the parties, and that was that the plaintiff had a house, the agreed value of which was £2,300, and it was agreed that that house should be sold, as a condition of the grant of a tenancy, to another person, the Pegasus company, for a sum which was agreed to be £500 less than the agreed price. That, to my mind, must be as much a " pecuniary consideration " as if there had been an actual payment of that sum of £500.

C On the second question, such a consideration is, in my judgment, none the less a " premium " within the meaning of s. 2 (1) and s. 18 (2) of the Act of 1949 because the plaintiff was required to sell his house to a third person, the Pegasus company, and not to the defendant company. It is one of the fundamental principles of the doctrine of consideration that it must move from the promisor, but need not move to the promisee. Here the consideration moved from the
D promisor, the plaintiff, although it did not actually move to the promisee, the defendant company, but to another party. Counsel for the defendant company agreed, in the course of the argument, that, if the word " pecuniary " had been left out of the definition in s. 18 (2) and the word " consideration " was without qualification, he might be in a difficulty on that part of his argument; and I find it hard to understand why there should be any difference in the position because
E the consideration must, according to the definition, be a pecuniary one.

Counsel for the defendant company sought support for his argument in a number of authorities where the word " premium " was held to be a payment of a sum of money to a lessor. For my part, I did not feel that the court could derive assistance from the interpretation of an expression used in statutes dealing with matters so far removed from the one under consideration. The learned county
F court judge would have decided the case in favour of the plaintiff, had he not felt himself bound by the decision of the High Court in *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (1) ([1951] 1 All E.R. 198), to which reference has already been made by LORD EVERSHED, M.R. Counsel for the defendant company relied strongly on that case, and particularly on the words of LORD GODDARD, C.J., to which reference has been made, when he said ([1951]
G 1 All E.R. at p. 202):

" Here I prefer to base my judgment on the ground that on the true construction of this Act it is clear that it was intended to apply to a pecuniary consideration paid to the landlord."

That case was very different from the one under consideration. There was an
H agreement between a landlord, a number of tenants, and a builder, for the builder to convert a part of a house into a flat, and for each of the tenants to pay the builder the sum of £500 as his share of the cost, it being agreed that the landlord would grant a tenancy when the work was done to the satisfaction of the surveyor. There was no question of payment to the landlord: a payment was to be made to the builder in return for work done. There was no question, as in the present
I case, of the money being paid to a nominee of the landlord.

I agree with LORD EVERSHED, M.R., that, if LORD GODDARD's words mean that a " premium " is a sum of money which must be paid as it were into the pocket of the landlord, then the judgment went further than was necessary to decide that case; and I would agree that those words cannot now be supported. It appears to me that the proper construction of these words is that a " premium " is a sum of money which is paid to the landlord or to his order, and, if those words are included, then the dictum of LORD GODDARD, C.J., can be reconciled with the position as I think it is. The county court judge has found here that the

defendant company made no profit in this transaction. So far as that means that there is no evidence of any profit having been made, I would agree with him: but it does not, in my view, make any difference to the position. For a landlord to require that a payment shall be made to a third person seems to me to be nothing more than for him to specify the manner in which payment shall be made; and I think that there is considerable force in the argument that a payment made to the order of the landlord is a payment made to the landlord. I am satisfied that in these circumstances this transaction comes within s. 2 (1) of the Act of 1949 and that the sum of £500 is recoverable, and is recoverable from the defendant company, by virtue of s. 2 (5) of the Act.

There is nothing that I wish to add on the question whether the plaintiff should receive the sum of £500 or only £250. I agree with the view expressed by LORD EVERSHED, M.R., that he is entitled to recover the full sum of £500. I would, therefore, allow this appeal.

WILLMER, L.J.: I am of the same opinion. There are four questions which have been raised in this case. (i) Leaving aside for the moment the question to whom payment was made, can it be said that the defendant company required payment of any premium at all? (ii) Does the fact that payment was required to be made to a third party make any difference? (iii) If a premium was "required" within the meaning of the Landlord and Tenant (Rent Control) Act, 1949, is it recoverable from the defendant company? (iv) If any sum is recoverable, is that sum the full amount of £500 or only £250, having regard to the fact that the plaintiff and his wife were joint owners of the house which was sold?

As to the first point, I can state my views very briefly. To my mind, there can be no doubt that the plaintiff suffered a detriment such as would constitute perfectly good consideration within the ordinary law of contract. Equally, it seems to me, there can be no doubt that that detriment was a pecuniary detriment, in the sense that it represented a sacrifice of £500. Again, in my judgment, there can be no doubt that the defendant company required a "payment" to be made. It is true that no actual money passed, but I venture to point out that a taxpayer is none the less a taxpayer because income tax which he owes is deducted at source. Similarly, the plaintiff and his wife in this case none the less "paid" £500 because it was deducted from the purchase price of the house which they had for sale.

As to the second point (namely, whether the fact that payment was made to a third party makes any difference), as has already been pointed out by LORD EVERSHED, M.R., the Act of 1949 says nothing about the premium being paid to the landlord. Indeed, the existence of sub-s. (2) of s. 2 shows that there must in some cases be circumstances in which a premium may be payable to somebody other than the landlord. On general principles, I am very much exercised by the consideration that, unless the Act is held to cover a payment made in such circumstances as those of this case, it can so easily be evaded by an unscrupulous landlord by the simple expedient of directing payment of the premium to some third party. If so, the Act would very soon become a dead letter, because that is what every unscrupulous landlord would do. I share the doubts expressed by my brethren as to the value of citing dicta from other cases where the words "premium" or "payment of a premium" were considered in other contexts; and I think I may usefully refer to what was said by SIR RAYMOND EVERSHED, M.R., in *Woods v. Wisc* (3) ([1955] 1 All E.R. 767 at p. 776), where he said, for instance, about the word "premium" in the context of Finance Acts. We are here considering the word in the context of the Rent Acts, which form a wholly different background. As it seems to me, the learned junior counsel for the plaintiff put his finger on the real point in relation to this aspect of the case, when he pointed out that, under the ordinary law of contract, payment as directed by the party entitled to payment is held to be good consideration. I can see no

A reason why payment to Pegasus Training Estates, Ltd. in this case, as directed by the defendant company, should not be regarded as good consideration within the section. The only obstacle in the way of this construction of the Act is the decision of the Divisional Court in *R. v. Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (1) ([1951] 1 All E.R. 198). My Lords have both dealt very fully with that case, and I see no object in going over it again. All I desire to do is to express my complete concurrence with what has been said by my Lords about that case; and in the circumstances I do not think that that decision can be regarded as any obstacle in the way of our holding that this was a payment of a premium, required by the defendant company, notwithstanding the fact that payment was directed to be made to a third party.

C Passing to the third question, namely, whether, the premium having been paid to a third party, it is now recoverable from the defendant company, I desire to do no more than emphasise that, as I read it, s. 2 of the Act of 1949 is primarily directed against the person "requiring" the payment of a premium. He is the person who is rendered liable to criminal prosecution under sub-s. (6), and he is the person who, under that subsection, may, in such criminal proceedings, be required to repay any premium unlawfully exacted. It seems to me that sub-s. (5) should be read together with sub-s. (6); and the conclusion appears to me to follow that the person who "requires" payment of a premium (in this case the landlord) is the person against whom primarily the amount may be recovered. It is unnecessary in this case to consider whether a premium unlawfully exacted could or could not be recovered from the person to whom it was paid. The plaintiff in this case has not sought to recover the premium from the Pegasus company, and it is not necessary to express any view on that point. I am satisfied that it is recoverable from the defendant company as being the person who "required" its payment.

Lastly, with regard to the question whether the full amount is recoverable or only £250, as has already been pointed out, this is not a question that admits of much elaboration. I have come to the conclusion that the full amount is recoverable, on this basis. As I have already pointed out, the payment was made by deduction at source. What was due from the Pegasus company was a sum representing the purchase price of the house, and it was due to the plaintiff and his wife jointly. The result of the transaction was that a sum less by £500 was paid to the plaintiff and his wife jointly: in other words, the payment by deduction at source was a payment made by the plaintiff and his wife jointly. The contrary view suggested by counsel for the defendant company, that this transaction should be looked at as though the whole amount of £2,300 had been received, had then been notionally split up between the plaintiff and his wife, and that each thereafter had notionally been regarded as having paid back £250, seems to me to be wholly unreal, especially bearing in mind the fact that payment was made by deduction at source before the money ever came into the hands of the plaintiff and his wife. In those circumstances, I am satisfied that the plaintiff and his wife were jointly concerned in this transaction, and it follows that, no objection having been taken with regard to parties, the plaintiff is entitled in this case to sue for and recover the whole amount. For those reasons, I am glad to be able to come to the conclusion to which the learned judge below would obviously have wished to come, and would have come, had he not felt himself to be precluded by the decision in *R. v. Birmingham (West) Rent Tribunal* (1).

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *M. Phillips & Co.* (for the plaintiff); *J. H. Milner & Son* (for the defendant company).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

Re DOUGLAS'S WILL TRUSTS. LLOYDS BANK, LTD. v.
NELSON AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 27, 1959.]

Will—Survivor—Gift subject to life interest to three persons "or the survivors or survivor of them". B

Administration of Estates—Partial intestacy—Testamentary life interest to widow—Right to receive immediately her absolute interests in property undisposed of.

A testator who died on Jan. 26, 1937, directed his trustees to allow his wife to have the use and enjoyment of his household furniture, household effects, books and jewellery during her life, if she so long remained his widow, and gave his real estate and the residue of his personal estate to his trustees on trust (subject to the payment of debts and funeral and testamentary expenses) to pay the income therefrom to his wife during her life provided she so long remained his widow, and from and after her death or second marriage he gave his said estate and effects "to my sisters Jane . . . Elizabeth . . . and Sarah . . . or the survivors or survivor of them". The testator's three sisters all survived the testator but died in the lifetime of the testator's widow. The widow had not re-married. On the question who was entitled to the testator's estate subject to the widow's testamentary benefits, C

Held: (i) apart from the interests given to the widow by the will, there was an intestacy because the term "survivors or survivor" related to the time of the widow's death and, none of the sisters having survived her, none could take. D

Cripps v. Wolcott ((1819), 4 Madd. 11) applied; *Browne v. Lord Kenyon* ((1818), 3 Madd. 410) considered. E

(ii) the widow's absolute interests in the undisposed of property, viz., her £1,000 with interest from the date of the testator's death and the personal chattels, ought to be paid and transferred to her immediately, the £1,000 and interest being paid out of the capital of the estate. F

Trust and Trustee—Investments—"Securities"—On such securities as they think fit—Power to invest in stocks and shares. G

The testator authorised his trustees to invest the trust funds "on such securities as they may think fit without being responsible for any loss or for the failure of any banker broker or other person in whose hands the trust funds may be."

Held: the word "securities" included any stocks or shares or bonds by way of investment. H

[As to the meaning of "survivors", see 34 HALSBURY'S LAWS (2nd Edn.) 279-283, paras. 330-333; and for cases on the subject, see 44 DIGEST 1187, 1188, 10,267-10,277.]

As to partial intestacy, see 16 HALSBURY'S LAWS (3rd Edn.) 407-409, 411, paras. 783, 784, 792; and for cases on the subject, see 24 DIGEST (Repl.) 966, 967, 9750-9752. I

As to the meaning of "securities", see 34 HALSBURY'S LAWS (2nd Edn.) 259, para. 310; and for cases on the subject, see 44 DIGEST 705-707, 5481-5496.]

Cases referred to:

(1) *Cripps v. Wolcott*, (1819), 4 Madd. 11; 56 E.R. 613; 44 Digest 1187, 10,267.

(2) *Browne v. Kenyon (Lord)*, (1818), 3 Madd. 410; 56 E.R. 556; 44 Digest 1188, 10,376.

A Adjourned Summons.

By his will dated Aug. 29, 1933, James Wightman Douglas (hereinafter called "the testator") provided:

"I give and devise my real estate together with the residue of my personal estate and effects to my trustees upon trust in the first instance to pay my just debts funeral and testamentary expenses and subject thereto I direct my trustees to pay the income from my estate to my said wife Gertrude Douglas for her use during her life provided she so long remain my widow and from and after her decease or second marriage whichever shall first happen then I give my estate and effects to my sisters Jane Catherine Douglas Elizabeth Grace Douglas and Sarah Scott Douglas or the survivors or survivor of them I authorise and empower my trustees to invest the trust funds on such securities as they may think fit without being responsible for any loss or for the failure of any banker broker or other person in whose hands the trust funds may be."

On Jan. 26, 1937, the testator died. His three sisters survived him but predeceased the testator's widow, who had not re-married.

This originating summons was issued by the sole trustee of the testator's will to determine (a) whether the trusts of the testator's estate operated after the death or second marriage of the widow in favour of some one or more of his said sisters, or whether the testator was partially intestate, (b) if the testator was partially intestate, whether the widow was entitled to claim to be paid immediately out of the capital of the estate the £1,000 to which she became entitled under s. 46 of the Administration of Estates Act, 1925, and interest, and to take at once absolutely the personal chattels, and (c) whether the trustee was entitled to invest trust funds only in or on debts or claims the repayment of which was secured on some fund or property, or the trustee might also invest in stocks and shares.

P. S. A. Rossdale for the plaintiff, the trustee.

B. S. Tatham for the first and second defendants, the personal representatives of the last to die of the testator's three sisters.

Oliver Lodge for the third, fourth, fifth and seventh defendants, interested on intestacy.

Owen Swingland for the sixth defendant, the widow.

VAISEY, J.: This is not an easy case, but the first point is one of the briefest. The testator made his will on Aug. 29, 1933. On Jan. 26, 1937, he died leaving an estate that was originally sworn at £18,000. He left surviving his widow and three sisters whom he names in the will, Jane, Elizabeth and Sarah. The difficulty has arisen owing to the fact that the three sisters Jane, Elizabeth and Sarah all predeceased the widow. The last surviving sister was Sarah, who died on May 4, 1957. The widow is still alive.

By his will, the testator gives to his wife in quite plain simple and unquestionable terms a life estate in the residue of his property determinable on her re-marriage. Then he goes on:

"And from and after her decease or second marriage whichever shall first happen then I give my estate and effects to my sisters Jane . . . Elizabeth . . . and Sarah . . . or the survivors or survivor of them."

Looking at this will without a knowledge of the authorities which govern this kind of point, it might have been said that the words "the survivors or survivor of them" referred to the death of the testator: in other words that the gift was to the three sisters or those or that one of them who survived the testator subject to the widow's life estate. There is, however, a well-settled rule, which is known

as the rule in *Cripps v. Wolcott* (1) ((1819), 4 Madd. 11), which is thus stated in *HAWKINS ON WILLS* (3rd Edn.), p. 310:

"In bequests of personal estate, words of survivorship are prima facie to be referred to the period of payment or distribution, and not to the death of the testator. . . . So if the bequest be to A. for life and after his decease to B., C. and D. or the survivors, those living at the death of A. will take the whole fund."

The authorities oblige me to read the words "survivors or survivor of them" as referring to the survivorship not of the testator, but of the tenant for life, his widow.

There is another rule, known as the rule in *Browne v. Lord Kenyon* (2) ((1818), 3 Madd. 410) which is referred to on p. 316 of Mr. *HAWKINS'* book in these words:

"A bequest to several, or to a class, 'or' to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favour of those living at that period, if there be such; and if none are then living, all are held to take."

The operation of that rule in *Browne v. Lord Kenyon* (2) depends on there having been a vested gift in the first instance, and I am bound to say that I cannot find any such gift in this case, this being a gift in joint tenancy to the three sisters followed by the words which I have already read "or the survivors or survivor of them". It is suggested that I should read this as a gift to the sisters with a substitutionary gift to the "survivors or survivor of them" living at the death of the widow, thus limiting the antecedent vested gift made previously so that the ladies would take under the original gift with the result that, as they take as joint tenants, Sarah, as survivor of the three, is entitled to the whole fund. I cannot read it in that way. This is a gift in one unbroken sentence with no sort of punctuation or anything of that kind. The gift is to the three sisters "or the survivors or survivor of them", which must mean, having regard to the leading case of *Cripps v. Wolcott* (1), a gift to such of the three ladies as survived the widow, but as none of them survived the widow, the tenant for life, who is still alive, none of them can take. There cannot be "any survivors or survivor" in the sense which I am bound to attribute to those words as stated in *Cripps v. Wolcott* (1). Therefore, there is no person to take under this will on the widow's death or re-marriage, with the result that in my judgment there is to that extent an intestacy. Subject to the interest during widowhood of the testator's widow, the testator's estate is undisposed of and goes as on an intestacy.

[HIS LORDSHIP heard further argument*.]

VAISEY, J.: There is a second point and it is a very strange one, and I do not think that there is much that I need say about it. Having regard to the construction which I have placed on the will, the testator must be assumed to have died intestate, subject to the interest during widowhood that he has given to his widow. There being an intestacy the relevant provisions† of the Administration of Estates Act, 1925, come into operation. There being already a full widowhood interest, the widow need not trouble about that provision of the Act which gives her a limited interest. As regards her absolute interests in undisposed of property, I think that the widow can claim to have paid over to her her £1,000 with interest at five per cent. from the death. I do not see how one can get over that. As to the testator's personal chattels, the widow is entitled to have them handed over to her, and delivered with the £1,000 and interest, notwithstanding that she might appear, on a narrow view of the case, to be disqualified by the fact that she is still alive.

[HIS LORDSHIP heard further argument.]

* The only case cited was *Re McKee* ([1931] 2 Ch. 145). His LORDSHIP gave judgment without calling on counsel for the widow.

† See s. 49 and s. 46.

A VASEY, J.: On the third point, I think that "securities" means investments. The term is not confined to secured investments. I am prepared to make a declaration that "securities" includes any stocks or shares or bonds by way of investment.

[His LORDSHIP also ordered that an inquiry be taken as to kin at once, and that it should not be postponed until the death of the widow.]

B

Order accordingly.

Solicitors: *Crossman, Black & Co.*, agents for *Adam Douglas & Son*, Alnwick, Northumberland (for the plaintiff and all defendants except the sixth); *Bolton, Jobson & Martyn* (for the sixth defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

C

D

Re PILKINGTON'S WILL TRUSTS. PILKINGTON AND OTHERS v. PILKINGTON AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), May 14, 1959.]

Trust and Trustee—Powers of trustee—Power of advancement—Statutory power—Exercise in favour of infant by way of settlement—Benefits to persons not objects of power—Delegation of trustees' discretionary powers.

E

Perpetuities—Rule against perpetuities—Power of advancement—Power arising under will—Time as at which application of rule to be considered.

F

By his will made in 1934 a testator who died in 1935 constituted a trust fund part of which he settled for the benefit of P.s' son (a nephew of the testator) during his life and after his death in trust for such children or issue of the nephew and in such manner as the nephew should by deed or will appoint, and in default of appointment for the nephew's children equally. The power of advancement conferred by the Trustee Act, 1925, s. 32, was by implication applicable. In 1959 P. (the testator's brother) proposed to execute a settlement for the benefit of Penelope, then aged two years, who was a daughter of P.'s son, the testator's nephew. Under this settlement if Penelope attained the age of thirty years she would take the settled fund absolutely, but if she should have died under that age leaving a child or children who attained the age of twenty-one years such child or children would take the fund absolutely and equally if more than one. Subject to these trusts, the proposed settlement provided that the settled fund should be held in trust for all the children of the testator's nephew (other than Penelope) who being male attained the age of twenty-one years or being female attained that age or married equally. The statutory powers of maintenance and advancement would be applicable to the settlement. It was desired that the trustees of the testator's will should exercise the power of advancement applicable under the will and raise a sum of money out of the testator's trust fund and pay it to the trustees of the proposed settlement on the trusts of that settlement. The advancement would be beneficial in that estate duty would be saved in certain events.

G

H

I

Held: the effect of the exercise of a power of advancement was to take the money advanced out of the trusts of the instrument under which the power subsisted, which in the present case was the testator's will; therefore the proposed advancement and settlement were proper, not transgressing the rule against perpetuities, nor constituting a delegation of discretionary powers by the trusts of the will, nor being invalid on the ground that the proposed settlement would benefit children or issue of an object of the power of advancement who were not themselves objects of the power.

Dictum of UPJOHN, J., in *Re Wills' Will Trusts* ([1958] 2 All E.R. at p. 478) not applied.

[As to power of advancement, see 21 HALSBURY'S LAWS (3rd Edn.) 177, para. 385; and for cases on the subject, see 28 DIGEST 251-253, 1073-1087, and 43 DIGEST 789, 790, 2274-2285.]

Cases referred to:

- (1) *Re Ropner's Settlement Trusts*, *Ropner v. Ropner*, [1956] 3 All E.R. 332; 3rd Digest Supp.
- (2) *Re Wills' Will Trusts*, *Wills v. Wills*, [1958] 2 All E.R. 472; [1959] Ch. 1.
- (3) *Re May's Settlement*, *Public Trustee v. Meredith*, [1926] Ch. 136; 95 L.J.Ch. 230; 134 L.T. 696; 37 Digest 409, 187.
- (4) *Re Newburn's Settlement*, *Perks v. Wood*, [1933] All E.R. Rep. 663; [1934] Ch. 112; 103 L.J.Ch. 37; 150 L.T. 76; Digest Supp.
- (5) *Re Morris' Settlement Trusts*, *Adams v. Napier*, [1951] 2 All E.R. 528; 2nd Digest Supp.

Adjourned Summons.

This originating summons was issued by the trustees of the will of William Norman Pilkington, deceased, for the determination of the question whether they as such trustees could lawfully exercise the powers conferred on them in relation to the expectant interest of the defendant Penelope Margaret Pilkington in the testator's residuary trust fund by applying (with the consent of the defendant, Richard Godfrey Pilkington, her father) some part not exceeding one equal moiety of the capital of such interest in such manner as to make it subject to the trusts, powers and provisions of a new settlement to be executed by the plaintiff, Guy Reginald Pilkington, in the form of a draft intended to be exhibited to an affidavit to be filed or whether such application would be improper and unauthorised.

The testator died on Feb. 8, 1935. His brother, Colonel Guy Reginald Pilkington, one of the plaintiffs and a trustee of his will, survived him. The defendant Richard Godfrey Pilkington was the son of Colonel Pilkington and a nephew of the testator. He was over twenty-five years of age, married, and had three children of whom the defendant Penelope Margaret Pilkington, born on Dec. 29, 1956, was one.

B. L. Bathurst, Q.C., and J. Cunliffe for the plaintiffs.

John Pennycuik, Q.C., and E. W. Griffith for the defendants.

DANCKWERTS, J.: This is a case on which the authorities seem to me far from clear. It depends basically on the will of William Norman Pilkington dated Dec. 14, 1934, who died on Feb. 8, 1935. The will dealt with the residuary estate held on trusts under which the fund was to be held "in equal shares if more than one for all or any of my nephews and nieces" being children of his brothers and their wives whom he names living at his death "who attain the age of twenty-one years or being females marry under that age" and for all or any of the children living at his death who "attain the age of twenty-one or being female marry under that age of any such nephew or niece as aforesaid". The shares are settled and I am concerned only with the share of the one nephew who survived the testator. Clause 13 of the will provides:

"The share of the trust fund hereinbefore given to a beneficiary as hereinbefore defined shall not vest absolutely in such beneficiary but shall be retained by my trustees and held by them upon the trusts hereinafter declared concerning the same (A) So long as such beneficiary being male is under the age of twenty-five years or being female is under the age of twenty-five years and has not married under that age Upon trust to pay all or such part (if any) as my trustees in their absolute discretion shall think fit of the income of such share to or apply the same for the maintenance, educa-

A tion or personal support or benefit . . . of such beneficiary [and then follows a trust to accumulate the balance as an accretion to the capital of the share in the trust fund of such beneficiary]. Provided always that the trusts powers and provisions in this sub-clause contained shall determine at the expiration of twenty-one years from the testator's death."

B Sub-clause (B) states that subject as aforesaid the trustees are to hold the income of such share on express protective trusts for the benefit of the beneficiary during his or her life with a provision that any consent to the exercise of any applicable form of advancement shall not cause a forfeiture of his or her life interest. Then there are provisions as to when the trust may be determined. I turn to sub-cl. (F):

C "After the death of such beneficiary my trustees shall stand possessed of the capital and future income of such share in trust for all or such one or more exclusively of the other or others of the children or remoter issue of such beneficiary at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of such beneficiary with the consent of such beneficiary or after the death of such beneficiary) and maintenance and education at the discretion of my trustees or any other person or persons as such beneficiary shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint. And in default of and subject to any appointment as aforesaid in trust for all or any of the children or child of such beneficiary who shall be living at my death or born afterwards and who being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares."

There is a power under sub-cl. (I) to a beneficiary to appoint in favour of a spouse and there is power in sub-cl. (J) to permit the trustees

F "to revoke the trusts of the whole or any part of the share of such beneficiary being a male and pay or transfer the portion of such share in respect of which such revocation takes effect to such beneficiary absolutely."

That provision, however, does not affect the issue in the present case. There is no reference to any power of advancement, but the power of advancement under the Trustee Act, 1925, s. 32, is applicable.

G A settlement is proposed to be executed by Colonel Pilkington (the settlor) by his son (the testator's nephew) and by the present trustees of the testator's will, which settlement will recite that the settlor desires to make some provision

H "for the benefit of Penelope Margaret Pilkington (hereinafter called 'Penelope') who was born on Dec. 29, 1956, and who is a daughter of Richard Godfrey Pilkington who is a son of the settlor."

In pursuance of that desire, the settlor settles £10 in cash on trusts of the settlement which are thereafter declared. I need not refer to the administrative provisions of the settlement. Clause 5 is the one which is important. It is as follows:

I "(i) Until Penelope shall attain the age of twenty-one years or die under that age the trustees shall have power at their discretion to pay or apply the whole or any part of the income of the trust fund to or for the maintenance education or benefit of Penelope in such manner as they may think fit and may either themselves so apply the same or pay the same to the parent or guardian of Penelope without seeing to the application thereof and in so doing shall not be bound to consider whether there is any other income available or any person bound by law to provide for her maintenance or education and shall accumulate all the residue of such income by investing

the same and the resulting income thereof in some form of investment hereby authorised as an addition to the capital of the trust fund with power from time to time to apply all or any part of such accumulations as if they were income of the current year. (ii) If Penelope shall attain the age of twenty-one years then until she shall attain the age of thirty years or die under that age the trustees shall pay the income of the trust fund to her. (iii) The trustees shall hold the capital of the trust fund upon trust for Penelope if she shall attain the age of thirty years absolutely. (iv) If Penelope shall die under the age of thirty years leaving children or a child living at her death the trustees shall hold the trust fund and the income thereof in trust for all or any her children or child who shall attain the age of twenty-one years and if more than one in equal shares and in such event the provisions of para. (i) of this clause shall apply *mutatis mutandis* to any such child and the income of his or her expectant share of the trust fund."

Clause 6 provides:

"Subject as aforesaid the trustees shall hold the trust fund in trust for all or any the children or child of the said Richard Godfrey Pilkington (other than Penelope) who being male attain the age of twenty-one years or being female attain that age or marry if more than one in equal shares."

By cl. 7, in the case of the failure of the trust, the fund is to be held on the trusts of the testator's will which would take effect after the death of the settlor's son as if he had died without having been married. In cl. 8 there are certain modifications of the Trustee Act, 1925, s. 31, as to education and maintenance. Clause 9 provides that the power of advancement contained in the Trustee Act, 1925, s. 32, shall apply.

It is suggested that in execution of the power of advancement existing under the testator's will the trustees of the will should raise a sum of £7,590 and pay it to the trustees of the proposed settlement to be held on trust. That is much less than the total share of the nephew and his issue as appointed under the testator's will. The question has been raised whether it will be a legitimate exercise of the power of advancement; the particular matters mentioned in the summons being whether it would infringe the rule against perpetuities, or whether it would amount, by reason of the power of advancement contained in the proposed settlement and various other things, to a delegation which is prohibited. If the provisions of the proposed settlement are to be read into the testator's will, which was made in 1934, that might offend against the rule against perpetuities, which applies to a person who is not a life in being at the date of the testator's death. The point about delegation seems to me one which is slightly different, but depends possibly on the same principles. It has been submitted that a proposed settlement of this kind would amount to an application of the sum advanced for non-objects of the power of advancement, i.e., Penelope's children.

I have been referred to a certain amount of authority, but I do not propose to go through the cases in detail. They establish plainly that it is a proper exercise of a power of advancement for the benefit of a named person if money is advanced on terms which are for the benefit of that person, or for the purposes of a settlement by that person, or in the form of a settlement for that person's benefit. There are benefits to be found in the present case because of the liability to the payment of death duties in certain events. That is the kind of reasoning which was accepted as perfectly legitimate in *Re Ropner's Settlement Trusts*, *Ropner v. Ropner* (1) ([1956] 3 All E.R. 332).

The latest case on the subject is in *Re Wills' Will Trusts*, *Wills v. Wills* (2) ([1958] 2 All E.R. 472). In that case there are certain observations of UPJOHN, J., which have given me some difficulty. The point which has troubled me in this case is whether there is anything in the decision in *Re Wills' Will*

A *Trusts* (2) which requires me to come to the conclusion that it is not proper to do what is proposed to be done in the present case. I think that it is a correct argument that a power of advancement is not the same as a power of appointment. It is plain on principle that, when a power of advancement is exercised, the fund is taken right out of the trust estate and devoted to the benefit of some person who holds it clear of the limiting trusts of the settlement under which the power of advancement is exercised. It is different in this respect from a limited power of appointment, which is merely a power to mark out the trusts of the settlement or will, and, therefore, operates when the power of appointment is exercised, so that a trust which is appointed by somebody else is read into the settlement or will. In such a case, far from the property being taken out of the settlement or will, the trusts in question are incorporated in the settlement or will. Therefore, in the case of the exercise of a power of appointment which is not a general but a limited power, the rule against perpetuities cannot be applied in relation to the date of the proposed exercise of the power of appointment, whether made by settlement or will.

D That seems to me to be the whole point in the present case. I should have thought that, quite plainly, the exercise of the power of advancement was something which took the money so advanced out of the settlement and either resulted in the money being handed over to the object of the power of advancement, or, as the cases show, resulted in it being resettled on new trusts, which necessarily have nothing to do with the trusts of the original settlement at all but are created as a result of the exercise of the power of advancement and nothing else.

E As regards the suggestion that the power of advancement cannot be exercised so as to incorporate provisions in favour of persons who are not objects of the original settlement, it seems to me, as counsel for the defendants said, to be common form that, when a settlement is made of a fund which is advanced to the beneficiary under such powers, the settlement may include trusts in favour not only of the beneficiary himself but his wife, or it may be his widow, and issue, and, consequently, I do not think that, in the present case, if I am right on my general point, the trust in favour of Penelope is bad. That seems to me, on principle, the correct answer to be given to the point which is raised. If I am right in the view which I have taken that a power of advancement is essentially different from a power of appointment, that also seems to me to dispose of the point about delegation.

G In the course of his judgment in *Re Wills' Will Trusts* (2) UPJOHN, J., after saying that in several other cases the court had not had the benefit of certain arguments which had been put before him, continued ([1958] 2 All E.R. at p. 478):

H "Nevertheless so far as this court is concerned these authorities establish the proposition that trustees exercising a power of advancement may make settlements on objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power."

I Those remarks about the object of the power were relied on by counsel for the plaintiffs in the course of his argument that the present proposed settlement was inadmissible because of Penelope's children not being born, but I do not think that UPJOHN, J.'s mind was directed to that point. He was referring generally to the question that there can be a settlement in the course of the exercise of the power of advancement. Then UPJOHN, J., continues:

"The authorities typified by *Re May's Settlement, Public Trustee v. Meredith* (3) ([1926] Ch. 136) and *Re Newburn's Settlement, Perks v. Wood* (4) ([1933] All E.R. Rep. 663) establish to my mind that any settlement made by way of advancement on an object of the power by trustees must not conflict with the principle *delegatus non potest delegare*. Thus unless on its proper

construction the power of advancement permits delegation of powers and discretions a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions at any rate in relation to beneficial interests to any trustees or other persons, and in so far as the settlement purports to do so it is pro tanto invalid. I say that without prejudice to the possible propriety of including ordinary powers of advancement in such a settlement: see *Re Morris' Settlement Trusts, Adams v. Napier* (5) ([1951] 2 All E.R. 528)."

In *Re Morris* (5) it was held by the Court of Appeal that the inclusion of a general simple power of advancement in what is called the standard form was not objectionable, and in the present case, so far as the power of advancement which is proposed is concerned, it merely refers to a statutory power. That is by the way. What puzzles me about this passage in the judgment of UPJOHN, J., is his reference to *Re May's Settlement* (3) and *Re Mewburn's Settlement* (4) as authorities for the proposition which he put forward; but it is quite plain that *Re May's Settlement* (3) and *Re Mewburn's Settlement* (4) are both cases of the exercise of powers of appointment which, as I have already indicated, are different matters from the exercise of powers of advancement, and, therefore, the cases to which UPJOHN, J., referred were not really relevant to the remarks that he subsequently made. I am not quite sure what the learned judge had in his mind, and I feel that I should not adopt that passage in his judgment in the somewhat different circumstances of the present case. It may be that the distinction between powers of advancement and powers of appointment was not really in UPJOHN, J.'s mind at that time, and, consequently, I do not feel bound to regard what he said as ruling out a conclusion in the present case in favour of the other proposition which is being put forward. I have come to the conclusion, on principle, that the exercise of the power of advancement is not objectionable if it is in the form of providing benefits for the objects of the power which are coupled with a settlement of the moneys so raised and allocated in such a way that the children or issue of the objects will become beneficiaries under the settlement. Such a settlement with discretionary powers, particularly if they are of a reasonable kind, is quite proper. A further conclusion is that in effect it is a resettlement of the money which is taken right out of the original settlement in the will. For the purposes of the rule against perpetuities, the relevant period and the relevant purposes for the application of the rule are those contained in the proposed settlement. It is not so tied up with the original will that the proposed provision is obnoxious to the rule against perpetuities.

Declaration accordingly.

Solicitors: *Alsop, Stevens & Co., Liverpool* (for all parties).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

PRACTICE NOTE.

CHANCERY DIVISION.

Practice—Title of proceedings—Chancery Division.

To reduce time and space wasting verbiage in titles to proceedings in the Chancery Division the judges of the Division have approved the following methods and principles:—

(1) Where the title refers to a document such as a settlement, lease, contract, etc., it will be sufficient to state the nature of the document, its date and parties. Initials only for the Christian or first names of each named party to the document should be given in conjunction with their surnames. It will normally be sufficient to refer to the parties as “between (A.B.) and others”. Should it be necessary to distinguish two documents of the same date the necessary distinction should be concise in form.

(2) Where a proceeding is taken in the matter of several instruments and it is convenient to do so, the instruments may be listed under suitable introductory words, e.g.:—

“IN THE MATTER OF the following instruments

Date	Instrument	Parties”.
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(3) Designation of a house or land or other premises should follow the lines of a postal address rather than those of a conveyancing description. Where such a method is not possible, the title should be limited to words sufficient to identify the property consistently with the nature of the proceedings. Words such as “in the parish of . . .” or “in the county of . . .” should not appear in the title.

(4) The capacity in which persons sue or are sued, e.g., as executors of a deceased person or as representing themselves and all other persons having a common interest, should be omitted from the title, but the status of female parties to the action must always be given. A party who is an infant must be so described. Where an infant is a plaintiff, the title should contain no reference to his next friend. Where an infant party attains his majority in the course of the proceedings, he should thereafter be described in the title as “(Late an infant)”. The additional words “but now of full age” should not be used.

Representative capacities should be mentioned in the body of the writ, originating summons, or other like document.

(5) Where a person has by order been added as a party, insert after his name “(added ./. /5 .)”. When a defendant has become a plaintiff or vice versa, insert after his name his former capacity and date of the order effecting the change, e.g., “William Brown (former defendant ./. /5 .)”.

Where proceedings are stayed against any particular party, insert after his name “(proceedings stayed ./. /5 .)”.

(6) When an action has been reconstituted on more than one occasion, the title to summonses, notices, pleadings and affidavits should set out no more than the original title and the one constituted by the last order to carry on. In setting out the names of the original parties, only those of the first named plaintiff and defendant should be given. Any additional plaintiffs and defendants can be covered by the words “and others”. (See R.S.C., Ord. 38, r. 2.) Unless otherwise directed, the full title will continue to be set out in any order which is drawn up.

(7) The above instances are not intended to be exhaustive, but the principles indicated should be followed as occasion requires.

MAURICE WILLMOTT

Chief Master, Chancery Division.

June 18, 1959.

Re BLANKET MANUFACTURERS' ASSOCIATION'S AGREEMENT.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), June 8, 9, 1959.]

Restrictive Trade Practices—Agreement under which restrictions are accepted—Resolution of trade association as to sanctity of contracts—Whether a restriction within Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 6 (1) (a)–(c), (3).

The Blanket Manufacturers' Association, a trade association formed with the main object of co-operating for the common good, protection and benefit of the members and of safeguarding and furthering their interests, passed a resolution, which was recognised by the members as binding on them, that "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure . . ." On the question whether the resolution was a restriction which fell within s. 6 (1) (a)–(c), (3)* of the Restrictive Trade Practices Act, 1956, which provides that Part I of that Act applies to any agreement between two or more persons carrying on business in the production or supply of goods under which restrictions are accepted by two or more parties in respect of (a) the prices "to be charged," quoted or paid for goods supplied, offered or acquired, (b) the terms or conditions on or subject to which goods are "to be supplied", and (c) the quantities or descriptions of goods "to be produced", supplied or acquired,

Held: the resolution was not a restriction which came within s. 6 (1) (a)–(c) of the Act of 1956, because, having regard to the phrases "to be charged", "to be supplied" and "to be produced", the subsection was directed to the pre-contractual position of members of an association, whereas the restriction imposed by the resolution was directed to cases where a contract had already been entered into.

Decision of the RESTRICTIVE PRACTICES COURT (ante, p. 1) affirmed.

[For the Restrictive Trade Practices Act, 1956, s. 6, see 36 HALSBURY'S STATUTES (2nd Edn.) 937.]

Appeal.

Appeal by way of Case Stated† under the Restrictive Trade Practices Act, 1956, s. 2 (4) and Schedule, para. 8, by the Registrar of Restrictive Trading Agreements from part of a decision of the Restrictive Practices Court (DEVLIN and UPHORN, J.J., SIR STANFORD COOPER, Mr. W. L. HEYWOOD, Mr. W. WALLACE and Mr. W. G. CAMPBELL), dated Mar. 23, 1959, and reported ante, p. 1. The appeal was concerned only with the question whether a resolution‡ dated June 19, 1951, made by the respondents, the Blanket Manufacturers' Association, relating to sanctity of contracts, was or was not a restriction within s. 6 (1) (a)–(c) of the Act of 1956.

John Megaw, Q.C., and Arthur Bagnall for the appellant, the Registrar of Restrictive Trading Agreements.

W. Gumbel for the respondents, the Blanket Manufacturers' Association.

LORD EVERSHED, M.R.: This appeal raises the single question whether a certain "restriction" (to use the word that I find in s. 6 of the Restrictive Trade Practices Act, 1956, and which is admittedly applicable in this case) is

* The terms of s. 6 (1) (a), (c), (3), are set out at p. 631, letters E to H, post.

† By the Restrictive Practices Court Rules, 1956, r. 81, the judgment of the Restrictive Practices Court is, in so far as facts are stated therein, to be deemed to be a Case Stated for the purpose of any appeal on a question of law to which those facts give rise.

‡ The terms of the resolution are set out at p. 631, letters A to C, post.

A one falling within the scope of s. 6 (1) of the Act. The "restriction", as I have called it, is set out in the judgment of the Restrictive Trade Practices Court (ante, at p. 11), and is in the following terms (being dated June 19, 1951):

B "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure. Should any attempt be made to break or vary the contract the manufacturer shall refuse to accept cancellation or variation and endeavour to obtain completion of the contract. If this should fail the member must send all correspondence to the secretary without informing the customer that he is doing so. The secretary should then forthwith write the customer to the effect that the correspondence had been handed to him and asking for the customer's explanation for his attempt to break the contract in order that he may advise the manufacturer concerned. If a manufacturer C has good reason to agree a request for the cancellation or variation of a contract he shall not so agree until approval is given by the reference committee which reference committee shall consist of the chairman, Mr. Illingworth and the secretary."

D That passage which I have read is the subject of a resolution duly passed by the members of the Blanket Manufacturers' Association, so as to be binding on them; and the question was formulated by the court as follows (ante, at p. 12):

E "The real question is whether an agreement between two or more persons, being manufacturers of the same type of goods, not to cancel or vary any contract of sale of goods made or to be made in the future by any of those persons with their customers without the consent of some third party, is the acceptance of a restriction which falls within any one or more of paras. (a) to (c) of s. 6 (1)."

I turn, accordingly, to that subsection. It provides:

F "Subject to the provisions of the two next following sections, this Part of this Act applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to G goods; (b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods; (c) the quantities or descriptions of goods to be produced, supplied or acquired . . ."

I can pass over para. (d) and para. (e); but I should read sub-s. (3):

H "In this Part of this Act 'agreement' includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Part of this Act to restrictions accepted under an agreement shall be construed accordingly; and 'restriction' includes any negative obligation, whether express or implied and whether absolute or not."

I It is the contention of the appellant in this court, the Registrar of Restrictive Trading Agreements, that the resolution already read (which is briefly called the "Sanctity of Contracts" resolution) falls plainly within the scope of the word "restriction" as expanded by definition to include "any negative obligation". For it is said that the effect of it is to limit or restrict the ordinary freedom which a trader would have to make such arrangements as he thought fit for cancelling or varying a contract already made, if such a course commended itself to the manufacturer. So far there is no contest between the registrar and the Association; for the Association also agrees that this recommendation or resolution is, or constitutes, a restriction. The question, however, is whether it is a

"restriction" within the terms of the subsection which I have read. The court, in its judgment (*ante*, at p. 12), stated that they had not found the question an easy one to answer; and I agree that it is not an easy question. But I have myself come to the same conclusion as did the court—that, reading the language of the section according to its ordinary significance, this restriction cannot fairly be said to fall within the language of sub-s. (1). The matter is, I think, very largely one of first impression; and (as counsel for both parties conceded) it is not one which lends itself usefully to much elaboration. I accept the premise of the argument of counsel for the Association that the language of para. (a), para. (b) and para. (c) of the subsection is, on the face of it, directed to the case of a manufacturer about to enter into a trading contract. I do not say that necessarily the language would not cover other cases; but in each case (it will be recalled) there is the collocation "*to be*"—"to be charged"; "*to be applied*"; "*to be produced*"—indicating that the draftsman is looking to a point of time when the contract is about to be entered into, and is not contemplating the case where the contract has already been made.

It is, therefore, against that background that the question must be put and answered: Is this resolution fairly within the language? Is it (in other words) an "agreement under which restrictions" (including "negative obligations") "are accepted by two or more parties in respect of "one or more" of the following matters":—"the prices *to be charged* . . .", etc.; "the terms or conditions on . . . which goods are *to be supplied* . . ."; or "the quantities or descriptions of goods *to be produced* . . ." ? It is, no doubt, true that, if a manufacturer, having made a bargain with a customer, later agrees with that customer, by way of variation of an existing contract, to reduce (say) the price, he may be said to make an arrangement with that customer which relates to the price which will ultimately be paid for the goods. None the less, if the question be posed, and be answered, as I think it must be answered, according to the ordinary usage of our tongue, I agree with the court that this recommendation cannot properly or fairly be described as being within this subsection—as being an agreement under which restrictions, including negative obligations, are accepted in respect of any of these specific, named matters.

I only add this—as was indeed conceded by counsel for the registrar: if this part of the section had confined itself merely to reference to the terms or conditions on or subject to which goods are to be supplied or acquired, that might have been a formula of so wide a scope as to include all agreements which in some sense were directed to that end. But the express sub-division into cases relating to prices as distinct from terms or conditions, and as distinct again from quantities or descriptions of goods, seems to me to have the effect of somewhat confining the language of each paragraph; and, therefore, without further elaboration I conclude that, fairly construed, this recommendation cannot be said to be of the description which you find in any one of the paragraphs of this subsection.

I would, accordingly, dismiss the appeal.

ROMER, L.J.: I agree. I accept the view which was suggested by counsel for the Association, that s. 6 (1) of the Restrictive Trade Practices Act, 1956, in so far as it relates to the prices and other terms or conditions of contract for supply or acquisition of goods, is confined to agreements regulating the pre-contractual position of members of an association such as the respondents, and that, once a member has entered into a contract with a customer, an agreement previously entered into with the other members affecting his rights and obligations under the contract is unaffected by the subsection. In other words, this part of the subsection is, in my judgment, directed to, and confined to, agreements regulating the contractual provisions as to the prices, terms and conditions, etc., which are to be incorporated in contracts into which the members enter with their customers. This is the general impression which I derive from sub-s. (1) and sub-s. (2) of s. 6, and, in particular, from the presence in para. (a), para. (b)

A and para. (c) of sub-s. (1) of the words "to be" "to be charged"; "to be supplied"; "to be produced", etc. If this view be right, the appeal must clearly fail, for it would never be a term or condition of any contract of sale between a member of the Association and a customer—nor does the agreement in question require that it should be—that the member should not agree to its cancellation or variation without the consent of a third party.

B As the Master of the Rolls has said, the point is a short one, and one of first impression; but I agree with the Restrictive Practices Court that the agreement which it is now sought to impeach cannot fairly be fitted into any of the provisions of s. 6 (1) of the Act. I, therefore, agree that the appeal fails.

C **PEARCE, L.J.:** I entirely agree with what my Lords have said. In my view, s. 6 (1) of the Restrictive Trade Practices Act, 1956, in so far as it relates to the prices and other terms or conditions of sale, is directed to restrictions prior to the contract for the sale of goods. The "Sanctity of Contracts" restriction only affects the situation after the contracts of sale have been entered into. It is a restriction, but it is not a restriction that comes within the terms of para. (a), para. (b) or para. (c), on a fair construction of their language.

D I agree, therefore, that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor; Brooke, Dyer & Goodwin, Leeds* (for the Blanket Manufacturers' Association).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

NOTE.

MEYER v. MEYER (HODGE Cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), May 11, 12, 13, 14, 15, 26, 27, 28, June 12, 1959.]

Divorce—Practice—Trial—Allegation of adultery—Submission by party cited at close of respondent's case that he ought to be dismissed from proceedings on ground that there was not sufficient evidence of adultery against him—Party cited not put to election before making submission—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 5.

[As to a person, other than the husband or wife, against whom adultery is alleged being dismissed from the suit, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, note (c).]

H As to a submission in a divorce suit of no case to answer, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, note (c); and for cases on the subject, see 27 DIGEST (Repl.) 544, 4921 and SUPPLEMENTS.

For the Matrimonial Causes Act, 1950, s. 5, see 29 HALSBURY'S STATUTES (2nd Edn.) 395.]

Cases referred to:

(1) *Lance v. Lance and Gardner*, [1958] 1 All E.R. 388; [1958] P. 134.

(2) *Wilson v. Wilson*, [1958] 3 All E.R. 195.

(3) *Yuill v. Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 27 Digest (Repl.) 544, 4921.

Petition.

This was a petition by the wife for divorce on the ground of the husband's cruelty. The husband denied the alleged cruelty and cross-pleaded for a divorce on the ground of the wife's adultery with the party cited. At the conclusion of the

cases for the wife and for the husband counsel for the party cited asked leave to make a submission which is the subject-matter of this note. A

Gerald Gardiner, Q.C., and Victor Williams for the wife.

W. A. Fearnley-Whittingstall, Q.C., and C. A. Marshall-Reynolds for the husband.

G. H. Crispin for the party cited.

G. H. Crispin, for the party cited, asked leave to make a submission under s. 5 of the Matrimonial Causes Act, 1950, without being put to election whether to call or not to call evidence. Section 5 provided as follows:— B

“ In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.” C

Counsel said that the party cited was in the position of a co-respondent; he referred to *Lance v. Lance and Gardner* (1) ([1958] 1 All E.R. 388) and, after reading the judgment in that case, drew a distinction between a submission, such as was made in *Lance v. Lance* (1), that there was no case to answer, and the language of s. 5 which concluded with the words “ not sufficient evidence against him or her ”. Those words did not necessarily go so far as, though they might include, a submission of no case to answer. Counsel referred also to *Wilson v. Wilson* (2) ([1958] 3 All E.R. 195). Counsel said that it would be a convenience to allow the submission under s. 5 to be made without putting the party cited to election whether to call evidence or not. *Yuill v. Yuill* (3) ([1945] 1 All E.R. 183), which was considered in *Lance v. Lance* (1), was a case where the parties were husband and wife and was not authority so far as a co-respondent or party cited was concerned. D

COLLINGWOOD, J.: I am prepared to hear your submission without putting you to an election. E

[Counsel then submitted that there was not sufficient evidence of adultery against his client, the party cited, and that he ought to be dismissed from the proceedings. COLLINGWOOD, J., rejected the submission and evidence was called on the party cited's behalf. In a reserved judgment HIS LORDSHIP granted a decree nisi to the wife on the ground of the husband's cruelty and rejected the husband's cross-prayer: the party cited was dismissed from the suit with costs.] F

Solicitors: *Allen & Overy* (for the wife); *Sumner & Co.* (for the husband); *J. D. Langton & Passmore* (for the party cited).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.] G

A

R. v. BARNSELY COUNTY BOROUGH LICENSING JUSTICES,
Ex parte BARNSELY & DISTRICT LICENSED VICTUALLERS'
 ASSOCIATION AND ANOTHER.

B

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Salmon, J.J.), May 7,
 8, June 5, 1959.]

C

*Licensing—Justices—Bias—Application by co-operative society for off-licence—
 All justices either members, or spouses of members, of the society—Necessity
 for showing real likelihood of bias—Whether objection need be taken at hearing
 if facts not known though suspected—Licensing Act, 1953 (1 & 2 Eliz. 2 c.
 46), s. 48 (5).*

D

*Magistrates—Bias—Objection—Advocate suspecting but not knowing facts possi-
 bly showing bias—No duty to question magistrates as to facts.*

The effect of s. 48 (5) of the Licensing Act, 1953, which provides that
 "no act done by any justice disqualified by this section shall be invalid by
 reason only of that disqualification" is to oust the rule of the common law in
R. v. Rand ((1866), L.R. 1 Q.B. 230) and to make it necessary for an applicant
 for certiorari to prove a real likelihood of bias, whether by reason of pecuniary
 interest or otherwise (see p. 638, letter F, post, per LORD PARKER, C.J., and
 DONOVAN, J., SALMON, J., dissenting).

E

The Barnsley British Co-operative Society, Ltd., applied for a spirits off-
 licence at their central drug department in Barnsley. At the first hearing of
 the application on Feb. 12, 1959, seven justices sat, five of whom were
 members of the society and the other two of whom were the spouses of
 members. The application was opposed by objectors, was adjourned to and
 was granted on Mar. 5, 1959, at a second hearing by seven justices, six of
 whom had sat at the first hearing. Of the total of seven justices, six were
 members of the society and the seventh was the wife of a member. The chair-
 man of the justices at both meetings had in July, 1958, been third among
 nine unsuccessful candidates for election to two vacancies on the board of
 directors of the society. The society already had a spirits off-licence at premi-
 ses within two hundred and fifty yards of the central drug department. Mem-
 bers of the society received an income, which in the case of all the justices in
 question was very small (£23 being the highest such income of any justice
 for the year to November, 1958) at a fixed rate on their loan deposits and
 shareholding in the society, and also a dividend in respect of each purchase
 which they made, which would amount to about 2s. 6d. on a bottle of gin and
 about 2s. 9d. on a bottle of whisky. There was no evidence that any of the
 justices drank spirits. For the year ended Nov. 18, 1958, the total turnover
 of the society was about £12,000,000, of which about £46,000 represented the
 sale of wine, spirits, and other liquor. It was estimated that the new spirits
 off-licence would increase the turnover by no more than £3,000 per annum.
 On application by the objectors for certiorari to quash the grant of the
 licence,

G

H

I

Held (SALMON, J., dissenting): though the justices who were members
 of the society were disqualified under s. 48 (4) of the Licensing Act, 1953,
 from acting, yet by reason of s. 48 (5) certiorari would not lie unless a real
 likelihood of bias were established by the applicant; in the circumstances
 of the present case no real likelihood of bias had been established and, there-
 fore, certiorari would not be granted.

R. v. Tempest ((1902), 86 L.T. 585) considered.

Per CTRHAM: although an objection on the ground of disqualification of
 justice should be taken at the hearing, it is not the duty of an advocate,
 if he thinks it possible that there may be disqualification but has not know-
 ledge of the facts giving rise to it, to put fishing questions to members of a

bench of justices for the purpose of ascertaining whether there is disqualification (see p. 640, letters D and E, and p. 642, letter C, post).

[As to the disqualification of licensing justices by statute, the effect thereof, and disqualification by interest or bias respectively, see 22 HALSBURY'S LAWS (3rd Edn.) 527, 528, paras. 1040, 1041, and 1043; and for cases on the subject, see 30 DIGEST (Repl.) 24-26, 152-166.

As to disqualification by interest from acting as a justice, see 25 HALSBURY'S LAWS (3rd Edn.) 131-136, paras. 238-244; and for cases on the subject, see 33 DIGEST 288-301, 44-157.

For the Licensing Act, 1953, s. 48, see 33 HALSBURY'S STATUTES (2nd Edn.) 191.]

Cases referred to:

- (1) *R. v. Rand*, (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157; sub nom. *R. v. Rand*, *R. v. Bradford JJ.*, 30 J.P. 293; 33 Digest 292, 84.
- (2) *R. v. Sunderland JJ.*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 33 Digest 296, 109.
- (3) *R. v. Tempest*, (1902), 86 L.T. 585; 66 J.P. 472; 33 Digest 296, 110.
- (4) *R. v. Kilkenny JJ.*, (1908), 42 Ir. L.T. 134.
- (5) *R. v. Handsley*, (1881), 8 Q.B.D. 383; sub nom. *R. v. Handsley, etc.*, *Burnley JJ.*, *Ex p. King*, 51 L.J.M.C. 137; 46 J.P. 119; 33 Digest 297, 125.
- (6) *R. v. Sassar JJ.*, *Ex p. McCarthy*, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; sub nom. *R. v. Hurst, Ex p. McCarthy*, 130 L.T. 510; 33 Digest 294, 97.
- (7) *R. v. Camberne JJ.*, *Ex p. Pearce*, [1954] 2 All E.R. 850; [1955] 1 Q.B. 41; 118 J.P. 488; 3rd Digest Supp.
- (8) *Frome United Breweries Co. v. Bath JJ.*, [1926] A.C. 586; 95 L.J.K.B. 730; 135 L.T. 482; 90 J.P. 121; 33 Digest 292, 83.
- (9) *R. v. Meyer*, (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; 33 Digest 294, 100.

Application for certiorari.

The Barnsley & District Licensed Victuallers' Association and the Barnsley & District Off-Licence Holders' Protection Association applied for certiorari to bring up and quash the grant by the licensing justices for the county borough of Barnsley, on Mar. 5, 1959, of an application by the Barnsley British Co-operative Society, Ltd. for a spirits off-licence at the society's central drug department in Barnsley.

H. C. Beaumont for the applicants for certiorari.

John McLusky for the society, the grantee of the licence.

Cur. adv. vult.

June 5. The following judgments were read.

LORD PARKER, C.J.: The following is the judgment of **DONOVAN, J.**, and myself.

Counsel for the applicants moves in this case for an order of certiorari to bring up and quash a decision of the licensing justices for Barnsley given on Mar. 5, 1959, whereby they granted an application by the Barnsley British Co-operative Society, Ltd. (hereinafter called "the society") for a spirits off-licence at their central drug department in Barnsley. The society already holds a wine licence for the same premises.

There were two hearings in this matter. At the first on Feb. 12 the justices apparently heard evidence and adjourned. Of the seven justices who then sat, five were members of the society and two were not. The spouses of these two justices were, however, members. At the second hearing when the application was granted seven justices sat, of whom six had sat on Feb. 12. Of the total of seven justices, six were members and one was not. The husband of this one

A justice was, however, a member. The membership of the society is apparently so large and comprehensive that there is only one borough justice in Barnsley who (or whose near relative) is not a member, and that justice is a member of Parliament.

The ground on which the court is asked to quash the grant of a licence is that of bias on the part of the justices. It is not said that they acted dishonestly in any way or that they were in fact biased, but that their membership of the society (or the membership of their spouses), which attracts financial benefits, constitutes bias in law. We are told that for the year ended Nov. 18, 1958, the total turnover of the society was some £12,000,000. Of this £46,000 only represented the proceeds of the sale of wine, spirits and other liquor, i.e., 0.36 per cent. of the total turnover. It is estimated that the new spirits licence will increase the trade by no more than £3,000 per annum. The justices concerned have small interests in the society by way of shares and loan deposits. The highest income that any one of them derived from these combined sources in the year ended November, 1958, was £23.

The position of justices having a financial interest in concerns which brew or distil or sell intoxicating liquor has been the subject of specific provisions in various Licensing Acts during the last century (see s. 60 of the Licensing Act, 1872, s. 40 of the Licensing (Consolidation) Act, 1910, and now s. 48 of the Licensing Act, 1953). One may summarise the effect of the first four subsections of s. 48 as follows: subsection (1) disqualifies a justice from acting for any purpose under the Act in the county or borough in question, or from being a member of the licensing committee for that county or borough, who is, individually or in partnership, a brewer or distiller or retailer of intoxicating liquor in that county or borough. Subsection (2) disqualifies a justice from being a member of the licensing committee or the confirming or compensation authority for that county or borough if he is a shareholder or stockholder in a company which brews or distils or retails intoxicating liquor in that county or borough, unless before appointment or re-appointment he discloses his interest to the appointing justices. In fact all the members of the licensing committee had duly disclosed their interests before their appointment. Subsection (3) provides that a person who has a beneficial holding of such shares or stock as aforesaid shall not be appointed or re-appointed a member of such committee or authority as aforesaid, unless the justices appointing him or re-appointing him are satisfied that the extent to which the company carries on the business of brewing, distilling or retailing intoxicating liquor is so small in relation to its whole business that the interest of the person concerned affords no reasonable ground for suggesting that he is not a proper person to be a member of the committee or authority. Then comes sub-s. (4) dealing with a case where a justice is interested in specific premises. It provides as follows:

H “No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested, or of which he is wholly or partly the owner, lessee, or occupier, or for the owner, lessee, or occupier of which he is manager or agent: Provided that a justice shall not be disqualified under this provision by reason of his having vested in him a legal interest only, and not a beneficial interest, in the premises concerned or the profits of them.”

Accordingly, whatever may be the position under sub-s. (2) and sub-s. (3), a person having such a beneficial interest in the premises as sub-s. (4) prescribes may not act for any purpose under the Act in a case which concerns those premises. In its context in sub-s. (4) the reference to profits of the premises is clearly, we think, an elliptical way of describing profits arising from any trade in making or selling intoxicating liquor carried on from the premises. Accordingly,

the justices in the present case who were members of the society were in our view disqualified from acting under sub-s. (4).

Pausing there, it is said, and this we think is undoubtedly true, that certiorari would lie. As was said by BLACKBURN, J., in *R. v. Rand* (1) ((1866), L.R. 1 Q.B. 230 at p. 232):

"There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter..."

Indeed, this is a rule of law and not a matter merely giving rise to a presumption of bias. Thus in *R. v. Sunderland JJ.* (2) ((1901) 2 K.B. 357), VAUGHAN WILLIAMS, L.J., said (*ibid.*, at p. 371):

"If he [i.e., a justice] has personally a pecuniary interest or an interest capable of being measured pecuniarily, the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go into the question whether he in fact acted partially or impartially. A bias is presumed from the mere fact of the existence of the interest."

The matter, however, does not rest there because sub-s. (5) of s. 48, so far as it is relevant, provides that:

"No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification..."

Counsel for the applicants contends that this subsection in no way affects the grounds on which certiorari will lie. It is only, he submits, a provision to ensure that unless and until the decision granting the licence is set aside, it shall remain and be treated as valid. Counsel for the respondents, on the other hand, contends that its effect is to oust the remedy by way of certiorari on the ground of pecuniary interest, be that interest large or small. Only in the event of the likelihood of bias arising, otherwise than from pecuniary interest, will certiorari lie.

In our judgment neither of these submissions is correct. All the subsection does is to oust the rule of law enunciated in *R. v. Rand* (1) and to require an applicant for certiorari to prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise. Indeed, this view has already been taken by this court in considering the corresponding provision in s. 60 of the Licensing Act, 1872. Thus in *R. v. Tempest* (3) ((1902), 86 L.T. 585), LORD ALVERSTONE, C.J., said this (*ibid.*, at p. 587):

"Then remains the further point, which is not without difficulty. The fourth magistrate who was present at the confirming sessions appears to have a share in Allsopps, and it is not disputed he comes within the opening words of s. 60. The point we have to consider is whether the licence is bad because he adjudicated upon it notwithstanding the provisions of that section. The true meaning of the proviso at the end of that section is not without difficulty. The words are: 'No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid'. It was argued by Mr. Hextall that comparing that with the analogous provision in s. 38, it meant to say that no objection should be taken to the sale of liquor in that case, acting under the licence, and if the question had arisen solely under s. 38, I think that there would be some ground for that argument. But when you look at the actual language of s. 60, which creates the status of disqualification, it says that: 'No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid'. In my opinion it is impossible to put such a limited construction as that contended for. I think the words of the Act here occurring in the proviso to a section creating a disqualification against the doing of the act, and creating a penalty, cannot be construed so narrowly; that is to say, that the act was

A not intended to be protected if that was the only disqualification. I would further point out that this proviso would be no protection where a case of actual bias was raised—where it is said that the interest of the brewer is such that he would be biased. In that case, of course, the section would not be wanted, but it is quite plain to my mind that the section saying 'by reason only of such disqualification' means thereby what I may call the technical disqualification created by the Act. But if any brewer was to sit, and the case made was that he was biased in fact, or likely to be biased in fact, different considerations would arise. Under all the circumstances I think neither of the objections are successful, and the rule must be discharged."

DARLING, J., and CHANNELL, J., agreed.

C The judgment of PALLES, C.B., in *R. v. Kilkenny JJ.* (4) ((1908), 42 Ir. L.T. 134), is to the same effect. See also the judgment of the court (FIELD, J., and CAVE, J.) in *R. v. Handsley* (5) ((1881), 8 Q.B.D. 383) on a somewhat similar provision, in which the following passage occurs (*ibid.*, at p. 386):

D "Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present where such a section as s. 502 of this local Act* exists, it is not enough to show merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information... but that in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

E Accordingly, it seems to us that certiorari cannot issue in this case unless there is proved a real likelihood of bias whether arising from a substantial pecuniary interest or otherwise. Here there is no suggestion of the likelihood of bias arising otherwise than from pecuniary interest. Apart from the small interest payable on any shares or deposits, the justices who were members of the society could, it is said, look forward to buying their spirits more cheaply than in an ordinary retail shop if they so wished. What happens, of course, is that at the end of the accounting period, a member of a Co-operative Society receives out of the profits of the society a dividend calculated not on shareholding, but on total purchases. The same effect is thus to reduce the cost of those purchases. Can it then be said that this financial interest is so substantial as to give rise to a real likelihood of bias? In our judgment it cannot. The total increase in trade which is anticipated to arise is, as stated above, only £3,000 per annum on a total turnover of £12,000,000. It is true that if the justices made purchases of spirits they would get the eventual rebates on those purchases. But here we do not know whether or to what extent any justice was a drinker of spirits. Finally, and this we think is conclusive, the society in fact have another branch only two hundred and fifty yards away from the premises in question which already has a spirits licence.

H All the justices, therefore, were already in a position to get a rebate on purchases of spirits. Indeed, the application for certiorari has been rested on the view, which we have held to be wrong, that bias is to be conclusively presumed from the existence of the justices' pecuniary interest, and from nothing else. It was not contended that there was any risk of bias because of the size of their interest or because of any other ground. In the course of argument, however, counsel

I for the applicants did accept a suggestion, which fell from SALMON, J., that the opportunity to buy spirits at what in effect is a discount, might import a real risk of bias. With this we have already dealt.

Before leaving this part of the case, it should be mentioned that counsel for the applicants relied on the principle that the right to apply for certiorari on the ground of lack of jurisdiction can only be taken away by express words. In

* The Burnley Borough Improvement Act, 1871, s. 502 of which provided that "... any person shall not be disqualified or disabled to act as justice of the peace... by reason of his being... a member of the council..."

the present case, however, it is not a case of the statute purporting to oust the remedy, but of the statute investing a justice with jurisdiction which he would not otherwise have had.

There remains a point taken by counsel for the society. The solicitor for the applicants, who opposed the application before the justices, has stated that before the application he thought it possible that some members of the bench were members of the society. So much so that he informally approached the clerk to the justices before hand, who told him that such membership would not disqualify the justices from sitting. After the application was granted, the said solicitor deposes that from inquiries which he made he is satisfied that the chairman of the bench was a member of the society and that to the best of his knowledge other members of the licensing committee were also members. Counsel for the society argues that it was the duty of the said solicitor to confirm his suspicions at the hearing by asking the justices which of them was a member of the society, and, if he so wished, to make formal objection then. Since he failed to do so, he ought not to be allowed to take objection now.

It is true there is ample authority for the proposition that if an advocate has knowledge that a particular justice is or may be disqualified from sitting on a particular application, he should take the objection then and there and not, so to speak, keep it up his sleeve for future use, if necessary, in this court. It is not possible to say that this is such a case. No attack on the bona fides of the solicitor in question is here made: indeed, a tribute has been paid by the society to his integrity. Whatever he may have thought, it cannot be said that he had knowledge. Nor is there, so far as the court knows, a public register of members that he could consult. "Means of knowledge" does not include for this purpose the opportunity to put fishing questions to each member of the bench, which he might or might not answer. And, indeed, it would be an invidious task to force on an advocate. In our view there is no substance in this alternative argument for the respondents.

Accordingly, we would refuse the application.

SALMON, J.: I have the misfortune to differ from my Lords in the conclusions which they have reached in this case. At the beginning of this year the society was minded to extend its business by the sale of spirits at its central drug department in Wellington Street, Barnsley. To this end an application was made on its behalf for a spirits off-licence for those premises. At a meeting of the licensing justices for the county borough of Barnsley held on Mar. 5, 1959, this application was granted. Seven justices sat at this meeting. Six of them were shareholders in, and members of, the society, and thereby admittedly disqualified from acting. The husband of the remaining justice was a shareholder in, and member of, the society. It will thus be seen that there was not even a quorum of qualified justices, as required by s. 4 of Part I of Sch. 1 to the Licensing Act, 1953. The chairman of the meeting was Alderman A. E. McVie. In July, 1959, he had presented himself for election to the board of directors of the society. There were then two vacancies on the board. Alderman McVie was third amongst the nine unsuccessful candidates. None of the justices disclosed his interest to the present applicants at or before the meeting of Mar. 5, 1959. The application was opposed by the present applicants, the Barnsley & District Licensed Victuallers' Association and the Barnsley & District Off-Licence Holders' Protection Association. They submitted that there were adequate existing facilities for the sale and purchase of intoxicating liquor in the neighbourhood of the society's central drug department. There were in fact fourteen fully licensed or full off-licensed premises within two hundred and fifty yards including one of the society's off-licensed premises; and two further full off-licensed premises within four hundred and seventy-five yards of these premises. The applicants no doubt pressed their objection because they regarded the society as a particularly serious trade competitor. Intoxicating liquor, in common with

A everything else in which the society trades, is sold by the society to its members in effect at a discount below ordinary retail list prices. This discount is not deducted at the time of each individual sale but is paid to the member annually on the total amount of his purchases. It is true that the payment is described as a dividend and that the member could not receive it, nor indeed be a member of the society, unless he were a shareholder. The amount of the payment, B however, is in no way referable to the size of the member's shareholding; it is calculated solely as a percentage of the member's purchases from the society. It is, in reality, whatever it may be called, a discount. The current rate of discount is seven and a half per cent.

The present applicants argue in this court that the decision of the justices should be quashed on the ground of bias. In order for them to succeed it is not C necessary for them to go as far as proving actual bias. On the other hand, the authorities plainly establish that it would not be enough for them to show only a bare possibility or a mere suspicion of bias. In order successfully to impugn the decision of the justices, a real likelihood of bias must be established. Quite D apart from the common law presumption of bias from any pecuniary interest, with which I will deal presently, how is this onus to be discharged? In my judgment, by establishing that there are real grounds on which ordinary right-thinking people might reasonably conclude that the decision may well have been E biased. In such circumstances justice would not manifestly be seen to be done. The doctrine that justice must not only be done but manifestly be seen to be done was enunciated by LORD HEWART, C.J., in *R. v. Sussex JJ., Ex p. McCarthy* (6) ([1924] 1 K.B. 256), but its roots are deep in legal history. As this court has pointed out in *R. v. Camborne JJ., Ex p. Pearce* (7) ([1954] 2 All E.R. 850) the doctrine has all too frequently been invoked in attempts to quash convictions or invalidate orders on the flimsiest pretexts of bias. The fact, however, that the doctrine has sometimes had dubious champions does not in any way detract from its validity or diminish its importance, which is fundamental.

The present applicants now know that the justices by granting the licence F obtained the advantage of being able to buy a bottle of gin at about 2s. 6d. and a bottle of whiskey at about 2s. 9d. below the retail list prices at the society's central drug department. It may be argued that the sum involved is small, but to any ordinary mortal the advantage is a very real one. The fact that it can also be enjoyed at the society's other premises two hundred and fifty yards away does not in my judgment by any means destroy its significance. It is G true that it is not certain whether or to what extent any justice is a drinker of spirits; nor could such a matter be inquired into. In my view one may reasonably draw the inference that, at any rate, some of the justices may well drink spirits. There is certainly no reason to assume that they are all teetotallers. Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not H be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence. Would any reasonable business man believe that any meeting of which he was chairman could give a completely fair and unbiassed hearing to what was, in effect, an application by the society to extend its business in Barnsley? Moreover, the present applicants know that not one or two of the justices, but six out of seven, were members of the society and may reasonably I believe that an esprit de corps exists amongst members of the society, not usually to be found amongst shareholders in the ordinary joint stock company. I find it impossible to hold that there are no real grounds on which ordinary right-thinking persons could reasonably conclude that the justices may well have had a bias in favour of granting the licence. If I pose to myself the exact question propounded by VAUGHAN WILLIAMS, L.J., in *R. v. Southland JJ.* (2) ([1901] 2 K.B. 357 at p. 373) and approved by LORD ATKINSON in *Frome United Breweries Co. v. Bath JJ.* (8) ([1926] A.C. 586 at p. 608):

"Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biased? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the inference that the justices . . . would have a real bias in favour of granting the licence . . .?"

I for my part am wholly unable to give anything but a negative answer to that question. In my view, in the words of LORD SUMNER (*Ibid.*, at p. 615)

"... there existed in the justices . . . such a likelihood of bias as the parties interested in [opposing the licence] could not justly be called upon to risk."

I agree, for the reasons stated by my Lords, that in the circumstances of this case there is no substance in the argument that the present applicants are now precluded from alleging a likelihood of bias because they did not take the point before the justices.

Taking the view that I do, I doubt whether any question arises under s. 48 of the Licensing Act, 1953. Subsections (1) to (4) of that section impose certain disqualifications. Subsection (5) provides that no act done by any justice disqualified by the section shall be invalid "by reason only" of that statutory disqualification. As pointed out by this court in *R. v. Tempest* (3) ((1902), 86 L.T. 585), the proviso to s. 69 of the Licensing Act, 1872, which is reproduced in sub-s. (5), gives no protection in case of bias whether from pecuniary interest or any other cause; it merely avoids the technical disqualifications imposed by the statute; where there is a case of bias it is unnecessary to look at the statute.

There is no doubt that at common law direct pecuniary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. This is no mere technicality but a most salutary rule founded in experience and common sense. As a matter of policy, it is obviously undesirable for any court to embark on the invidious task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal. Any pecuniary interest, however small, is fatal. In such a case the law assumes bias (*R. v. Rind* (1) (1866), L.R. 1 Q.B. 230, per BLACKBURN, J., at p. 232; *R. v. Sunderland JJ.* (2), [1901] 2 K.B. 357, per VAUGHAN WILLIAMS, L.J., at p. 371). The justices as shareholders had a pecuniary interest, although a very small one, in the subject-matter of the proceedings. It is argued by the present applicants that on that ground alone, and quite apart from the general circumstances with which I have already dealt, the decision should be quashed. On the other hand, the society contend that the combined effect of sub-s. (4) and sub-s. (5) of s. 48 is to oust the common law presumption of bias, at any rate, in all cases where the licensing justices' pecuniary interest in the subject-matter of the proceeding is very small. I must confess that I would be reluctant to read these subsections as making any such wide inroad into the common law, unless compelled to do so either by authority or by unambiguous language in the subsections themselves.

In my view the point is free from direct authority. Neither sub-s. (5), nor any of the former statutory provisions it reproduces, has ever before been invoked in a case where the justices or any of them had a direct pecuniary interest in the subject-matter of their decision. *R. v. Tempest* (3), in my judgment, does not touch this point. In that case one justice was technically disqualified under the Act only because he was a shareholder in a brewery company (present sub-s. (2)). That company, however, had no connexion of any kind with the applicants or opponents to the licence. Nor was it suggested that the proposed licensed premises would compete with the company. The justice, accordingly, had no pecuniary interest in the subject-matter of the inquiry and no question touching the common law rule arose. In *R. v. Mager* (9) ((1875), 1 Q.B.D. 173), BLACKBURN, J., points out that the legislature has in many cases

- A removed the disqualification imposed by the common law—see, for example, Justices Jurisdiction Act, 1742, s. 1, Justices of the Peace Act, 1867, s. 2, and the Public Health Act, 1875, s. 258. These and all similar enactments, however, expressly empower the justices to act, for example, in matters relating to rates, notwithstanding the fact that the justices have a pecuniary interest in the matter as ratepayers, or expressly remove the disqualification
- B to which a justice would otherwise be subject, for example, as a member of a town council having, as such, a pecuniary interest in the result of a complaint or information. In cases of this type the justices are in a different position from justices who have a pecuniary interest in any matter as shareholders, and no investigation could ever become necessary into the importance of their pecuniary interest as ratepayers or town councillors (*R. v. Handsley* (5)
- C (1881), 8 Q.B.D. 383). Section 48 of the Licensing Act, 1953, is different from all the relevant sections in the class of statutes to which I have referred, in that it is not an empowering section and does not purport to remove any disqualification. Indeed, sub-s. (1) to sub-s. (3) impose a number of technical disqualifications going beyond the common law, and sub-s. (4), far from removing the common law disqualification, expressly disqualifies any justice from acting in any matter in
- D which he is financially interested, and thereby adopts the common law rule. What then is the meaning of sub-s. (5): “No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification . . .”? In my view the words “that disqualification” refer only to the disqualification under the statute. Since s. 48 is not an empowering section or one which removes any disqualification, it leaves the common law disqualification untouched,
- E and this disqualification runs parallel with the statutory disqualification. Accordingly, sub-s. (5) in my judgment saves any act which would otherwise be invalid by reason only of a disqualification under the section, but it does not save an act done by a justice disqualified at common law. This view seems to me to derive some support also from the judgment of LORD ALVERSTONE, C.J., in *R. v. Tempest* (3). It may be asked what purpose could the legislature have had in
- F including sub-s. (4) in s. 48 if it was not intended to absorb the common law disqualification and excuse it under sub-s. (5)? In my view sub-s. (4) was included because under sub-s. (6) of s. 48 a fine may be imposed on a justice only if he acts for a purpose for which he is disqualified under the statute. Accordingly, unless sub-s. (4) were included in the section, a justice could be fined for a mere technical disqualification under sub-s. (1) to sub-s. (3), but not for the
- G disqualification of pecuniary interest, which would be absurd.

I have, accordingly, come to the conclusion that the justices’ pecuniary interest as shareholders is fatal, and for that reason also this application should succeed. I am fortified in this view by the reflection that if it is correct, the statute will not in any case impose on the courts the task which, according to the policy of the common law, should never be undertaken by a court, namely, the task of

H deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal.

I would only add that I am not unmindful of the practical difficulties stressed by counsel for the society which on the particular facts of this case would be involved in the conclusions I have reached, for all the Barnsley justices (or their near relatives) save one, are members of the society. These difficulties are,

I however, in my view of little importance in comparison with the principle involved. In any event the difficulties would undoubtedly exist in any summary proceedings other than licensing matters relating to the society. Such proceedings could not be dealt with by the Barnsley bench as at present constituted, for in such a case an irrebuttable presumption of bias would undoubtedly arise.

I would allow the application.

John McLusky: May I draw your Lordships’ attention to the fact that this licence still has to be confirmed. I would respectfully take the view that on the

decision of the majority of this court the Barnsley justices as a confirming authority are not disqualified from hearing the application for confirmation.

LORD PARKER, C.J.: I do not think that it is for this court to make any further observations on that.

John McLusky: I appreciate that, but any ruling your Lordships would think fit to give on that matter would no doubt be greatly respected.

LORD PARKER, C.J.: We do not give any ruling.

Application refused.

Solicitors: *Corbin, Greener & Cook*, agents for *J. Donald Driver*, Barnsley (for the applicants); *Batchelor, Fry, Coulson & Burder*, agents for *W. Winter*, Barnsley (for the society).

[Reported by **HENRY SUMMERFIELD, ESQ., Barrister-at-Law.**]

GAYNOR v. ALLEN.

[QUEEN'S BENCH DIVISION (McNair, J.), May 27, 1959.]

Road Traffic Negligence—Police motor cyclist travelling at sixty m.p.h. in pursuance of police duties—Speed limit forty m.p.h.—Whether police motor cyclist exonerated from civil liability for negligence by Road Traffic Act, 1934 (24 & 25 Geo. 5 c. 50), s. 3.

The plaintiff, while crossing the northern carriageway of the Great West Road, at Hammersmith (a dual carriageway, each carriageway being some thirty feet wide), was knocked down and injured by a motor cycle driven by one A., who was killed; the accident occurred at about 7.20 p.m., in March, twenty minutes after lighting up time. A. was a police constable who, at the time of the accident, was riding at a speed of some sixty m.p.h. in pursuance of police duties. The speed limit was forty m.p.h. Section 3 of the Road Traffic Act, 1934*, provided, so far as relevant, that the speed limit on motor vehicles should not apply to any vehicle when used for police purposes.

Held: A.'s civil liability for negligence was not affected by s. 3 of the Road Traffic Act, 1934, and in driving at such speed on a restricted road in the half-light he was guilty of negligence.

PER CURIAM: the exempting provision of s. 3 does not qualify police drivers' criminal liability for dangerous driving or, indeed, driving without due care and attention (see p. 646, letter C, post).

[For the Road Traffic Act, 1934, s. 3, see 24 HALSBURY'S STATUTES (2nd Edn.) 713.]

Action.

In this action Susan Gaynor, the plaintiff, a state registered nurse, claimed from Anne Patricia Allen, the defendant, sued as the administratrix of Edgar Gerald Allen (referred to hereinafter as "the deceased"), damages for personal injuries sustained by the plaintiff and loss and damage suffered by her when she was knocked down by a motor cycle driven by the deceased on Mar. 29, 1958, at the Great West Road, Hammersmith, in the county of London. At the time of the accident the deceased, who was a police constable, was acting in the course of his police patrol duties and was driving a motor cycle owned by the Receiver of Metropolitan Police. The plaintiff alleged that the accident was due to the deceased's negligence in that he drove at a speed excessive in the circumstances, failed to keep any or any proper look out, failed to brake or to take sufficient steps so as to avoid colliding with the plaintiff, failed properly to

* Section 3 of the Road Traffic Act, 1934, is printed at p. 645, letter I, post.

A steer, manage or control the motor cycle and failed to sound his hooter or flash his headlights. McNAIR, J., found the following facts. It was the custom of the plaintiff every day, in going to and from the hospital where she worked, to cross the Great West Road from Eyot Gardens (where she lived) to North Eyot Gardens and vice versa. This involved crossing a double carriageway, the two carriageways consisting of roads some thirty feet wide, divided by a
B centre division of grass and railings some four or five feet wide. The speed limit on this part of the Great West Road was forty miles per hour. On the day of the accident, the plaintiff, who was returning home after a day's work at the hospital, reached the grass verge on the north side of the Great West Road, immediately opposite the island in the middle of the road, at about 7.20 p.m., which was some twenty minutes after lighting up time; she was intending to
C cross to the island, and from there, to the south side of the road after having observed if the traffic was clear in both carriageways. The Great West Road is well lit, with lamp standards spaced down the centre division of the road and also along the kerb of each of the carriageways. The plaintiff, who had no clear recollection of the events immediately preceding the accident as a result of concussion caused by the accident, had started to cross the northern carriageway
D when she was hit by the motor cycle driven by the deceased. The evidence showed that just before the accident a group of cars, one of which was travelling faster than the others, had proceeded along the northern carriageway, in the same direction as the deceased and ahead of him: the deceased was travelling at a speed of not less than sixty miles per hour and was probably pursuing, in the course of his police patrol duties, a motor car that was speeding.

E The defendant alleged that the plaintiff was guilty of contributory negligence. In the course of the trial the question arose whether s. 3 of the Road Traffic Act, 1934, affected civil liability in respect of a vehicle which was driven in excess of the permitted speed limit while being used for police purposes.

M. D. Sherrard for the plaintiff.

P. M. O'Connor for the defendant.

F McNAIR, J., having reviewed the evidence and found the facts (see letters A to E, *supra*), continued: The motor cycle was a very powerful machine, capable of a speed of seventy or eighty miles an hour on the Great West Road. Estimates have been given that at the time in question the motor cycle was proceeding at some sixty miles an hour. My conclusion is that the motor cycle
G was certainly going at that speed, and it may well have been going slightly faster, because it is said that the justification for the speed was that the police motor cyclist (the deceased) was properly engaged in pursuing a motor car that was speeding. The unfortunate rider was killed, but I have had evidence from the police sergeant, who knew him well and had served with him for some years, and he gives him a first-class character, both as a man and as a driver. He said
H that he had never been involved in any police offence, and that on this evening he was detailed for patrol duty on the road. I think that the fair inference is, and I find, that at the time when he was proceeding at this speed, certainly sixty miles an hour, probably more, he was proceeding at that speed in pursuance of his police duties.

I In those circumstances, it is clear by reason of s. 3 of the Road Traffic Act, 1934, that although the road in question was subject to a forty miles an hour limit, the deceased was not guilty of a criminal offence, for s. 3 provides:

"The provisions of any enactment, or of any statutory rule or order, imposing a speed limit on motor vehicles shall not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, if the observance of those provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion."

On the facts here, I am prepared to infer and hold that this motor cycle was being

used for police purposes, and was being driven under conditions in which the observance of the forty miles an hour speed limit would have hindered the use of that vehicle for the purpose for which it was being used. A

That, however, deals only with criminal liability, and it raises a question which, so far as I know, is without authority, whether and to what extent s. 3 of the Act of 1934, or the circumstances which bring that provision into effect, affects the civil liability of the driver. It is argued on behalf of the defendant that if the deceased had not been driving on official business and had been proceeding at sixty miles an hour or more on that road on that occasion it would have been difficult for him to escape at least partial liability, but those considerations do not apply in the case of the driver in question. On the other hand, it is observed, and rightly observed, that this exempting provision in s. 3 of the Road Traffic Act, 1934, does not in any way qualify the police drivers' criminal liability for dangerous driving or, indeed, for driving without due care and attention. C It is submitted that s. 3 must be given a strictly limited application to criminal responsibility and does not affect in any way the driver's civil liability.

In my judgment, the deceased, the driver of this police motor cycle, on this occasion as regards civil liability must be judged in exactly the same way as any other driver of a motor cycle on that occasion. He, like any other driver of a motor vehicle, on that occasion owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger. D

The question, as I see it, is this: First, is it clear that the deceased, judged by the standard of an ordinary driver of a motor vehicle on his private occasions, is to be held guilty of negligence causing the accident? I think that the answer to that clearly must be "Yes". To drive at that speed on a restricted road, in the half-light, at a time of the evening when it must be known that there may be pedestrians making their way home, is itself, in my judgment, to drive at an improper and unsafe speed. E

The second question is whether the plaintiff herself is to be held to any extent, and, if so, to what extent, responsible for the accident. [His LORDSHIP referred to the evidence, which was that the plaintiff walked across the road at a medium pace, looking in front of her, and said that the fair conclusion to draw was that when she stepped off the kerb, having looked to her right to see if the way was clear, as she normally did, she then went straight across the road without again glancing to her right, and that in those circumstances, the plaintiff must bear some responsibility for the accident. His LORDSHIP apportioned the plaintiff's share of the responsibility at one-third and the deceased's share at two-thirds, and went on to assess the general damages, the special damages being agreed at £350 19s. 6d. As a result of the accident the plaintiff suffered a transverse fracture of the mid-shaft of the right tibia and fibula, a fracture of the middle of the right clavicle (collar bone), a fracture of the right scapula (the shoulder blade) and certain abrasions. She was detained in hospital for about six weeks and had her right leg in plaster for three months. She returned to private nursing some time before Christmas, 1958, and to her full work at Paddington Hospital in April, 1959. She now complained of tiredness in her right leg at the end of a day's work; she had a prominent protrusion at one end of the collar bone, and her right leg was slightly distorted at the site of the fracture. On these facts His LORDSHIP assessed the general damages at £750, and awarded the plaintiff two-thirds of that amount.] F G H I

Judgment for the plaintiff.

Solicitors: *D. J. Freeman & Fraser* (for the plaintiff); *Pensford & Dovenish, Tivendale & Munday* (for the defendant).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

MARKS v. LILLEY.

[CHANCERY DIVISION (Vaisey, J.), May 29,* June 2, 1959.]

Sale of Land—Contract—Specific performance—Failure to complete on due date—Time not of the essence—Writ issued—Contract completed—Costs of action.

B *Costs—Specific performance—Contract completed soon after issue of writ—Costs of action—Time not of the essence.*

On Nov. 28, 1958, the plaintiff agreed in writing with the defendant to buy the defendant's dwelling-house, the National Conditions of Sale (16th Edn.) being incorporated in the contract. The contract itself specified no date for completion, and accordingly under condition 4 of the National Conditions completion was due to take place on Jan. 7, 1959. Completion did not take place on that day and the plaintiff issued no notice making time of the essence of the contract, but on Feb. 9, 1959, the plaintiff issued a writ claiming specific performance of the contract. On Feb. 16, 1959, possession of the house was given to the plaintiff and the contract was completed on Feb. 18, 1959. On Feb. 25, 1959, the plaintiff issued a summons asking for an order that the costs of the action be taxed and paid by the defendant. It was not suggested that there was any defence to the action.

Held: the plaintiff was entitled to the order for which he asked because he was justified in issuing the writ since his equitable right to specific performance had accrued at the date when it was issued.

[As to costs in proceedings for specific performance, see 31 HALSBURY'S LAWS (2nd Edn.) 429, para. 516; and for cases on the subject, see 42 DIGEST 585, 1510-1523.]

Adjourned Summons.

The plaintiff, having issued a writ against the defendant claiming specific performance of an agreement to sell a dwelling-house, now applied, after the completion of the sale, by a summons in the action for an order that the costs of the action be taxed and paid to the plaintiff.

Greville Janner for the plaintiff.

E. G. Nugee for the defendant.

VAISEY, J.: This is an action in which the plaintiff, Mr. Brian Marks, claims against the defendant, Mr. John David Lilley, specific performance of an agreement dated Nov. 28, 1958, whereby the defendant agreed to sell to the plaintiff a house known as No. 86, Winchester Avenue, at Wembley, in the county of Middlesex. A great deal has been said about this contract; but without going into too great detail, it seems to me pretty clear. The contract is on a printed page, and one of the clauses in the contract is that the purchase should be completed "on or before the (blank) day of (blank) next"; i.e., that particular printed clause is left in blank. Therefore, in one sense, the contract names no date for completion; but the contract also says that the property is sold subject to the National Conditions of Sale (1953) (16th Edn.), with certain exceptions which are immaterial. When I look at those National Conditions I find that the date for the completion of the purchase is provided for in perfectly clear language. Number 4 of the National Conditions provides:

"The completion date shall be the day mentioned for the purpose in the special conditions or, if none, the first working day after the expiration of five weeks from the delivery of the abstract of title."

It is no good telling me that the real arrangement was that the contract should not be completed on that date, but on some date which was referable to the completion of a building for the defendant's occupation, or something of that kind. Here is the contract in perfectly plain terms, and it provides a date for completion.

Unfortunately, owing to difficulties into which I need not go, the defendant was unwilling and unable to complete the contract on the date indicated, and no step was taken to make time of the essence of the contract. The date which was indicated for the completion of the purchase under the general conditions, i.e., the first working day after the expiration of a certain period, was Jan. 7, 1959. The purchase was not completed on that day, and a considerable amount of correspondence took place between the solicitors for the parties. The plaintiff pressed for an early completion, and the defendant said that he was quite willing to complete as soon as he could, but that he was not at present able to do so. One month after that date, i.e., after Jan. 7, 1959, the plaintiff issued the writ in this action, on Feb. 9, 1959. I think in a sense he acted rather precipitately, but the question is: Was he entitled to issue this writ? There had been no default in the strict sense. There had been no firm date for completion of the essence of the contract, and I do not think that there was any doubt that, subject to clearing away the difficulties which were besetting the defendant, the contract would have been completed within a reasonable time. In fact, what happened was that seven days after the issue of the writ, possession of the property was given to the plaintiff on Feb. 16, 1959, and the contract was in fact completed on Feb. 18, 1959. The completion statement did not deal with the costs of the action, but contemporaneously or immediately afterwards the plaintiff asked for the costs of the action. When asked what they would come to, he said £25, which seems to have been rather a shock to the defendant, and indeed I am not surprised. I think that it was probably too much. On Feb. 25, 1959, the summons was issued by the plaintiff, asking for an order that the costs of the action should be taxed and paid to the plaintiff. Strictly speaking, that was premature, because he ought not to get the costs without going into the merits of the case and so on, and there might have been matters of controversy which would have afforded a defence to this action. It is quite obvious, however, that in point of fact there was no defence to the action; but the defendant takes the view that the issue of the writ was premature, and that he ought not to be asked to pay the costs of an unnecessary action.

I agree that the point is somewhat technical, but I am going to quote from Mr. T. CYPRIAN WILLIAMS' book on the *CONTRACT OF SALE OF LAND* (1930), p. 132, which I think is a well-founded expression of the law of specific performance:

"The cause of action . . . is not a breach of the contract, such as alone gives rise to an action at law for damages, but is the duty considered in equity to be incumbent on the defendant of actually doing what he promised by the contract to perform. It follows that a breach of the contract by one party thereto is not necessarily a condition precedent to the other party's obtaining an order for its specific performance; though a breach of the contract is usually requisite to induce the court to interfere."

Nowadays, this contract could have been registered as an estate contract, which would have afforded protection to the purchaser: but in former days, before there were such things as registered estate contracts, I believe that the issue of a writ for specific performance before actual breach was to enable the purchaser, if he thought right, to register his action as a *lis pendens*. In my judgment, when that summons was issued on Feb. 25, 1959, the plaintiff was entitled to an order for the payment of the costs of the action, notwithstanding the fact that the action had yet to be tried, because it is admitted that there is nothing left in the action. Completion has taken place and, although technical points might be taken, it is not suggested that there was any real defence to the action. The sole question is: Was the plaintiff justified in issuing the writ which he did issue on Feb. 9, 1959? I think that he was. I quite agree that it seems like a futile proceeding in a way; but, as the equitable right had already accrued, notwithstanding the fact that the date for completion had yet to be made certain by the service of the ordinary

A notice making time of the essence, I think that at the date that the writ was issued there was already in existence a right which the plaintiff was in a position, if he had so desired, to enforce by action. I think that the proper course to be followed by the defendant would have been to agree to pay the costs of the action to be taxed.

B The effect of my making an order for the payment of the plaintiff's costs is to dispose of the only outstanding point, and I shall stay all further proceedings, subject only to an order that the plaintiff's costs as between party and party shall be taxed and be paid by the defendant, and there will be an end of the action.

Order accordingly.

Solicitors: *John Pinto* (for the plaintiff); *Francis & Francis* (for the defendant).

(*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*)

THATCHER v. THATCHER AND GILL (WHEELER intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karininski, J.), May 27, 1959.]

E *Divorce—Practice—Pleading—Answer to cross-petition—Amending answer to cross-petition by adding cross-charge of desertion—Three years immediately preceding the presentation of the cross-petition—Date of cross-petition—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (b)—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 18 (1).*

F In 1957 the husband presented a petition for divorce on the ground of the wife's adultery. The wife by her answer denied the allegation and cross-prayed for a divorce on the grounds of cruelty and adultery to which the husband filed a reply. In 1959 the wife obtained leave to amend her answer to include a cross-petition for divorce on the ground of the husband's desertion from a date in March, 1955. On an application by the husband to amend his reply by including by way of answer to the cross-petition a cross-prayer for divorce on the ground of the wife's desertion from a date in March, 1955,

Held: leave would be granted to make the amendment sought.

[As to cross-charges in answer, see 12 HALSBURY'S LAWS (3rd Edn.) 341, para. 713, note (e); and for cases on the subject, see 27 DIGEST (Repl.) 481, 482, 4196-4199.]

H For the Matrimonial Causes Act, 1950, s. 1 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 389.]

Cases referred to:

(1) *Spawforth v. Spawforth*, [1946] 1 All E.R. 379; [1946] P. 131; 115 L.J.P. 38; 174 L.T. 260; 27 Digest (Repl.) 451, 3823.

(2) *Robertson v. Robertson*, [1954] 3 All E.R. 413 n.; 3rd Digest Supp.

Application.

I In this case by a petition dated June 27, 1957, the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. By her answer dated Mar. 18, 1958, the wife denied adultery and cross-prayed for divorce on the grounds of the husband's cruelty and adultery with the intervener. By his reply the husband denied the alleged cruelty and adultery. On May 14, 1959, pursuant to an order of the registrar, the wife amended her answer to include a cross-petition for divorce on the ground of the husband's constructive desertion

from a date in March, 1955, but prior to Mar. 18*; and on May 22, 1959, the husband amended his reply to deny the alleged desertion. At the hearing of the suit the husband applied for leave to amend his reply by including by way of answer to the cross-petition a cross-prayer for divorce on the ground of the wife's desertion "for a period of at least three years immediately preceding the presentation of the cross-petition", namely, from Mar. 19, 1955. The application was supported by the other parties to the suit.

Brian T. Neill for the husband and for the intervener.

Alan de Piro for the wife.

C. J. S. French for the co-respondent.

Brian T. Neill referred to *Spawforth v. Spawforth* (1) ([1946] 1 All E.R. 379), and *Robertson v. Robertson* (2) ([1954] 3 All E.R. 413 n.) and submitted that, since it was proper for the wife to cross-petition on the basis of a period of three years preceding the date of the cross-petition, the husband was entitled to the same relief by way of answer to the cross-petition.

KARMINSKI, J.: In a reply that is a novelty, is it not? It seems an excellent way out. Otherwise it means the presentation of a new petition with all the costs that it would incur, which is very much to be deprecated. Rule 18 (1) of the Matrimonial Causes Rules, 1957, says:

"No reply shall be filed without leave, except where the answer contains counter-charges and a prayer for relief, in which case a reply may be filed within fourteen days from the delivery of the answer."

To strike out the existing petition and start again would be a costly method. Once there is a cross-petition, the petitioner in the original petition must be in no worse position than the respondent; so the proposed reply is really an answer to the counterclaim, with the right to cross-pray. I give you leave to make the amendment. Both counsel for the wife and the co-respondent are present, and by consent I shall order no re-service.

[The husband abandoned his charge of cruelty and the wife abandoned her cross-charges of cruelty, adultery and desertion. HIS LORDSHIP then heard evidence by the husband in support of the charge of desertion raised in the amended reply and granted a decree nisi to the husband and dismissed the co-respondent and the intervener from the suit.]

Order accordingly.

Solicitors: *Champion & Co.*, agents for *Knight & Maudsley*, Maidenhead (for the husband and for the intervener); *Willmetts & Co.* (for the wife and for the co-respondent).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* Although it was alleged in the answer that desertion occurred "prior to Mar. 18", in fact it was not disputed that the separation took place after Mar. 18, 1955, i.e., less than three years preceding the date of the answer.

ARMSTRONG v. SHEPPARD & SHORT, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Willmer, L.J., and Cassels, J.), May 8, 1959.]

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod and Willmer, L.J.J.), May 12, 13, 14, 1959.]

Trespass—Construction of sewer on plaintiff's land—Oral permission by plaintiff while ignorant of his proprietary right—Permission revoked after sewer constructed—Defendants continuing to discharge effluent through plaintiff's land—Injunction—Damages.

The plaintiff was the owner of one of a number of houses at the back of which was a private pathway leading from the public highway to premises owned by the defendants. The plaintiff's house was the one nearest to the highway, and the strip of pathway behind his house and garden, and adjoining the highway, was part of his property. In 1957 the defendants wished to construct a sewer under the pathway to carry storm water and a small quantity of foul water from their premises to the public sewer in the highway. Before proceeding with the work, they asked the plaintiff (among others) for his permission. In a telephone conversation with a representative of the defendants, the plaintiff raised no objection to the construction of the sewer or to the construction of a manhole on the strip of the pathway which belonged to him; but, at the time, he was not aware that that piece of the pathway was his own property, the title deeds to his property being held by mortgagees. From the end of 1957, when the construction of the sewer was completed, effluent from the defendants' premises was discharged through this sewer into the public sewer. The plaintiff suffered no inconvenience from the construction or use of the sewer. In August, 1958, the plaintiff, having learned that he was the owner of the strip of pathway where the manhole had been constructed, requested them, by letter of his solicitor, to remove the sewer and the manhole, stating that they had been constructed on his property without his permission. The defendants having failed to comply with his request, the plaintiff brought an action against them, claiming damages for trespass and an injunction to restrain the further discharge of effluent through the sewer. The trial judge found that the defendants had, technically, committed trespass and awarded nominal damages of 20s. to the plaintiff, but refused to grant him the injunction. On an appeal by the plaintiff that an injunction should be granted and that the damages were inadequate, and on cross-appeal by the defendants that the action should have been dismissed by reason of the plaintiff's approval of the sewer, it was not disputed that the award of damages was referable only to the entry and excavation for the manhole and sewer and to trespass by discharge of effluent to the date of the hearing.

Held: (i) (on the appeal) the plaintiff was not debarred by acquiescence from enforcing his legal rights because he had not known that he owned the strip of land at the time when he gave his assent; but an injunction should nevertheless not be granted in aid of his legal right, because any injury to the plaintiff was trivial, and for the same reason the award of nominal damages of 20s. was adequate.

(ii) (on the cross-appeal) the plaintiff's oral assent to the construction of the manhole and sewer was sufficient answer to his claim in trespass for their having been constructed on his land, even though the assent was given in ignorance of his legal title to the land; but the oral assent was not sufficient answer to a claim for discharging effluent through the plaintiff's land, because such a right could not be granted validly by parol, and, if the plaintiff had given licence for the discharge of the effluent, the licence was not irrevocable

(since it was gratuitous and did not rest in contract) and had been revoked by the letter of the plaintiff's solicitors.

Appeal and cross-appeal dismissed.

[As to what constitutes trespass to land, see 33 HALSBURY'S LAWS (2nd Edn.) 6, para. 9.

As to the distinction between an easement and a licence, see 12 HALSBURY'S LAWS (3rd Edn.) 524, para. 1133.

As to when an injunction will be granted, see 21 HALSBURY'S LAWS (3rd Edn.) 352, 354, paras. 739, 742, 743.]

Cases referred to:

- (1) *Ramsden v. Dyson*, (1866), L.R. 1 H.L. 129; 28 Digest 429, 528.
- (2) *Willmott v. Barber*, (1880), 15 Ch.D. 96; 49 L.J.Ch. 792; 43 L.T. 95; on appeal, C.A., (1881), 17 Ch.D. 772; 31 Digest (Repl.) 431, 5579.
- (3) *Imperial Gas Light & Coke Co. (Directors, etc.) v. Broadbent*, (1859), 7 H.L. Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 11 E.R. 239; 28 Digest 391, 205.
- (4) *Webb v. Paternoster*, (1619), 2 Roll. Rep. 143, 152; 81 E.R. 713, 719; Palm. 71; 81 E.R. 983; 30 Digest (Repl.) 539, 1738.
- (5) *Wood v. Lake*, (1751), Say. 3; 96 E.R. 783; 30 Digest (Repl.) 537, 1713.
- (6) *Winter v. Brockwell*, (1807), 8 East. 308; 103 E.R. 359; 30 Digest (Repl.) 539, 1739.
- (7) *Taylor v. Waters*, (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 30 Digest (Repl.) 530, 1680.
- (8) *Hewlins v. Shippam*, (1826), 5 B. & C. 221; 7 Dow. & Ry. K.B. 783; 4 L.J.O.S.K.B. 241; 108 E.R. 82; 19 Digest 7, 2.
- (9) *Wallis v. Harrison*, (1838), 4 M. & W. 538; 1 Horn & H. 405; 8 L.J.Ex. 44; 150 E.R. 1543; subsequent proceedings, (1839), 5 M. & W. 142; 19 Digest 28, 130.
- (10) *Wood v. Manley*, (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L.J.Q.B. 27; 113 E.R. 325; 18 Digest (Repl.) 342, 904.
- (11) *Wood v. Leadbitter*, (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 153 E.R. 351; 30 Digest (Repl.) 542, 1771.
- (12) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (13) *Bentall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.
- (14) *Liggins v. Inge*, (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L.J.O.S. C.P. 202; 131 E.R. 263; 30 Digest (Repl.) 539, 1740.

Appeal and Cross-Appeal.

The plaintiff, Henry Albert Armstrong, appealed from a judgment given by His Honour Judge HARGREAVES at Willesden County Court on Dec. 18, 1958. The defendants, Sheppard & Short, Ltd., served notice that, on the hearing of the plaintiff's appeal, they desired to contend that the judgment should in any event be reversed or varied, and that judgment should be entered for them.

By his particulars of claim, the plaintiff, after stating that he was the registered proprietor of the property known as No. 2, Priory Close, Wembley, Middlesex, alleged that on or about Dec. 6, 1957, the defendants wrongfully entered his land, excavated part thereof, and constructed a sewer and manhole therein; and that, since about January, 1958, the defendants had discharged or caused or permitted to be discharged sewage or effluent through the sewer and threatened to continue to do so. The plaintiff claimed: (i) damages limited to £400; and (ii) an injunction to restrain the further discharge of effluent through his land. The defendants, by their defence, alleged that the plaintiff gave an oral licence to them to excavate the land in the passage way at the rear of his property and to construct a sewer and manhole thereon, and that, therefore, the plaintiff was not

A entitled to complain of the matters set out in the particulars of claim. The learned judge found that the plaintiff had intimated to the defendants that he had no objection to the construction of the sewer; that, at the time of the intimation, the plaintiff did not know that he was the owner of any part of the passage-way under which the sewer was to be constructed; and that the plaintiff had made no objection while the work was actually in progress and had proved no actual damage. The judge held that, in the absence of permission, the defendants had committed trespass on the plaintiff's property for which the plaintiff was entitled to nominal damages; and that the plaintiff was not entitled to an injunction; and he gave judgment for the plaintiff in the sum of 20s. for damages and the costs of his action.

C The appeal came on for hearing on May 8, 1959, before LORD EVERSHED, M.R., WILLMER, L.J., and CASSELS, J., and argument on the appeal was concluded at that hearing. The cross-appeal came on for hearing on May 12, 1959, before LORD EVERSHED, M.R., ORMEROD and WILLMER, L.JJ.

D. G. Scott for the plaintiff.

E. A. Machin for the defendants.

D **LORD EVERSHED, M.R.:** This appeal and cross-appeal have taken an unusual course, owing to the necessary change in the constitution of the court after the hearing of the appeal. I can only hope that the result has not been to increase the difficulties or the costs of the parties concerned.

E The case has certainly not been without interest or without difficulty. The facts of the appeal are, briefly, these. The plaintiff is the owner and occupier of certain premises known as 2, Priory Close, Harrow Road, Wembley. It appears from the entry in the register at the Land Registry that the plaintiff has charged his interest by way of mortgage; and the significance of that fact lies in this, that the documents of title which he might have held at the relevant time were in the possession of the chargee. The plan which I have before me, and which is attached to the entry on the register, shows that the plaintiff's house is at the extreme end of Priory Close, that is, at its south-east end, where Priory Close goes into Priory Avenue. At the back of the plaintiff's house is a pathway, or roadway, made up, not being a public highway. That pathway goes at the back of a number of houses and leads to premises now owned and occupied by the defendants, Sheppard & Short, Ltd. The little strip of that pathway which (so to say) matches the plaintiff's house and garden is at the end of that passage nearest to Priory Avenue. At the end of 1957 the defendants conceived the idea that it would be to their advantage to construct a drain, or sewer, from their premises, and leading to the public sewer in Priory Avenue. The drain was not required to carry any great quantity of foul water. The defendants were concerned only with one water closet and one urinal; but they also wished to carry away the storm water, which would collect on their building, in the same manner to the sewer in Priory Avenue. They constructed, accordingly, a manhole and made the necessary excavations for the sewer; and they also constructed the sewer. The manhole is, in fact, situated on the little strip, which belongs to the plaintiff and which I have described as being the strip at the extreme end of the passage-way nearest to Priory Avenue. That was done, and it was concluded by the end of 1957. Thereafter, the defendants passed the foul and storm water down this drain into the public sewer in Priory Avenue.

I On Aug. 20, 1958, the plaintiff, through his solicitors, wrote to the solicitors for the defendants a letter which, after stating who the writers were, continued as follows:

Our client [the plaintiff] further instructs us that he has at no time been approached by the defendants for permission or been advised of their intention, and has given no permission or licence of any kind. We write on behalf of the plaintiff to require that the sewer and manhole be removed forthwith

from his premises, the premises be made good, and [the plaintiff] compensated in damages for the trespass. Alternatively, [the plaintiff] will have no alternative but to take such steps as may be necessary to stop the unauthorised flow of effluent across his land."

The reply from the defendants' solicitors denied the assertion that no permission of any kind had been given. Unfortunately that was not satisfactory to the plaintiff, and the present proceedings were begun in October, 1958. The particulars of claim alleged (i) that the plaintiff was at all material times the registered proprietor of 2, Priory Close; (ii) that on or about Dec. 6, 1957, the defendants wrongfully entered and excavated part of his land and constructed a sewer and manhole; and (iii) that since January, 1958, the defendants had discharged or caused or permitted to be discharged effluent through the sewer under the land. The plaintiff claimed damages for trespass (but limited to the sum of £400); and he also claimed an injunction against the further discharge of effluent through or under his land.

The matter came on for trial in December, 1958, a year after the entry complained of. It is quite plain from the evidence given by the plaintiff that he continued to assert that he had never given any assent to or permission for what the defendants had done. According to the learned judge's note, the plaintiff said:

"I have never given consent for the manhole and I had no knowledge it was to be built. I did notice it being done on two or three occasions. On the first, the construction of it was well on the way. I did nothing at all about it. I was not approached by anyone for consent."

I must say in clear and unqualified terms that that evidence was false, according to the judge's finding. The learned judge held, after hearing the evidence (and, in particular, the evidence of the representative for the defendants, a Mr. Sheppard), that there had been clear permission or assent given to what was being done. Mr. Sheppard described the interview with a little detail. He said that the plaintiff pointed out that he himself was in the business of a sanitary engineer, which took him all over the country, and he fully understood the defendant's difficulty. It must, however, be conceded that the defendants were somewhat rash over this matter. They had first made a mistake, apparently, in supposing that a Mr. Nelson was the owner of the whole of the relevant property. No doubt that mistake put them in a difficulty. They had to see, and according to the evidence saw, a number of house-owners whose properties back on to this strip; but they were content—rashly, as I have ventured to say—to leave it on the footing that they supposed that they had been properly authorised, by all the persons interested, to construct the sewer and to pass this effluent down it. The learned judge found that they were justified in supposing that, so far as the plaintiff was concerned, he knew what his rights and position were and had deliberately consented to what the defendants were doing. The plaintiff, however, though baulked in his attempt to establish that he had never spoken to anybody about it, also gave evidence of the fact that, at the time when this was going on and when (as eventually was found) he gave his assent to the defendants, he was unaware that he had any proprietary right in respect of this strip—he did not, apparently, use it himself—and, therefore, he must be taken to have been unaware that he had any interest or concern which was involved when his permission was asked or that he could refuse his consent or qualify it.

The part of the learned judge's judgment dealing with that is as follows:

"I accept the [defendants'] evidence that there was a telephone conversation between [them] and the plaintiff, and I accept the [defendants'] evidence that [they] induced the plaintiff to have given [them] permission to go ahead with the work of constructing the sewer; but I also accept the plaintiff's evidence that he did not give the [defendants] such permission. My reason for both conclusions is the same, that the plaintiff, not having seen

A the deeds of his property for some time and forgetting the contents of the
deeds and the exact boundary of the plan, did not realise when he spoke to
the [defendants] that he, the plaintiff, was the owner of any part of the said
pathway. This being so, he would naturally not give permission to the
[defendants], because he did not know he had the right to do so; neither,
B however, would he object, because he would not know he had the right to
object either. Consequently, I feel safe in taking the view that the plaintiff
is right in saying that he never actually gave permission for the sewer to be
constructed, but that the [defendants are] correct in saying that the plaintiff
made it clear, whatever words he used, that he was not objecting to it."

To some extent the distinction is one more of words than of substance. It is
clear, however, that what the judge meant was that the plaintiff did not give
C permission, in the sense that he did not purport, qua owner, to give authority or a
licence to the defendants to do something on his land. On the other hand, the
learned judge found that the plaintiff made it quite clear, and that the defendants
were well justified in so assuming, that he was raising no kind of objection to the
proposed course of construction. In those circumstances, the learned judge at the
trial declined to grant any injunction, either to remove the manhole or to restrain
D the effluent being sent down. He also held that the damage suffered from the
trespass which, on the view that he took, he thought must technically have been
committed, was purely nominal. He therefore said:

"Taking the view, as I do, that it is reasonable for the plaintiff to desire
that his position should be clarified, I award him costs on Scale 2."

E By the notice of appeal the plaintiff submitted that the learned judge should
have granted an injunction, in the terms of the claim, to restrain the discharge of
the effluent down the sewer. The short basis of the case made for an injunction
was this: A proprietor who establishes a proprietary right is, *ex debito justitiae*,
entitled to an injunction, unless it can be said against him that he has raised such
an equity that it is no longer open to him to assert his legal or proprietary title.
F In this case (said counsel for the plaintiff) it is of the essence of the judge's
finding that the plaintiff did not know that he had the proprietary right which
would be affected by the suggested licence, and, therefore, no such equity is
raised against him which will deprive him of his *prima facie* right to an injunction.
Further, the plaintiff said that 20s., which was derisory damages, was quite
inadequate by way of compensation for the interference with his proprietary
right. We heard the argument on that appeal, the court being constituted by
G myself, WILLMER, L.J., and CASSELS, J.; and the argument on that appeal was
concluded. CASSELS, J., was unable to sit further, and, therefore, the court was
reconstituted, and ORMEROD, L.J., joined WILLMER, L.J., and me for the purpose
of hearing the cross-appeal, the substance of which was that, in the circumstances
and for reasons which will be dealt with when I deal with the cross-appeal, the
learned judge should have dismissed the plaintiff's action altogether. Owing to
H this change in the composition of the court, it is necessary in this case to distin-
guish clearly between the appeal and the cross-appeal, and, in order to remove
possible doubts, I thought that it might help if I wrote a statement of the points
raised and submitted it to the learned counsel in the case for approval. They
said that they approved it, and it may be worth while my incorporating in this
judgment the statement which I made. It is as follows:

I "On the appeal counsel for the plaintiff contended (a) that the judge
should have granted the injunction prayed, and (b) that the damages
awarded (i.e., nominal damages of 20s.) were too low. On the appeal the court
(myself, WILLMER, L.J., and CASSELS, J.) have intimated their rejection of
the appeal, but have treated the damages awarded as referable to the entry
and excavation or (at most) to the alleged trespass up to the date of the hear-
ing.

"On the cross-appeal counsel for the defendants contends that the action

should have been dismissed on the ground that the 'approval' given by the plaintiff as found by the judge prevents him complaining that the acts of entry and excavation (and any other acts covered by the award of 20s. damages—see above) were trespasses: and [counsel] further contends that such 'approval' also prevents [the plaintiff] (personally) complaining of any use of the pipes laid by the defendants for the (obvious) purpose for which they were laid. Counsel for the defendants concedes that, unless he is right on his wider contention, the plaintiff may bring fresh proceedings founded on trespass or may himself interfere with the manhole and pipes. Counsel for the defendants further concedes (for present purposes) that the plaintiff's 'approval' does not extend in effect to the plaintiff's successors in title. The question, therefore, to be debated on the cross-appeal is whether, on the facts proved or found, the effect of the plaintiff's 'approval' is to prevent him personally complaining (on the ground of trespass) of the defendants' acts in entering on and excavating the land and installing the pipes and manhole and also in using the manhole and pipes in the ordinary course for the purposes for which they were installed."

For the present purposes, the most important sentence is: that it has been accepted by the court that the damages awarded in the action must be treated as referable, and referable only, to the entry and excavation, or, at most, to any alleged trespass (by discharge of effluent) up to the date of the hearing.

I now, therefore, come back to give the reasons for the conclusion which I have earlier indicated that the appeal fails. The proposition of counsel for the plaintiff, in general, must, I think, be accepted. First, it is true to say that a proprietor will not be debarred, on the ground of acquiescence, from asserting his legal rights against one who is shown to have infringed them, unless it is also clear that, at the time when he did so acquiesce, the proprietor was aware of his proprietary rights. There is substantial authority for that view, such as *Ramsden v. Dyson* (1) ((1866), L.R. 1 H.L. 129) and the judgment of FRY, J., in *Willmott v. Barber* (2) ((1880), 15 Ch.D. 96). It is, therefore, in this case, I think, well said by counsel for the plaintiff that the absence of an essential knowledge, as found by the judge, in December, 1957, prevents the erection against the plaintiff of an equity which would bar him from asserting, for any purpose, his legal title. Secondly, it is true to say that, if a man, having a proprietary right, proves an infringement of that right, *prima facie* he is entitled to an injunction: but that needs some qualification. It is not a matter of unqualified right: and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on *Imperial Gas Light & Coke Co. (Directors, etc.) v. Broulbert* (3) ((1859), 7 H.L. Cas. 600): but I can, I think, summarise it by reading from KERR ON INJUNCTIONS (6th Edn.) (1927) at p. 30:

"After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."

The learned judge (he it observed) was here dealing with the claim as I have formulated it, and he came to the conclusion that the circumstances of this case were special, and, as his judgment shows, that the damage was trivial. For the latter statement, he was supported by the plaintiff himself, who said in evidence that he had suffered no inconvenience whatever from what had been done. But there were other good grounds, and formidable grounds (as I think), for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He was serious about the matter at all: and in his evidence in chief he so swore, untruly. It is not, therefore, at all surprising that the learned judge came to the conclusion

A that he should grant no equitable relief: and, in my judgment, on the facts of this case he was well entitled to take that view. Nor, on the evidence, does it seem to me that the plaintiff can complain of the award of 20s. damages. He proved none. He said (as I have mentioned a moment ago) that he had suffered no inconvenience whatever; and one has only to look at the picture and have some comprehension of the circumstances and facts to realise that he could not have suffered the slightest inconvenience—all the more since, as he says, he never uses the pathway.

B There is, however, one matter which clearly was not, I think, dealt with. The passing the effluent down the sewer, as distinct from the work of construction, does involve (and I am now approaching a point which must be dealt with more fully on the cross-appeal) something which is in the nature of a proprietary interest, in the nature of an easement—a right to pass effluent under somebody's land; and if it is a right in respect of which the plaintiff's land must become, so to speak, a servient tenement, then I think that a case might well have been put for saying, under Lord Cairns' Act (the Chancery Amendment Act, 1858*), that there should be an award of monetary compensation referable to the qualification which would thereby be imposed on the title of the plaintiff as absolute owner. It is, however, quite clear that the learned judge was not invited to consider Lord Cairns' Act. As I have said, the damage (as has been agreed before us) must be treated as having been limited to the technical trespasses, such as they were—that is to say, assuming that the cross-appeal did not succeed, to the excavations and the discharge of effluent up to the hearing.

D The result of what I have said, therefore, is that the appeal fails. Counsel for the plaintiff has not persuaded me that he is entitled to an injunction, and he has not persuaded me that there is anything wholly wrong with the award of damages as compensation for the alleged trespasses up to the date of the hearing. It follows, therefore, that the appeal should be dismissed: and I have been authorised by CASSELS, J., to say that he agrees with the conclusion which I have stated, and with my reasons.

F WILLMER, L.J.: I also agree that the appeal should be dismissed, for the reasons stated by my Lord; and I do not desire to add anything further on the appeal.

G LORD EVERSLED, M.R.: I now proceed to deal with the cross-appeal. I have indicated that its purpose was that the action should have been dismissed. The form of the notice given was:

“... the [defendants desire] to contend that the ... judgment should in any event be reversed ... so far as it directs that there should be judgment for the plaintiff for £1 with costs ... And ... the [defendants propose] to ask the Court of Appeal to enter judgment ... for the defendants ...”

H To enter judgment, that is to say, that the action should be dismissed altogether. I shall treat as incorporated also in this judgment the memorandum which I gave to counsel and with which they agreed, because it states what was the point which counsel for the defendants has put before us with great care. His point was shortly this. He said, in effect: “I am only concerned to resist an action for common law trespass: if, therefore, I can establish that the subject-matter of which the plaintiff complains was not without lawful justification, that is an answer to the plaintiff's action; and I say that that of which the plaintiff complains had lawful justification, for the plaintiff himself approved it: he approved the entry on his land for the purpose of excavating that land and inserting a sewer and a manhole, and, particularly since the plaintiff himself appeared to be

* The Chancery Amendment Act, 1858, was repealed by the Statute Law Revision and Civil Procedure Act, 1883, but by savings in that and later Acts the jurisdiction given to the Chancery Court by s. 2 of the Act still exists and is vested in the High Court: see 18 HALSBURY'S STATUTES (2nd Edn.) 456.

in the same line of business, he certainly must have supposed that the pipe was not put into the land merely for the fun of it but was put there in order that effluent of some kind could be passed through it." Counsel went further and said that the plaintiff would have known exactly what the whole purpose of the operation was: that, therefore, it could not be said by the plaintiff that the entry and excavation, and the natural and intended consequences thereof, were without justification; and that that was an answer to an action for trespass. Counsel for the defendants has not contended that, if he is right, he can do other than answer an action brought by the plaintiff. He would not suggest that, if the plaintiff were to sell his property, the buyer would be affected by the permission, authority—whatever the right word is—which the plaintiff gave. But he does say that the plaintiff, having authorised what the defendants did, and having, therefore, authorised the obvious and intended consequences, cannot complain at common law.

There is much attraction in the argument, particularly on the facts found: and it is not easy to put out of one's mind that the plaintiff attempted to say that he never knew anything about it. In support of the argument counsel for the defendants has taken us through a series of cases, beginning with *Webb v. Paternoster* (4) (1619), Palm. 71). We looked at that case and at later cases which I will just mention: *Wood v. Lake* (5) (1751), Say. 3); *Winter v. Brockwell* (6) (1807), 8 East, 308); *Taylor v. Waters* (7) (1816), 7 Taunt. 374); *Henlins v. Shippam* (8) (1826), 5 B. & C. 221); *Wallis v. Harrison* (9) (1838), 4 M. & W. 538); *Wood v. Mansley* (10) (1839), 11 Ad. & El. 34); down to the well known and classic case, *Wood v. Leadhitter* (11) (1845), 13 M. & W. 838). Finally, we looked at *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.* (12) ([1947] 2 All E.R. 331), and at a dictum of DENNING, L.J., in *Bendall v. McWhirter* (13) ([1952] 1 All E.R. 1307 at p. 1312).

It is, I think, true to say (and these cases establish it) that, if A. gives authority to B. for the doing of an act on A.'s land and the act is done and completed, then, whatever be the strict description of the authority, whether it be called a permission or a licence, it is, generally speaking at any rate, too late for A., who gave the authority, to complain of it. And that will go to this extent—that a man may by such means extinguish a proprietary right: for example (to quote an instance from the cases), if I, having an easement of light, permit another to come and build a wall up against my window, so as to extinguish the easement, if the wall is built and completed that may well be the end of it, and I cannot complain of the infringement of my ancient light or require the wall to be taken down.

The effect of these cases was for this purpose sufficiently well stated in GALE ON EASEMENTS (11th Edn.) (1932) at p. 67. After a very full discussion of the cases to which counsel for the defendants referred us, it is there stated:

"The result of the common law authorities above referred to was thus in effect stated by Mr. Gale: 'A man may in some cases by parol licence relinquish a right which he has acquired in addition to the ordinary rights of property and thus restore his own and his neighbour's property to their original and natural condition?'"

I intervene there to say that that is obviously a reference to *Liggins v. Inge* (14) (1831), 7 Bing. 682), to which counsel for the defendants drew our attention. In that case, the plaintiff's father approved a neighbour's so altering an embankment to a watercourse that the water which had formerly flowed to the plaintiff's mill was diverted to the neighbour's (the defendant's) property. The actual doing of the work was no trespass, for the bank was wholly on the defendant's property: but the point is that, once the work had been done, then the consequence followed that a previously enjoyed right of receiving water had been pro tanto lost—just as, if one allows another to build against one's window, one may lose an ancient right of light. But I observe that in these cases (so far as I can see) it is always assumed that the plaintiff giving the licence knew what his

real rights were. I continue to read from GALE ON EASEMENTS (11th Edn.) at pp. 67, 68:

“ But he cannot by such means impose any burden on land in derogation of such ordinary rights of property”. Thus, a parol licence given by B, the owner of land (the servient tenement), to A, the owner of a neighbouring house (the dominant tenement), to turn a spout of water from the house on to the land, will be revocable. On the other hand, supposing in such a case the house to contain ancient windows, a parol licence given by A to B to build a wall on B’s land in front of A’s ancient windows will be irrevocable once the wall has been built. It would seem, however, that, in order that a parol licence should so operate, the act licensed should be executed, and the necessary consequence of such execution should be per se the extinguishment of the right to light. For the cases do not appear to furnish any authority for saying that where the extinguishment of an easement would depend upon a repetition of the licensed acts, a parol licence would be sufficient to effect it. Indeed, where the acts from their nature lie in repetition such licence could not be executed.”

I would add that that statement finds later support, I think, in the speeches of VISCOUNT SIMON and LORD PORTER (to which counsel for the plaintiff referred us) in *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (12).

If that is a right summary, it follows that counsel for the defendants is entitled to say that the plaintiff cannot complain of the alleged trespass consisting of the defendants’ acts of entry on his land in December, 1957, making holes in it and putting a sewer and a manhole in it; and I agree with him that, in an action of common law trespass, it does not, in the circumstances here, matter that the plaintiff was unaware of his proprietary rights when he gave permission: the thing is done: and it has had the lawful justification (in so far as this case is concerned) that it was done with the approval of the man who now tries to complain about it. It follows from that conclusion (as counsel for the plaintiff conceded) that the plaintiff cannot complain of the presence in the land now of the physical things, the manhole and pipes; indeed, as counsel for the defendants conceded, they belong in law to the plaintiff, there having been no agreement or arrangement made which would alter the ordinary consequence that that which is put into a man’s land becomes part of that man’s property. But that only goes to deal with the matter of the original entry and the physical things, the manhole and sewer. What of the passage of effluent, which is the subject of para. (iii)* of the particulars of claim? For unless counsel for the defendants can satisfy us that he can also find an answer to the allegation of trespass by means of the discharge of effluent, then he cannot succeed, as it seems to me, in disposing of the award of 20s. damages and the consequences as regards costs in the action. He cannot, in other words, invite us to set aside the judge’s judgment and dismiss the action.

In my judgment, counsel for the defendants cannot succeed on this part of his case. It seems to me, after a review of the authorities, that two propositions stand forth. First, if the subject-matter which is alleged to have been granted is an interest in land, then it cannot be done by parol only. A licence coupled with a grant, if it is effectively done, will, no doubt, be irrevocable: but there is nothing in the authorities which counsel for the defendants cited to support the view that a right to pass water through another’s land—which is, as I conceive, a proprietary right—is capable of grant by parol. Secondly, such a permission to pass effluent down a man’s land might be, as a matter of contract, properly covered as between one individual and another, and it is on that part of it that perhaps counsel for the defendants concentrated; for he said that he was only concerned to show that the plaintiff in this case, by the permission which he gave, notwithstanding that he did not know what his interest was, had given to the defendants

* See p. 654, letter B, ante.

an irrevocable licence during his own tenure. In my judgment, the answer to that argument is that a licence of that kind, if it is to be irrevocable during the plaintiff's tenure, must have the necessary qualities of a contract, binding on the parties: it must be supported by consideration and must, in other respects, be the subject of a contract. There was, I think, clearly no consideration for the alleged irrevocable licence to pass effluent under the plaintiff's land, and counsel for the defendants has not so contended. He has not contended that the licence which he invokes rests in contract at all: he said that it was a mere gratuitous licence, but that, in the circumstances, it was, during the plaintiff's tenure, irrevocable. In my judgment, that is not well founded.

Counsel for the defendants then fell back on this submission: assuming that it was a gratuitous licence and was revocable, then, by well-established principle, the licensee does not become necessarily a trespasser the moment the licensor says "The licence is at an end"; the alleged trespasser is allowed a reasonable time to remove the cause of the trespass or make other arrangements to discontinue the act which thereby would become a trespass. I read*, as part of my judgment on the appeal, the letter of the plaintiff's solicitors dated Aug. 20, 1958. I do not propose to read it again. For present purposes, it is, I think, quite clear that it would constitute a revocation of the licence. It is true that it is not expressed in that way. Nor does it refer to any limit of time at the end of which the effluent must cease to be discharged. But counsel for the plaintiff satisfied me that that is not necessary in determining a revocable licence. I have no doubt that there was time, between Aug. 20 and the proceedings in October, and certainly by the time the hearing came on, for the defendants, if they had been so minded, to make some other arrangement.

It follows, therefore, that, on this narrow point to which this cross-appeal is directed, counsel for the defendants cannot go far enough to show that there was no common law wrong which the learned judge could compensate by an award of 20s. damages. It follows that the cross-appeal, like the appeal, must also fail.

ORMEROD, L.J.: I agree; and I have nothing to add.

WILLMER, L.J.: I also agree that the cross-appeal should be dismissed.

Appeal dismissed. Cross-appeal dismissed.

Solicitors: *W. J. Fraser & Son* (for the plaintiff); *J. Tickle & Co.* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* See p. 653, letter I, to p. 654, letter A, ante.

LYLE & SCOTT, LTD. v. SCOTT'S TRUSTEES.
 LYLE & SCOTT, LTD. v. BRITISH INVESTMENT TRUST, LTD.

HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), May 4, 5, 6, June 18, 1959.]

Company Shares—Transfer—Restriction imposed by articles of association—Notice to be given to secretary of desire to “transfer”—Agreement to sell shares to third person without completing transfers for the time being—Whether compliance with article requiring notice of the transfer to be given enforceable.

Article 9 of the articles of association of a private limited company prohibited a registered holder of more than one per centum of the issued ordinary share capital of the company transferring ordinary shares for onerous consideration so long as any other ordinary shareholder was willing to purchase them. Further, art. 9 required any such ordinary shareholder who was “desirous of transferring” his ordinary shares to inform the secretary in writing of the number of ordinary shares which he desired to transfer, and provided for notice being given to other holders of ordinary shares and for the sale of the shares among such of them as made offers. The respondents held more than one per centum of the ordinary shares of the company and, in common with all other shareholders of the company, were approached on behalf of H. F., a person not holding shares in the company, who offered to purchase their shares. The respondents agreed that in the event of the offer becoming unconditional (which happened), H. F.’s nominee should be authorised to use general proxies, that the respondents would deliver their share certificates in respect of all the shares agreed to be sold, and that they would execute transfer deeds when called on to do so. H. F. duly paid for the shares. The company sought a declaration against the respondents that they were bound to implement art. 9.

Held: the respondents were bound to implement art. 9 by informing the secretary of the company in writing of the number of ordinary shares that they had agreed to sell because—

(i) the respondents having agreed to sell their shares to H. F., it was not open to them, so long as that agreement was subsisting, to deny that they were “desirous of transferring” their shares within the meaning of art. 9, merely because it suited the purchaser and them that registration of the transfers should be delayed for the time being, and

(ii) the contract with H. F. unequivocally evinced a desire to sell and brought the machinery of art. 9 into operation.

PER VISCOUNT SIMONDS and LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW concurring: a notice to the secretary of the company implementing art. 9 was revocable unless and until there was a contract between the giver of the notice and a shareholder purchasing shares comprised in the notice; and (per LORD REID) the respondents could annul their contract for sale of shares to H. F. (see p. 665 letter I, p. 669 letter I, p. 671, letter D, and p. 674, post).

Smith v. Wilson ((1901), 9 S.L.T. 137) and *Stevenson v. Wilson* (1907 S.C. 445) considered.

Appeals allowed.

[As to restrictions in articles of association of a private company on the transfer of the company’s shares, see 6 HALSBURY’S LAWS (3rd Edn.) 252, para. 526; and for cases on the effect of refusal of consent to a transfer, see 9 DIGEST (Repl.) 393, 394, 2527-2530.]

Cases referred to:

(1) *Smith v. Wilson*, (1901), 9 S.L.T. 137.

- (2) *Stevenson v. Wilson*, 1907 S.C. 445; 44 Sc.L.R. 339; 14 S.L.T. 743; 9 A Digest (Repl.) 394, 1080.
- (3) *Re Copal Varnish Co., Ltd.*, [1917] 2 Ch. 349; 87 L.J.Ch. 132; 117 L.T. 384; 9 Digest (Repl.) 384, 2480.

Appeals.

Appeals by Lyle & Scott, Ltd., a private company incorporated under the Companies Acts, against two interlocutors dated Feb. 14, 1958, pronounced by the First Division of the Court of Session (LORD CLYDE (Lord President), LORD CARMONT, LORD RUSSELL and LORD SORNS), adhering to interlocutors of the Lord Ordinary (LORD STRACHAN), dated Oct. 30, 1957. The respondents in the first appeal were Mrs. Norah A. Scott, James Wright and Guy Hepburn Armstrong, trustees and executors of the late John P. Scott, and in the second appeal British Investment Trust, Ltd., a private company incorporated under the Companies Acts. The facts appear in the opinion of VISCOUNT SIMONDS.

Sir Milner Holland, Q.C., I. M. Robertson, Q.C. (of the Scottish Bar), *P. J. Sykes* and *H. S. Keith* (of the Scottish Bar) for the appellant company.

I. H. Shearer, Q.C., P. Maxwell (both of the Scottish Bar) and *Arthur Baynall* for the respondents, Scott's trustees.

W. R. Grievé, Q.C., and J. A. Dick (both of the Scottish Bar) for the respondents, British Investment Trust, Ltd.

Their Lordships took time for consideration.

June 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the respondents, whom I will call "Scott's trustees", are, and were in November, 1956, the registered holders of a number of ordinary shares of the appellant company. The precise number has not been disclosed; it is sufficient to say that it is more than one per cent. of the issued ordinary share capital. That being so, their power to dispose of their shares is limited by certain of the articles of association of the company. I must refer to them in some detail. Article 7 provides that the directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share. This article must be borne in mind in construing the succeeding articles. Article 8 provides that, subject to the provisions of art. 7 and art. 12, ordinary shares may be dealt with by an ordinary shareholder by way of transfer or bequest to, or conveyance to trustees for behoof of certain relations with or without any consideration being paid. Article 9 is that on which this appeal turns, and I must set it out in extenso—

"Subject to the provisions of cl. 7, cl. 8 and cl. 12 no registered holder of more than one per centum of the issued ordinary share capital of the company shall, without consent of the directors, be entitled to transfer any ordinary share for a nominal consideration or by way of security, and no transfer of ordinary shares by such a shareholder shall take place for an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price, which shall be ascertained by agreement between the intending transferor and the directors and, failing agreement, at a price to be fixed by the auditor of the company for the time being. Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer, and the price shall immediately be fixed as aforesaid. Thereafter the secretary shall intimate the same to all the other holders of ordinary shares simultaneously by written notice containing particulars of the intending transfer. Thereafter each ordinary shareholder receiving such notice shall be entitled, within fourteen days from the date of the notice, to intimate in writing to the secretary that he offers to purchase some or all of the shares mentioned in the intimation made to him; otherwise he shall

- A not be a party to the offer. On the expiry of the foresaid fourteen days' notice, the secretary shall report the result to the directors who shall divide and appropriate the shares specified in the notice among the offerers in proportion to the number of ordinary shares held by them respectively or as near thereto as possible, provided that no offerer shall have apportioned to him a greater number of shares than he has offered to purchase. If any difficulty
- B shall arise in apportioning the said shares or any of them, the directors may appropriate the shares in respect of which such difficulty arises among the offerers in such manner as they think fit or otherwise in their sole discretion. If after intimation by the secretary to the ordinary shareholders in manner aforesaid the number of shares offered to be purchased by them shall be less
- C than the number of shares which the intending transferor gave notice of his desire to transfer, or if the offering ordinary shareholders shall fail to complete their purchase of such shares as shall be appropriated to them within one month after the date of such appropriation, the intending transferor may transfer the shares undisposed of to any person, whether a member of the company or not, as he thinks proper, provided that he shall not take for them less than the price to be ascertained as aforesaid, without first offering
- D them in manner foresaid to the other ordinary shareholders at such lower price."

Article 10, art. 11 and art. 12 also deal with transfer or transmission of shares, but I think that there is nothing in them relevant to this appeal.

- E In these circumstances, in November, 1956, Scott's trustees and all other shareholders of the company were approached by a firm of solicitors acting on behalf of a principal, who, though his name was then undisclosed, later proved to be a Mr. Hugh Fraser, with a written offer to purchase their shares. The offer was expressed to be subject to certain terms and conditions, of which the first was that the offer was conditional on acceptance by the holders of seventy-five per cent. of the ordinary shares then in issue or such lesser proportion as their clients might in their absolute discretion accept as sufficient, and the
- F second that the price for each ordinary share should be £2 10s. and should be inclusive of any ordinary dividend declared subsequent to the date thereof and that the price for each preference share should be 20s. with a similar provision in regard to dividend. Then there was a condition about holdings of both ordinary and preference shares, and then this condition which I deem of sufficient importance to set out in full—

- G "The price shall be satisfied by payment in cash on or after Dec. 18, 1956, against delivery of valid and effective transfers of the said ordinary and/or preference shares together with the relative share certificates and a general proxy in favour of our clients' nominee."

- H Certain other conditions were expressed to which I need not refer, and lastly it was provided that

"Acceptances of this offer must be received by us not later than first post on Nov. 27, 1956, on the enclosed form of acceptance, duly signed by you."

- I By a subsequent letter, the price offered for each ordinary share was increased to £3 and the time for acceptance was extended. By the enclosed form of acceptance, which was signed by Scott's trustees and returned by them, they agreed, subject to the terms and conditions of the offer, to sell to the client of their correspondents their holdings in the company at the price of 20s. for preference shares and 60s. for ordinary shares. They further agreed that, in the event of the offer becoming unconditional according to its terms, they authorised them to use the enclosed form of proxy, and they also agreed to deliver up their share certificates in respect of all their shares in the appellant company which they had agreed to sell, and to sign the relative transfer deeds when called on to do so in exchange for the price. On or about Dec. 4, 1956, they were informed by the said solicitors

that a majority of the shareholders had accepted the offer, and that the acceptances were no longer open for rejection. On or about Dec. 20, 1956, the purchaser, whom I may now refer to as "Mr. Fraser", paid Scott's trustees £3 for each ordinary share and £1 for each preference share held by them and they delivered to him or his agent the relative share certificates and a completed form of general proxy. The appellant company, learning of these proposed transactions, called the attention of Scott's trustees to the terms of art. 9 by letters of Dec. 5 and 14, 1956, and, finding that their letters were ignored, on Dec. 31, 1956, raised the action against Scott's trustees out of which this appeal arises, and at the same time raised similar actions against twelve other shareholders who had accepted Mr. Fraser's offer. I can pass over the next skirmish between the parties, which took the form of an attempt by certain shareholders, who had sold their shares, to remove three of the directors from the board of the appellant company and substitute others of their or Mr. Fraser's choice. This attempt met the failure that it deserved and so the action proceeded.

It is convenient now to refer to these conclusions of the summons which are still alive, for the appellant company have so far failed on the ground that, though the provisions of art. 9 have been breached by Scott's trustees, they have not established their right to the remedy they have claimed. Conclusions 1 and 2 of the summons are as follows:

"1. For declarator that the defenders, in respect that they are the holders of ordinary shares of Lyle & Scott, Ltd. amounting to more than one per centum of the issued ordinary share capital of the said company and are desirous of transferring the said ordinary shares for an onerous consideration, are bound to implement the terms of art. 9 of the articles of association of the said company and that by informing the secretary of the said company in writing of the number of ordinary shares which they desire to transfer.

"2. For decree ordaining the defenders forthwith to implement the terms of the said art. 9 by informing the said secretary in writing of the number of ordinary shares which they desire to transfer."

At the hearing before the Lord Ordinary (LORD STRACHAN), as also at that before the First Division, the debate appears to have been divided into two parts. First, it was questioned whether Scott's trustees had been guilty of a breach of the first or prohibitive part of art. 9, a question answered in the affirmative by the Lord Ordinary and the learned judges of the First Division who thought fit to answer it. But, secondly, it was asked whether, on this assumption, the appellant company were entitled to the remedy they sought, and here they had no voice in their favour. This was, no doubt, a convenient way of examining the curious problem which arises in this case but it was, perhaps, apt to obscure the vital question whether, on the facts which I have set out, Scott's trustees are to be deemed to be shareholders desirous of transferring their ordinary shares within art. 9. If they were, the appellant company would be entitled to their relief, whether or not what Scott's trustees had done was a breach of the first part of the article.

I do not dissent, my Lords, from the opinion expressed by the Lord Ordinary and the Lord President (LORD CLYDE) and LORD RUSSELL in the First Division that Scott's trustees had been guilty of a breach of this part of the article. The determination of this question rests on the meaning to be assigned to the word "transfer" where it there occurs. But I do not think it necessary to express a final opinion on it, for, as I have said, the question is not whether what has been done is a breach of the first part of the article, but whether it demonstrates with sufficient clearness that Scott's trustees are persons desirous of transferring their ordinary shares. It appears to me that there is no room for doubt that that is just what they are. Here I can proceed on their admissions. For, since it is their admitted fact that they entered into the agreement for sale of their shares and have received and retain the price, it follows that, whether or not they have yet done

A all that they ought as vendors to do, they hold the shares as trustees for the purchasers. They are bound to do everything that in them lies to perfect the title of the purchaser. They cannot compel the appellant company to register him as the holder of the shares, but everything else they must do, and it is straining credulity too far to suppose that everything else would not already have been done, if it had not been hoped to gain some tactical advantage by delay. In my opinion, it is not open to a shareholder, who has agreed to do a certain thing and is bound to do it, to deny that he is desirous of doing it. I wish to make it quite clear, for it goes to the root of the matter, that I regard Scott's trustees as desirous of transferring their ordinary shares unless and until their agreement with Mr. Fraser has been abrogated. Of this at least one acid test would be the return by them of the price they have received.

C Against this view it was urged that they were not desirous of transferring their shares within the meaning of the article because they had not a general desire but a particular desire to transfer only to Mr. Fraser at a certain price. This makes nonsense of the article, the purpose of which would be wholly defeated if it did not apply to a desire to transfer to a particular person, who might be the person whom the appellant company particularly wished to exclude. Then it was contended that they were not desirous of transferring their shares, because their task had been done and their desire satisfied. I think, my Lords, that this ingenious and almost humorous plea ignores that they have elsewhere pleaded and vigorously relied on the fact that the transfer has not been completed. This plea had, perhaps, not been thought of when they decided not "at the present time" to have deeds of transfer executed.

E If, then, Scott's trustees are, as I hold they are, shareholders desirous of transferring their ordinary shares, what follows? It is at this point that I am constrained to differ from the opinions of the learned judges in the courts below. I cannot, for instance, accept the view of the Lord President that there has been no overt act which could enable the appellant company to require Scott's trustees to follow out the procedure in the article, nor do I find it easy to reconcile this

F part of his judgment with his decision that Scott's trustees had infringed the article by transferring, or purporting to transfer, their shares to Mr. Fraser. What more conspicuous overt act, evincing the desire to transfer, could there be than this? I must agree with LORD SORN that there may in some cases be difficulty in determining when a shareholder begins to be desirous and when he ceases to be desirous, and at what stage he is at liberty to change his mind. I will, therefore,

G say something on this aspect of the case. I have already indicated that a shareholder who has agreed to sell his shares and has received the price is to be deemed to be desirous of transferring them. At once, therefore, the machinery of the article is put in motion, and he must inform the secretary of the number that he desires to sell which is *ex hypothesi* the number that he has agreed to sell. The price is then fixed in the manner prescribed by the article, and so the matter

H proceeds. But can he at any stage change his mind, abandon his desire, and stop the machinery? I have already indicated that his desire must be deemed to continue so long as he adheres to his contract of sale. I do not wish to be dogmatic on a question which may be the subject of other proceedings. But I will add that the onus will be on him to satisfy the company and, if necessary, the court that his desire is spent and his proof must be cogent. If he succeeds in this and if

I the machinery has not operated so far that a contract has been made with the other shareholders, it appears to me that he can withdraw his offer—for that is what the intimation that he desires to sell amounts to. I do not at all dissent from the view expressed in *Smith v. Wilson* (1) ((1901), 9 S.L.T. 137) that an offer made in pursuance of an article of this kind may be timeously withdrawn, what is uncertain depending, of course, on the language of the particular article. He is thus placed in the same position as any other shareholder who wishes to sell his shares in the manner prescribed by the article if he can get a satisfactory price for them. That is the bargain which he made when he became a shareholder

and he must abide by it. What he cannot be permitted to do is to adhere to his contract and in the same breath assert that he does not desire to transfer his shares. It may well be that he thus places himself in a position of disadvantage vis-à-vis the purchaser with whom he has contracted. But it cannot be denied that he has done so with his eyes open.

I would, therefore, allow the appeal with costs here and below. The order will be in the form which my noble and learned friend, LORD REID, has prepared and will intimate to the House.

My Lords, in the second case of *Lyle & Scott, Ltd. v. British Investment Trust, Ltd.* the respondents are shareholders of the appellant company and held more than one per cent. of its issued ordinary shares. I cannot in any relevant matter distinguish this case from that of *Scott's Trustees* with which the House is dealing. The same order must, in my opinion, be made.

LORD REID: My Lords, in these two actions the pursuers and appellants are a private company whose articles of association contain provisions restricting the transfer of shares. The appellant company carry on a knit wear and hosiery business in Hawick. In each case the defenders and respondents are shareholders of the appellant company. On Nov. 6, 1956, a firm of solicitors in Edinburgh, acting on behalf of a client then undisclosed but now known to be Mr. Hugh Fraser, sent to all the shareholders letters offering to purchase their shares, the offer being conditional on acceptance by the holders of seventy-five per cent. of the ordinary shares. The price offered was £2 10s. which was subsequently increased to £3 per share, and this was to be payable against valid and effective transfers and a general proxy in favour of the purchaser's nominee. Both respondents accepted the offer by completing and returning the form of acceptance sent to them and also completing a form of proxy. In the acceptance they agreed to sell their shares, authorised the use of the proxy, and agreed to deliver up their share certificates and to sign transfer deeds when called on in exchange for the price. On Dec. 31, 1956, the appellant company raised actions against the respondents and about ten other shareholders who had accepted the offer. On Jan. 22, 1957, their secretary received notices requisitioning a general meeting of the appellant company for the purpose of removing three of the directors and appointing Mr. Fraser and two others whom he wished to have appointed. Conclusions for interdict were then added and interim interdict was granted to prevent the respondents from voting at the meeting. I need not deal further with this matter because there is now no conclusion for interdict in these cases: we were informed that other proceedings are pending between the parties.

The appellant company's case is that, by reason of the provisions of the articles, the respondents were not entitled to enter into these contracts for the sale of their shares. Article 7 permits the directors in their absolute discretion to decline to register any transfer of any share. Article 8 permits transfer or bequest to, or conveyance to trustees for behoof of certain relatives of a shareholder. Article 12 deals with shares held by employees of the appellant company. The article which is important in this case is art. 9, which is in these terms:

"Subject to the provisions of cl. 7, cl. 8 and cl. 12 no registered holder of more than one per centum of the issued ordinary share capital of the company shall, without the consent of the directors, be entitled to transfer any ordinary share for a nominal consideration or by way of security, and no transfer of ordinary shares by such a shareholder shall take place for an onerous consideration so long as any other ordinary shareholder is willing to purchase the same at a price, which shall be ascertained by agreement between the intending transferor and the directors and, failing agreement, at a price to be fixed by the auditor of the company for the time being. Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer, and the price shall immediately be fixed as aforesaid.

- A Thereafter the secretary shall intimate the same to all the other holders of ordinary shares simultaneously by written notice containing particulars of the intending transfer. Thereafter each ordinary shareholder receiving such notice shall be entitled, within fourteen days from the date of the notice, to intimate in writing to the secretary that he offers to purchase some or all of the shares mentioned in the intimation made to him; otherwise he shall
- B not be a party to the offer. On the expiry of the foresaid fourteen days' notice, the secretary shall report the result to the directors who shall divide and appropriate the shares specified in the notice among the offerers in proportion to the number of ordinary shares held by them respectively or as near thereto as possible, provided that no offerer shall have apportioned to him a greater number of shares than he has offered to purchase. If any
- C difficulty shall arise in apportioning the said shares or any of them, the directors may appropriate the shares in respect of which such difficulty arises among the offerers in such manner as they think fit or otherwise in their sole discretion. If after intimation by the secretary to the ordinary shareholders in manner aforesaid the number of shares offered to be purchased by them shall be less than the number of shares which the intending
- D transferor gave notice of his desire to transfer, or if the offering ordinary shareholders shall fail to complete their purchase of such shares as shall be appropriated to them within one month after the date of such appropriation, the intending transferor may transfer the shares undisposed of to any person, whether a member of the company or not, as he thinks proper, provided that he shall not take for them less than the price to be ascertained as aforesaid,
- E without first offering them in manner foresaid to the other ordinary shareholders at such lower price."

The respondents are each holders of more than one per cent. of the ordinary shares, and it is clear from their defences that they have received the price of £3 per share and that they have not attempted to resile from their contracts with Mr. Fraser. The appellant company maintain that this necessarily means that

F they are desirous of transferring their shares within the meaning of this article, and that they are, therefore, bound so to inform the secretary of the appellant company so as to set in motion the provisions of the article under which the other shareholders are entitled to have an opportunity to purchase any shares which any shareholder is desirous of transferring. The only conclusions of the summons now in issue are for declarator that the respondents, in respect that they

G are desirous of transferring their shares, are bound to implement the terms of art. 9 and for decree ordaining them forthwith to do so by informing the secretary of the number of ordinary shares which they desire to transfer.

The Lord Ordinary (LORD STRACHAN) and the First Division have held that the respondents have contravened the provisions of art. 9, but that the appellant company are not entitled to the remedy which they seek. Before your Lordships,

H the appellant company supported the first of these findings but maintained that the second was erroneous. One at least of the respondents maintained that the appellant company's averments disclose no breach of art. 9; both support the decision of the Court of Session that the remedy which the appellant company seek should not be granted.

I have come to the conclusion without difficulty that, on their own admissions, the respondents are in breach of art. 9. The purpose of the article is plain: to prevent sales of shares to strangers so long as other members of the appellant company are willing to buy them at a price prescribed by the article. And this is a perfectly legitimate restriction in a private company. But the respondents argue that, whatever may have been the intention, the terms of the article are such that it has only a very limited application. They say that "transfer" and "transferring" only apply to a complete transfer of the ownership of shares by acceptance and registration of deeds of transfer, and that a shareholder who agrees

to sell his shares is quite entitled to do so and to receive the price and vote as the purchaser wishes so long as he is not desirous of having a transfer registered. I see no reason for reading the article in that limited way. Transferring a share involves a series of steps, first an agreement to sell, then the execution of a deed of transfer and finally the registration of the transfer. The word transfer can mean the whole of those steps. Moreover, the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used. In art. 7, it clearly means a deed of transfer. In art. 8, which authorises certain dealings "by way of transfer or bequest", it must, I think, refer to the sale or gift of the shares. I have already referred to the obvious purpose of art. 9; to give the other shareholders an option to purchase shares which any shareholder desires to part with. To be effective, it must come into operation before that shareholder agrees to sell to anyone else, and the last part of the article clearly contemplates this. If the other shareholders do not purchase any or all of the shares the owner

"may transfer the shares undisposed of to any person . . . provided that he shall not take for them less than the price to be ascertained as aforesaid, without first offering them"

to the other shareholders at the new price. That appears to me to make it clear that the shareholder "desirous of transferring" shall so inform the secretary before he makes any agreement to sell to anyone, and that he is only entitled to agree to sell to a stranger such shares as the other shareholders fail to purchase under art. 9. I find nothing in the article which is inconsistent or even difficult to reconcile with this interpretation of it.

Whether the appellant company are entitled to the remedy which they seek depends in the first place on whether the respondents are now "desirous of transferring" their shares. They were certainly desirous of doing so when they made their contracts with Mr. Fraser. It is said that, though they desired to transfer to him at £3, they never desired to transfer to the other shareholders under art. 9. But the article does not say desirous of transferring in the manner which it provides. It simply says desirous of transferring, and, if it is to be effective in ensuring that the other shareholders have an option to purchase, it must apply whenever a shareholder desires to sell to anyone. Then it is said that the respondents' desire to transfer has never been evinced by any overt act on which the appellant company can found. But if the respondents' admitted actions were in breach of their obligations, I do not see that it matters whether or in what sense they were "overt". I would not hold a desire to transfer proved by some equivocal words or acts. But here it is impossible that the respondents could have done what they did unless they desired to transfer; there is no suggestion of any other reason why they should have contracted with Mr. Fraser.

Another argument was that art. 9 cannot be used as a compulsion, that it is an avenue open to a shareholder who desires to sell his shares, but that he cannot be compelled to use it. That is true in a sense. No action can be taken against a shareholder who merely says that he wishes to sell, or does something which shows that that is his intention. But, when he goes further and does something which is a breach of his obligations under the article, the position appears to me to be quite different. Unless some action can then be taken to assert the other shareholders' rights under the article there is a wrong without a remedy.

The respondents next maintained that, even if they were desirous of transferring their shares when they made these contracts, they are entitled to say that they are no longer desirous of doing so. They do not deny that they have received and intend to keep the price of the shares. But they say that, at present, neither they nor the purchaser intend transfers to be made. They appear to be waiting to see whether some change will be made in the appellant company which will result in transfers being accepted and registered. But, in my judgment, a person

A who has agreed to sell with a view to a transfer at some future date cannot be heard to say that he is not desirous of transferring the shares merely because it suits him and the purchaser to delay execution and presentation of the transfers.

One reason for not granting this remedy which appears to have weighed heavily with the learned judges of the Court of Session is that, if it is granted, the respondents will be unable to avoid a compulsory sale of their shares to other shareholders who are willing to buy them in terms of art. 9. If that were so, I would find this case much more difficult. It would seem unjust that a shareholder who in bona fide mistakes his rights should be compelled to sell his shares on terms which he cannot control, and I might find it difficult to read such a meaning into an article of this kind. But I think that that is not the meaning of art. 9. That article requires a notice to be given by any shareholder who desires to sell his shares, but it does not make such a notice irrevocable. No doubt it becomes irrevocable when the procedure following on it results in a contract between the shareholder giving the notice and another shareholder who has made an offer for the shares, and I need not discuss the question of the exact stage at which such a contract emerges. But, until that stage is reached, it appears to me that it is open to the shareholder who gives the notice to withdraw it; I see no reason to doubt two decisions of the Court of Session on this matter: *Smith v. Wilson* (1) ((1901), 9 S.L.T. 137) and *Stevenson v. Wilson* (2) (1907 S.C. 445).

Both these cases arose out of the same transaction. In 1900 Mr. Wilson, as trustee in a sequestration, advertised for sale shares of J. M. Smith, Ltd. and on Jan. 30 Mr. Stevenson agreed to buy the shares. An article of association of the company, known to both, required a shareholder wishing to sell first to offer his shares to the company at a stated price and contained provisions for their sale to the directors or other shareholders. Mr. Wilson duly offered the shares under this article, but for some reason which does not appear he withdrew this offer before it was accepted. In the first of these two cases, the Second Division held that he was entitled to do so. Mr. Stevenson then paid the price and presented transfers in his favour which the company refused to register, but, apart from that, the company raised no objection to Mr. Wilson having agreed to sell to Mr. Stevenson. Possibly this was because, in the circumstances, it did not matter to the company that Mr. Stevenson should have a beneficial interest in the shares or that Mr. Wilson should vote as Mr. Stevenson required him to do. Then there was a deadlock because the company refused to pay dividends to Mr. Stevenson and Mr. Wilson refused to collect them and hand them to Mr. Stevenson, and the second of these actions was raised by Mr. Stevenson. The Lord Ordinary (LORD SALVESSEN) held that the shares were held by Mr. Wilson in trust for Mr. Stevenson and he was required to produce an account of his intromissions. The First Division adhered, and LORD DUNEDIN (Lord President) said (1907 S.C. at p. 445):

“when there is a stipulation in the articles of the company which allows the directors of the company to refuse at their own hand any particular transferee, then A and B, who are contracting, do so with their eyes open, and knowing that it may be the case that B will not be accepted as a transferee. It still becomes the duty of B, if he cannot get the [company] to register him, to find a transferee whom the [company] will register in order to free A, and I think, if he is entirely unable to do that, A can bring the bargain to an end. But I think he could only do so in the ordinary way by annulling the bargain, — that is, giving back the money he had got from B and bringing matters back to their entirety.”

As Mr. Wilson did not desire to annul the bargain or give the money back he must “fulfil this obligation of quasi-trustee to which the judgment of the Lord Ordinary subjects him”. From these cases two things follow — first, any notice given by the respondents would not be irrevocable, and secondly, the respondents can if they choose annul their bargains with Mr. Fraser. The cases are of no assistance on the question whether a company is entitled to object and take

action if a shareholder purports to sell to a stranger in breach of its articles because *J. M. Smith, Ltd.* did not object and this question was not raised. A

Under art. 9, the respondents are bound to give notices so long as they are desirous of selling their shares, and they must be held to be desirous of selling their shares so long as they maintain and do not annul their contracts with Mr. Fraser. It is in their power to do that, and, once they have done so, they will be entitled to say that they are no longer desirous of transferring their shares. So B any decree requiring them to give notice must be so qualified that they are only required to give notice if they are still desirous of transferring their shares. And, even if they have not terminated these contracts before they are required to give notice, they could still do so and withdraw the notices before any contract with the other shareholders had been made. But if either of the respondents does not C withdraw the notice, then the shares to which it relates will pass to other shareholders who acquire them under art. 9 and the respondents will receive the price payable under that article.

In these circumstances, I see no difficulty in granting a decree of the kind sought. It is a decree requiring specific implement, requiring the respondents to do something which they have undertaken to do and which they are still able to do. It is argued that a court should not order a person to do something which D he can immediately undo. As a general proposition that may be true, but here the purpose of the decree is to afford a remedy against a continuing breach of an obligation, and the step ordered could only be undone after that breach had ceased. In view of the respondents' admissions in their defences no proof is necessary, and their counsel did not maintain that proof should be allowed. In E my judgment, the interlocutors appealed from should be recalled and the cases should be remitted to the Court of Session with a direction in each case (i) to repel the first plea-in-law for the respondents and to sustain the sixth plea-in-law for the appellant company, (ii) to grant decree of declarator that the respondents, being the holders of ordinary shares of the appellant company amounting to more than one per centum of the issued ordinary share capital of the said company and having agreed to sell their said shares, have shown themselves to be F desirous of transferring their said shares within the meaning of art. 9 of the articles of association of the said company and are, therefore, bound to implement the said art. 9 by informing the secretary of the said company in writing of the number of ordinary shares comprised in the said agreement of sale, and (iii) to G ordain the respondents, standing the said agreement to sell, forthwith to implement the terms of the said art. 9 by informing the said secretary in writing of the number of ordinary shares which they have agreed to sell and to proceed as accords.

LORD TUCKER: My Lords, by signing the form of acceptance which had been enclosed in the letter of Nov. 6, 1956, from Messrs. Hill, Dougal & Co. on behalf of Mr. Hugh Fraser, the respondents entered into a contract with Mr. Fraser whereby they agreed to sell all their ordinary shares in the appellant company and to deliver up their share certificates and sign the relative transfer H deeds when called on to do so in exchange for the price. They thereby bound themselves to take every step which is required from the holder of a share who desires to transfer to another the legal and equitable title to his share. They have received from Mr. Fraser the agreed purchase price and the contract still I subsists. By so doing they have, in my view, beyond question taken an overt act signifying their desire to transfer their shares within the meaning of art. 9 of the articles of association of the appellant company. Such desire must be taken as continuing so long as the contract subsists. The desire to sell having been established, it became imperative for the respondents to inform the secretary of the appellant company in writing of the number of shares they desired to transfer, and thereby to bring into operation the procedure contained in the article for offering such shares to all the other ordinary shareholders at the price

A fixed in accordance therewith. I cannot accept the respondents' contention that the desire to sell envisaged by the article does not include a desire to sell to some specific person but only applies to a desire to sell to some unascertained purchaser who may be found as a result of notification to the secretary and putting into operation the procedure of the article. This step of informing the secretary was not taken and the respondents were, and continue to be, in breach of the article.

B For the purpose of ascertaining whether or not there has been a breach it is not, in my opinion, necessary to decide the meaning of the word "transfer" in the first [sentence*] of the article nor to consider whether the steps so far taken by the respondents constitute a transfer.

For these reasons, I am in agreement with the decision of the First Division of the Court of Session that the appellant company have relevantly alleged in C their pleading a breach of art. 9.

With regard to the remedies sought for the breach, I agree with your Lordships that, subject to the proposed modification of the language of relief set out in conclusions 1 and 2, the appellant company are entitled to the relief claimed therein. The Court of Session, in coming to a contrary conclusion, were, I think, much influenced by their view that the respondents could not be deprived of the D locus poenitentiae afforded to them under the article of withdrawing their notification of willingness to sell before acceptance. I agree with your Lordships that relief in the terms proposed by my noble and learned friend, LORD REID, makes it plain that no such consequence can result. I also agree that the only matters of fact in dispute on the pleadings† being whether transfers were executed and whether the share certificates were deposited or handed over for inspection E and returned and that the determination of these questions being unnecessary for the decision of these appeals, your Lordships can dispose of them without requiring that the cases should go for proof.

LORD KEITH OF AVONHOLM: My Lords, this is my opinion in *Lyle & Scott, Ltd. v. Scott's Trustees*. This case, I think, can be disposed of on the averments of the parties on record without the necessity of a proof. The case F turns on the meaning and effect of art. 9 of the appellant company's articles of association which has already been quoted. It is quite clear from the admissions of the respondents that they have agreed to sell their shares to an unnamed purchaser, and have received payment of the purchase price. The respondents qualify this admission by saying that they have only sold the beneficial interest and have no intention of executing a document of transfer "at the present time". They G say they have no intention of invoking art. 9. I shall consider the bearing of these qualifications in a moment. The Lord Ordinary (LORD STRACHAN) has, I consider, accurately stated the position when he says (1958 S.C. at p. 233):

"The [respondents'] averments as a whole seem to me to indicate a sale or transfer of the shares subject to a condition that the formal steps necessary to complete the transfer should be postponed for a period which is not stated. H If that be a right reading of the defences, I take leave to suspect that the delay in completing the transfer was introduced simply in order to leave open

* The passage to which LORD TUCKER referred was the sentence beginning "Subject to the provisions of" and ending with the words "for the time being" set out at p. 666, letters H and I, ante.

† It was pleaded by condensation of the pursuers (the appellant company) that it was believed and averred that a transfer, declaration of trust or other document of transfer had been executed and delivered by the defendants. It was pleaded by answer of the defenders (the respondents) that at about the time of sale the defenders sent then share certificates to the purchaser for the purpose of examination; that the share certificates had since been returned to and were in the possession of the defenders; that the defenders and the purchaser had specifically agreed, before Dec. 20, 1956, that no document of transfer relative to the shares should be either executed or delivered; and that no document of transfer had been executed or delivered and neither the purchaser nor the defenders intended that such a document should be executed or delivered at the present time.

an argument that art. 9 did not apply to the circumstances of these particular transactions."

The respondents in fact relied for their main argument on the submission that art. 9 did not apply here at all. Their argument proceeded on a very narrow point. The word "transfer" in the prohibitory words in art. 9 "no transfer of ordinary shares . . . shall take place for an onerous consideration so long as", &c., meant, they said, "no registration of an instrument of transfer shall take place". From this, as I understood it, the next stage was reached that the words:

"Any such ordinary shareholder who is desirous of transferring his ordinary shares shall inform the secretary in writing of the number of ordinary shares which he desires to transfer",

&c., must be read as referring to an ordinary shareholder desiring to register an instrument of transfer. As the respondents were not, at the moment at least, so desirous, art. 9 could not be invoked. I am unable to accept such a construction of art. 9. For one thing, it is not the vendor who has the instrument of transfer registered but the purchaser. But, apart from that, it is apparent from a cursory perusal of the articles that the word "transfer" is used in varying senses in different places, depending on the context. For instance, in art. 2 (a) "no transfer which would increase such number of members beyond fifty shall be valid" clearly must refer to a registered transfer but the very next words "and the directors shall refuse to recognise or register any transfer which would so increase such number" refers to an unregistered instrument of transfer. So, also, under art. 7, the directors may, in their absolute discretion, decline to register any transfer of any share. On the other hand, there are provisions which, in my opinion, use "transfer" in the broad sense of "dispose of", or "sell". Thus, art. 9 itself concludes by saying that in certain eventualities "the intending transferor may transfer the shares undisposed of to any person". That, of course, will cover all the steps necessary to effectuate the title of the purchaser. But it must start with an agreement to sell for a price. It is not the intending transferor who completes the transaction but the purchaser, and the document of transfer requires the signatures of both purchaser and seller. So, also, in art. 12, which provides that an employee shareholder who ceases to be employed by the company, or by a subsidiary company, shall "transfer his ordinary shares to the nominees of the directors", "transfer" is used, in my opinion, in a broad sense as meaning "dispose of" his shares to the directors' nominees.

Even if the words "no transfer of ordinary shares . . . shall take place" were to be read as meaning "no transfer of ordinary shares shall be registered", it does not therefore follow, in my opinion, that, under the article, a shareholder does not express his desire to transfer his ordinary shares until an instrument of transfer of the shares has been presented for registration. If I may express my view of the article in the most general sense, I think the prohibitory part of the article is the sanction which prevents a shareholder from carrying through a transfer of shares without complying with the machinery of transfer set out in the second part of the article. And I think that a shareholder who has transferred, or pretended to transfer, the beneficial interest in a share to a purchaser for value is merely endeavouring by a subterfuge to escape from the peremptory provisions of the article. A share is of no value to anyone without the benefits it confers. A sale of a share is a sale of the beneficial rights that it confers, and to sell or purport to sell the beneficial rights without the title to the share is, in my opinion, a plain breach of the provisions of art. 9. Thus, I think, is the view which commanded itself to Lord SORN and I think that he is right. What has happened in the present case is that, by virtue of the articles, the purchaser is unable to take the seller's name off the register and to substitute his own. The respondents have done everything apart from executing a formal instrument of transfer that would be necessary to a normal purchase and sale of shares. They have even done more, for they have executed proxies in favour of the purchaser's solicitors. While

- A leaving it open whether there has been any breach of the prohibitory part of art. 9, which may be directed rather to the appellant company and its board than to the shareholders, I am clear that there is here a clear breach of the positive part of the article requiring an intending transferor to inform the secretary in writing of the number of shares he wishes to transfer and an invasion of the rights of the shareholders under the article. The admitted actings of the respondents, in my opinion,
- B lead to the inevitable inference that they are desirous of transferring their ordinary shares. The qualifications that the respondents seek to attach to their admissions, videlicet, that they have no intention of invoking art. 9, and that neither the purchaser nor the respondents intend that a document of transfer shall be executed or delivered "at the present time", do not, in my opinion, affect the matter one bit. Standing a completed and unrepudiated contract of
- C sale and acceptance of the purchase money, the respondents cannot be heard to say that they are not desirous to transfer their shares because they choose for some reason or other to hold up completion of the document of transfer or wish to sell only to a particular person.

- The Lord Ordinary and their Lordships of the First Division have taken the view that it is not open to compel the respondents to initiate the procedure laid
- D down in the article by giving notice to the secretary of their desire to sell their shares. They seem to have proceeded on the view that it is for the respondents, and the respondents alone, to say whether they will set the machinery of the article in motion by intimating their desire to the secretary. The Lord President (LORD CLYDE) would seem to look for some overt act of such desire, such an act as notice to the secretary. The decision in *Smith v. Wilson* (1) ((1901), 9 S.L.T.
- E 137) was also thought by their Lordships to be adverse to imposing any compulsitor on the respondents.

- In my opinion, the admitted actings of the respondents are overt acts amply sufficient for any court of law to infer a desire on their part to sell their shares. There must reside in the courts some power to enforce observance of the article, unless the rights of the shareholders are to be defeated, and the appropriate step
- F at this stage, in my opinion, is to ordain the respondents to give notice to the secretary of their desire to transfer the number of shares which they have contracted to sell to their purchaser. There is nothing in the decision in *Smith v. Wilson* (1) to prevent such a course. In that case, Mr. Wilson offered, under a clause similar to that in the present case, certain shares to the company concerned. The offer was made on Jan. 31, 1900. The offer was intimated by the
- G board to the other shareholders, and on Feb. 10 a shareholder lodged with the company a sealed offer to buy the shares. Before this, the intending seller had withdrawn his offer on Feb. 5. The only point considered was whether Mr. Wilson was bound to keep his offer open for fourteen days from the board's notice to the other shareholders, within which a shareholder could lodge his offer to buy. The court held that Mr. Wilson was not bound to keep his offer open for that
- H period. It appears from the later case of *Stevenson v. Wilson* (2) (1907 S.C. 445) that Mr. Wilson had, on Jan. 30, 1900, entered into a conditional contract with Mr. Stevenson, which incorporated the company's articles of association, for sale of the shares which he offered to the company on Jan. 31. But no point was taken on this in *Smith v. Wilson* (1). In *Stevenson v. Wilson* (2), Mr. Wilson being still on the register, the Lord Ordinary (LORD SALVESSEN) granted a declarator
- I (i) that Mr. Stevenson had the beneficial right in the shares and (ii) that Mr. Wilson held them in trust for him so long as Mr. Wilson remained on the register and the pursuer (Mr. Stevenson) held the beneficial interest. The company was cited as a defender in this litigation but no decree was made against it, and the Lord Ordinary held that the declarators granted were not binding on the company and that the company was not bound under its articles to recognise the pursuer's (Mr. Stevenson's) beneficial interest. Mr. Wilson reclaimed to the First Division which adhered to the Lord Ordinary's interlocutor. The Lord President (LORD

DUNEDIN) pointed out (1907 S.C. at p. 445) that a seller of shares was ordinarily entitled to get his name off the register but that, under their contract, both seller and buyer knew this might be impossible. It still remained, however, the duty of the buyer to find a transferee whom the company would register, and, if he could not do so, the seller might bring the contract to an end. In neither of these cases was any of the questions that have been debated in this case considered. Nor could they have been, unless they were raised by the persons competent to do so, the company or the shareholders. I see no reason why, in a situation like the present, the appellant company cannot bring matters to a head and cut the Gordian knot, as well as protect the rights of their shareholders, by obtaining a decree from the court that will compel the vendor to initiate procedure under the articles.

Re Copal Varnish Co., Ltd. (3) ([1917] 2 Ch. 349) was much relied on by the respondents. I find nothing in it that directly touches the issue here. But there are dicta of EYE, J., which appear to me to tell against the respondents. It hardly needs authority that a step in an onerous transfer of shares is a contract of sale, but EYE, J., went out of his way to emphasise that fact, and I see little reason to think that he would have said that a contract to sell shares did not evidence a desire to sell the shares. I quote only one passage from his judgment which is much in point here (*ibid.*, at p. 355):

"So long as prior to the completion of the transaction an opportunity is given to the directors sitting as a board to determine whether the proposed transferee is a person whom they are prepared to admit as a member of the company, the conditions imposed by the article are, in my opinion, complied with, and the contract into which the vendor on becoming a shareholder entered with his co-shareholders is sufficiently discharged."

That case was concerned with the consent of directors under a company's articles to a transfer of shares. But *mutatis mutandis* it can equally be applied to the contract which the respondents made here with their co-shareholders when they became members of the company and bound themselves to observe the conditions of art. 9.

In the circumstances, I think that the appellant company's averments and the admissions of the respondents are relevant to infer a desire of the respondents to transfer their ordinary shares for an onerous consideration within the meaning of art. 9. In my opinion, the respondents' first plea in law should be repelled, the appellant company's sixth plea in law should be sustained, and an appropriate decree within the conclusions of the summons should be pronounced. I agree with the form of order proposed by my noble and learned friend, LORD REID.

I would, accordingly, allow the appeal.

My Lords, I can see no material distinction between *Lyle & Scott, Ltd. v. British Investment Trust, Ltd.* and *Scott's Trustees* in which judgment has just been given. The same result must follow and a similar order be made. I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeals allowed.

Solicitors: *Slaughter & May*, agents for *Davidson & Syme*, Edinburgh (for the appellant company); *Herbert Smith & Co.*, agents for *Macpherson & Macleay*, Edinburgh (for the respondents *Scott's trustees*); *Martin & Co.*, agents for *Dundas & Wilson*, Edinburgh (for the respondents *British Investment Trust, Ltd.*).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

NOTE.

Re S. (an infant).

B

[CHANCERY DIVISION (Roxburgh, J.), June 19, 1959.]

Adoption—Guardian ad litem—Appointment by justices under Adoption Act, 1958—Appeal to High Court—Guardian ad litem for purposes of High Court proceedings—Leave to appeal out of time—Service of notice of motion on guardian ad litem.

C

[For the Adoption Act, 1958, s. 10 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 549.]

Motion.

D

The applicants gave notice of motion, dated June 1, 1959, for leave to serve originating notice of motion of appeal out of time from an order dated Apr. 9, 1959, made by the justices of the juvenile court of the petty sessions division of Blackpool, in a matter arising under the Adoption Act, 1958. The notice of motion of June 1, 1959, was addressed to the respondent in the proceedings, but had not been served on any guardian ad litem on behalf of the infant.

J. Franklin Willmer for the applicants.

The respondent did not appear and was not represented.

E

ROXBURGH, J., said that he was prepared to give a formal ruling that, in the case of an appeal from a magistrates' court, the guardian ad litem appointed in that court under the Adoption Act, 1958, and, in the case of an appeal from a county court, the guardian ad litem appointed in that court for the purposes of that Act, was the guardian ad litem for the purpose of an appeal from either of those courts. His LORDSHIP granted leave to appeal out of time but said that in this type of case the notice of motion for leave ought to have been served on the guardian ad litem. His LORDSHIP would, however, dispense with service in this case, because it was the first time that the matter had arisen and it was not dealt with by the rules.

F

Order accordingly.

Solicitors: *Corbin, Greener & Cook*, agents for *Charles Ingham, Clegg & Crowther*, Blackpool (for the applicants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re WATSON'S SETTLEMENT TRUSTS.
DAWSON AND ANOTHER v. REID AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 28, 29, 30, May 1, 5, 26, 27, June 1, 1959.]

Perpetuities—Rule against perpetuities—Power of revocation and new appointment—Possibility of exercise beyond period.

By a settlement made in 1931 the settlor settled 112,000 shares in an unlimited liability company, some of them in various blocks on each of his four children, conferring a life interest on the child with trusts in remainder for the benefit of the children of that child. The settlor settled thirty thousand of the shares on such trusts for named persons and their respective children as the trustees in their absolute discretion by deed revocable or irrevocable from time to time at any time before the death of the settlor might appoint, and in default of and subject to any such appointment on trust (after declaring trusts of other parts) as to one equal fifth part ("the campaign shares") on trust to pay the income arising therefrom to the British Empire Cancer Campaign, such income to be applied for the general purposes of research work in cancer until such time as the campaign should notify the trustees that the cause of cancer had been discovered. On receipt of the notice the trustees were directed to appoint arbiters to decide who the discoverer or discoverers was or were, and the trustees were empowered at their discretion to sell the campaign shares or any part thereof and pay to the discoverer or discoverers such part of the proceeds as they thought fit. The balance of the campaign shares was to be held by the trustees on trust to pay the income to the treasurer of the campaign for the general purposes of research in cancer until a cure for cancer had been discovered. The trustees were then again to appoint arbiters to decide who was or were the discoverer or discoverers, and the trustees were to sell the rest of the campaign shares or such part as they thought fit and pay the proceeds to such discoverer or discoverers; and subject thereto to hold the campaign shares for Dr. Barnardo's Homes. There followed a general power of revocation and appointment in these terms: "Without prejudice to any payment which shall already have been made in pursuance of the trusts hereof or under any power for the time being exercisable in respect of any of the shares hereby settled . . . the trustees may from time to time by deed revocable or irrevocable (and expressed to be supplemental to these presents) at their absolute and uncontrolled discretion without being in any way liable for the exercise of such discretion revoke all or any of the trusts powers and provisions hereinbefore declared and contained concerning all or any of the shares hereby settled and may direct that the shares to which such revocation extends shall thenceforth be held upon such other trusts and subject to such other powers and provisions for the benefit of such person or persons [other than the settlor and another] or for such charitable purposes as they may think proper . . .". There had been purported exercises of the power of revocation. The court having decided that the trusts of the campaign shares were charitable and sufficiently certain, having construed the word "shares" in the power of revocation as referring to shares in the capital of the company not to beneficial shares of the trust fund (with the consequence that the power of revocation was not severable) and having construed the power as not being confined to the original trustees of the settlement but as extending to their successors,

Held: the power of revocation and new appointment was void ab initio because it was capable of being exercised beyond the period allowed by the

A rule against perpetuities (as distinct from being a power that could be exercised only within that period and would be itself a valid power, although some particular exercise of it might be void because of the rule): accordingly all purported exercises of the power of revocation were void.

Dictum of PARKER, J., in *Re De Sommery* ([1912] 2 Ch. at p. 630) applied.

B *Re Boules* ([1905] 1 Ch. 371) and *Re Davies & Kent's Contract* ([1910] 2 Ch. 35) explained.

[As to the application of the rule against perpetuities to a power, see 25 HALSBURY'S LAWS (2nd Edn.) 149, 152-157, paras. 250, 251, 257-267; and for cases on the subject, see 37 DIGEST 107-110, 413-427.]

Cases referred to:

- C (1) *Re Boules, Page v. Page*, [1905] 1 Ch. 371; 74 L.J.Ch. 338; 92 L.T. 556; 37 Digest 104, 389.
 (2) *Re Davies & Kent's Contract*, [1910] 2 Ch. 35; 79 L.J.Ch. 689; 102 L.T. 622; 37 Digest 104, 390.
 (3) *Re De Sommery, Coelenbier v. De Sommery*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 823; 37 Digest 107, 414.
 D (4) *Attenborough v. Attenborough*, (1855), 1 K. & J. 296; 25 L.T.O.S. 155; 69 E.R. 470; 37 Digest 107, 413.
 (5) *Kennedy v. Kennedy*, [1914] A.C. 215; 83 L.J.P.C. 63; 109 L.T. 833; 37 Digest 79, 193.

Adjourned Summons.

E The plaintiffs, two of the trustees of settlements dated respectively Dec. 4, 1931 and Aug. 31, 1933, applied to the court by originating summons for the determination of the question (among others) whether on the true construction of the settlements, the powers of revocation and new appointment expressed to be conferred by cl. 7 of the settlement of 1931 and (by reference thereto) by the settlement of 1933 were (a) wholly valid and effectual or (b) wholly void for remoteness or (c) partly and to what extent valid and partly and to what extent F void for remoteness.

The settlement dated Aug. 31, 1933, was expressed to be supplemental to the settlement of 1931 and it recited (as was the fact) that the capital of the company (shares in which were settled by the settlement of 1931) had been increased by the creation of eighteen thousand shares and that a further sixteen thousand shares G belonging to the settlor had at his direction been registered in the names of the trustees to be held on, with and subject to like trusts, powers and provisions as set out in the settlement of 1931. In purported exercise of the power contained in cl. 7 of the settlement of 1931 the trustees had executed deeds of revocation and new appointment.

H *E. J. A. Freeman* for the plaintiffs, two of the present trustees of the settlements.

E. I. Goulding for the first, second and seventh defendants, parties beneficially interested, including a grandchild of the settlor.

F. G. H. Hallett for the third, fourth, fifth and sixth defendants, children of the settlor.

D. A. Thomas for the eighth defendant.

I *J. A. Brightman* for the ninth and tenth defendants.

N. C. H. Brown Wilkinson for the eleventh, twelfth and fourteenth defendants.

L. H. L. Cohen for the thirteenth defendant.

The last seven defendants were all charitable institutions beneficially interested under the settlements.

Cur. adv. vult.

JUNE 1. ROXBURGH, J., read the following judgment: The question for decision today is whether a power of revocation and new appointment inserted

in a settlement has always been, or may become, void as infringing the rule against perpetuities.

The settlement, dated Dec. 4, 1931 and made between James Angus Watson (now Sir Angus) of the one part and three trustees of the other part, was a settlement of 112,000 shares in the capital of a company with unlimited liability registered under the Companies Act, 1929, and it contains no trust for sale. On the contrary, specific blocks of the said shares were settled on different trusts, and I have as a matter of construction reached the conclusion that generally in this settlement (though not invariably) and in particular in the general revocation clause, the word "shares" refers to the shares in the capital of the unlimited company and not to shares of beneficiaries in the corpus of the trust fund. This is an important point. The first block of thirty-six thousand shares was settled (subject to Lady Watson's life interest) on trust for division into quarters and to hold one quarter on the trusts thereafter declared concerning a block of four thousand shares called "Doreen's portion", another quarter on the trusts declared concerning Hazel's portion, another quarter on the trusts declared concerning Graham's portion, and the last quarter on the trusts of Bernard's portion. These were the settlor's four children. The second and third blocks (ten thousand shares each) are now held, in the events which have happened, on the foregoing trusts (excluding Lady Watson's life interest). The fourth block (four thousand shares) constitutes Doreen's portion, and the trusts thereof are as follows (cl. 2):

"Upon trust to pay the dividends and income to arise therefrom to the said Doreen Ethel Watson during her life and from and after her death in trust for such one or more exclusively of the others or other of her children at such age or time or respective ages or times if more than one (not being later than twenty-one years after her death) and if more than one in such shares and with trusts for their respective benefit and such provision for their respective advancement maintenance and education at the discretion of the trustees or of any other person or persons as the said Doreen Ethel Watson may by deed revocable or irrevocable or by will or codicil appoint and subject to or in default of any such appointment in trust for all or any the children or child of the said Doreen Ethel Watson who attain the age of twenty-one years or being female marry under that age and if more than one in equal shares absolutely."

The trusts of the fifth block (Hazel's portion of four thousand shares) and the sixth block (Graham's portion of eight thousand shares) (cl. 3 and cl. 4) are similar.

There is an accruer clause (cl. 5) and thus seventy-two thousand are disposed of. Clause 6 disposes of the remaining forty thousand shares. After the death of the settlor, ten thousand of them (subject to certain life interests) accrue to his children's portions, and the balance of thirty thousand were settled on the following trusts:

"As to the remaining thirty thousand shares upon such trusts and subject to such powers and provisions for the benefit of all or any one or more of the following persons namely (1) the said Ethel Watson (2) the said Doreen Ethel Watson (3) her children (4) the said Hazel Marguerite Watson (5) her children (6) the said Angus Graham Watson (7) his children (8) the said Bernard Angus Watson (9) his children (10) the said Emma Watson (11) the said Jessie Lambert (12) the said Nellie Reid and (13) the said Eleanor May Wilkinson as the trustees may in their absolute and uncontrolled discretion by deed revocable or irrevocable (without infringing any rule against perpetuities) from time to time and at any time before the death of the settlor appoint and in default of and subject to any such appointment and so far as the same shall not extend upon trust as to one equal fifth part thereof for the National Commercial Travellers Association absolutely as to another equal

A fifth part thereof for the Salvation Army absolutely as to another equal fifth
part thereof for the London Missionary Society absolutely as to one equal
tenth part thereof for the Northern Counties Gentlewomen's Society abso-
lutely as to another equal tenth part thereof for the Indigent Gentlewomen's
Fund absolutely and as to the remaining one equal fifth part thereof (herein-
after called 'the Campaign Shares') upon trust to pay the income arising
B therefrom to the treasurer for the time being of the British Empire Cancer
Campaign (hereinafter referred to as 'the campaign') such income to be
applied for the general purposes of research work in cancer until such time as
the campaign shall notify the trustees in writing that the cause of cancer has
been discovered (though the cure thereof may not be part of the discovery)
C to the complete satisfaction of the Scientific Advisory Committee or other
body nominated by the campaign and upon trust that on receipt of such notice
the trustees shall appoint arbiters who shall decide whether the cause of can-
cer has been discovered and if so who is or are the discoverer or discoverers
and so that the decisions of the said arbiters shall be final and binding on all
persons for all purposes and upon trust if the said arbiters shall decide that
D the cause of cancer has been discovered that the trustees shall in their
absolute and uncontrolled discretion sell the campaign shares or any part
thereof and shall pay to such discoverer or discoverers (and if more than one
in such proportions as they shall think fit) such part of the proceeds of sale
thereof as the trustees may in their uncontrolled and unfettered discretion
think fit and upon trust as to the balance of the campaign shares which shall
not be so sold that the same shall be retained by the trustees and the income
E arising therefrom shall be paid to the treasurer for the time being of the
campaign and shall be applied by him for the general purposes of research work
in cancer until such time as the campaign shall notify the trustees in writing
that a cure for cancer has been discovered to the complete satisfaction of the
Scientific Advisory Committee or other body nominated by the campaign
and upon trust that on receipt of such notice the trustees shall appoint
F arbiters who shall decide whether a cure for cancer has been discovered and if
so who is or are the discoverer or discoverers and so that the decision of the
arbiters shall be final and binding on all persons and for all purposes and upon
trust if the arbiters shall decide that a cure has been found that the trustees
shall sell the balance of the campaign shares remaining unsold or such part
thereof as the trustees shall think fit and shall pay the proceeds of sale thereof
G to such discoverer or discoverers in such shares and proportions as the
trustees shall in their absolute and uncontrolled and unfettered discretion
think fit and subject as aforesaid the trustees shall hold the campaign shares
in trust for the charitable institution known as Dr. Barnardo's Homes."

Then follows the general revocation clause (cl. 7), the validity of which is in issue.
It is as follows:

H "Without prejudice to any payment which shall already have been made
in pursuance of the trusts hereof or under any power for the time being
exercisable in respect of any of the shares hereby settled and subject as
hereinafter provided the trustees may from time to time by deed revocable
or irrevocable (and expressed to be supplemental to these presents) at their
I absolute and uncontrolled discretion without being in any way liable for the
exercise of such discretion revoke all or any of the trusts powers and provi-
sions hereinbefore declared and contained concerning all or any of the shares
hereby settled and may direct that the shares to which such revocation extends
shall thenceforth be held upon such other trusts and subject to such other
powers and provisions for the benefit of such person or persons (other than
the settlor or the said Ethel Watson) or for such charitable purposes as they
may think proper provided further that the trustees shall not be at liberty
to exercise the power of revocation hereby conferred in respect of any of the

shares hereby settled the beneficial interest in which shall for the time being have already become absolutely vested in possession in any person or charity."

As I have already indicated, I construe the word "shares" in this clause as meaning shares in the capital of the company. This is important, because in my judgment it excludes the possibility which might otherwise exist of severing the power as between one share in the corpus of the trust fund and another, and in particular as between "the campaign shares" (in respect of which the power of revocation is particularly vulnerable) and the other shares in the trust fund. I also hold that the power of revocation is not confined to the original three named trustees, but extends to all duly appointed trustees throughout the duration of the settlement.

I must now construe the trusts of "the campaign shares". These I hold to be wholly charitable and sufficiently certain. We are not travelling in the artificial sea of conditions subsequent, and I do not anticipate that arbiters will be unable to decide at some future time whether the cause of cancer has been discovered and whether a cure (by which I understand "a generally effective cure") has been found. Moreover, I regard the prizes not as a reward for past efforts, but as an incentive to qualified persons to direct their brains and energies to the relief of human suffering. If these four conclusions are right, that must be the end of the power, because if the power is indivisible it may continue to be exercised long after the period allowed by the rule against perpetuities. Indeed, as the gift in favour of Dr. Barnardo's Homes is exempt from the rule, these shares may never become absolutely vested in any charity, or alternatively they may become so vested in the remotest future. But, owing to the difficulties of the case and its serious consequence (for indeed there have been purported exercises of the power), I should not do justice to counsels' able arguments if I stopped at this point.

It has been argued by the friends of the power that I ought to sever it, avoiding it as regards the campaign shares (or alternatively construing the trusts of those shares differently), but adopting as regards the remaining shares an attitude of "wait and see"; and the foundation of this argument is laid on *Re Buckle*, *Page v. Page* (1) ([1905] 1 Ch. 371), and *Re Davies & Kend's Contract* (2) ([1910] 2 Ch. 35). Thus they seek to counter the arguments of their foe: for it was argued by counsel for the first, second and seventh defendants that as regards the four funds named after the children of the settlor, the named child might under cl. 2 or the trustees might under cl. 7, and as regards the balance of thirty thousand shares the trustees might under cl. 6 or cl. 7, interpose a life interest in favour of a grandchild of the settlor born after the date of the settlement. Such an appointment would be valid, and would not prejudice the ultimate remainders, which vested in interest in due time, but the fund might not fall into possession within the period allowed by the rule. Accordingly (so the argument ran) the power of revocation might be exercisable beyond that period.

Counsel answered this argument by saying that none of these two possibilities have happened, and none may ever happen, so that the power of revocation has at any rate not yet disclosed its invalidity (except perhaps as regards the campaign shares in relation to which it should be severed). This is at first sight a startling contention, and it runs entirely counter to the well-known passage in the judgment of PARKER, J., later LORD PARKER of WARRINGTON, in *Re De Souza, Colenbier v. De Souza* (3) ([1912] 2 Ch. 622) which is later in date than either of the two foregoing cases (*ibid.*, at p. 630):

"A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void: but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might

A be void because of the rule. If a power be given to a person alive at the date of the instrument creating it, it must, of course, if exercised at all, be exercised during his life, and is therefore valid. Again, if a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, and is therefore unobjectionable. Further, the instrument itself may expressly limit a period, not exceeding the legal limits, for the exercise of the power. Lastly, where the settlor has used language from which the court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the court will avoid the latter only and will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has, so far as I can discover, been uniformly looked on as a single and indivisible power, it may be otherwise if the power be limited to A. and B. or other the trustees of the settlement for the time being. In this case the court may treat the settlor as having created one power vested in A. and B. while trustees, and a distinct power vested in their successors, in which case the power vested in A. and B. would be open to no objection on the ground of remoteness: *Attenborough v. Attenborough* (4) ((1855), 1 K. & J. 296)."

I cannot disregard that exposition of the law (approved as it was by the Privy Council in *Kennedy v. Kennedy* (5), [1914] A.C. 215) which has become almost canonical, but I should like to attempt a reconciliation between the three cases, which does not seem to me to be difficult. It is in fact foreshadowed in the opening sentence of the last quotation from the judgment of PARKER, J. The distinction is between a power which is in itself void and a power which is itself good although some particular exercise of it might be void because of the rule. In the latter type of case it is permissible to wait and see how the power is in fact exercised, and both *Re Boules* (1) and *Re Davies & Kent's Contract* (2) belong to this class. But such a course is without precedent and would be taken in plain defiance of the judgment in *Re De Sommery* (3) and quite contrary to traditional doctrine, where the power itself is at stake. I would adopt, as the traditional doctrine, the following passage lately offered for acceptance by two living authors, MCGARRY and WADE (the LAW OF REAL PROPERTY, (1957), pp. 214, 215):

"There is no 'wait and see'. . . . If at the relevant moment there is the slightest possibility that the perpetuity period may be exceeded, the limitation is void ab initio, even if it is most improbable that this in fact will happen and even if, as events turn out, it does not."

It follows, therefore, that even if severance were possible, the severed power would be void as regards each separable portion of the fund. I hold that the power was itself void ab initio because it was capable of being exercised beyond the period allowed by the rule against perpetuities, and accordingly all purported exercises of such powers of revocation are themselves void.

Order accordingly.

Solicitors: *Lawrence Jones & Co.* (for the plaintiffs and the first to the seventh defendant*); *Ranger, Burton & Frost* (for the eighth defendant); *Amery-Parkes & Co.* (for the ninth and tenth defendants); *Kingsford, Dorman & Co.* (for the eleventh, twelfth and fourteenth defendants); *Crossman, Black & Co.* (for the thirteenth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re SUTHERLAND (*deceased*). WINTER AND OTHERS v.
INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), June 10, 11, 19, 1959.]

Estate Duty—Company—Shares—Valuation—Allowance for contingent liabilities—Balancing charge—Liability not existing at the date of the death—Finance Act, 1940 (3 & 4 Geo. 6 c. 29) s. 50, s. 55—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 292.

S., who was the owner of shares in a company of which he had control during the five years ending with his death, died in March, 1953. For purpose of estate duty these shares had to be valued in accordance with the provisions of s. 50* and s. 55* of the Finance Act, 1940. The assets of the company included five ships, the value of which had been agreed with the estate duty office at £1,150,000. For income tax purposes the cost of these ships was agreed at £847,907. Capital allowances had been allowed under Part 10 of the Income Tax Act, 1952, leaving expenditure unallowed of £290,749. The ships were sold in the latter part of 1953 and early 1954 for £1,070,505, and in consequence of the sale a balancing charge was made under s. 292 of the Income Tax Act, 1952, of £548,318, which resulted in additional income tax and profits tax assessments (aggregating £370,114 13s.) on the company. On the question whether, in computing as at the date of S.'s death the value of the shares of the company for estate duty purposes, any allowance should be made in respect of the additional income tax and profits tax as "contingent liabilities" within s. 50 (1) of the Finance Act, 1940,

Held: no allowance ought to be made under s. 50 (1) of the Finance Act, 1940, in respect of the additional income tax and profits tax resulting from the balancing charge because, at the death of S., events had yet to occur before the charge came into existence, and, therefore, there was not then any existing legal liability, not even a contingent liability, in relation to the additional tax.

Re Duffy ([1948] 2 All E.R. 756) followed.

[As to balancing allowances and charges, see 20 HALSBURY'S LAWS (3rd Edn.) 501-504, paras. 964-969, and as to valuation of assets of companies deemed to pass on death, see 15 HALSBURY'S LAWS (3rd Edn.) 33-37, paras. 63-69.

For the Finance Act, 1940, s. 50, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 478, 483, and for the Income Tax Act, 1952, s. 292, see 31 HALSBURY'S STATUTES (2nd Edn.) 283.]

Cases referred to:

- (1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.
- (2) *Re Duffy, Lakeman v. A.-G.*, [1948] 2 All E.R. 756; [1949] Ch. 28; [1949] L.J.R. 133; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Wood Bros. (Birkenhead), Ltd.*, [1959] 1 All E.R. 53.
- (4) *Kirkness v. Hudson (John) & Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.
- (5) *I. R. Comrs. v. Butterley Co., Ltd.*, [1956] 2 All E.R. 197; [1957] A.C. 32; 3rd Digest Supp.
- (6) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 163; 134 L.T. 98; 28 Digest 105, 649.

Adjourned Summons.

This was an application by the executors of the will of Sir Arthur Moore Sutherland, Bart., by originating summons, dated Apr. 14, 1958, for the determination of the question whether, on the true construction of s. 50 (1) of the Finance Act, 1940, as applied by s. 55 (2) (a) for the purposes of s. 55 and in the

* The relevant terms of s. 50 (1) of the Finance Act, 1940, are printed at p. 684, letter C, post, and of s. 55 of the Act at p. 683, letter H, to p. 684, letter A, post.

A events which had happened, any allowance should be made in valuing for estate duty at the date of his death the shares of B. J. Sutherland & Co., Ltd. on the basis of the net value of the assets of the company including certain ships and in particular whether allowance fell to be made at such date by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of the ships in question by reason of and up to the amount of capital allowances previously received by the company in respect of the said ships. The facts appear in the judgment.

Sir John Senter, Q.C., and R. A. Watson for the plaintiffs.

R. O. Wilberforce, Q.C., and E. Blanshard Stamp for the defendants.

Cur. adv. vult.

C June 19. **DANCKWERTS, J.**, read the following judgment: Sir Arthur Monro Sutherland died on Mar. 29, 1953. He was the owner of 98,700 shares of £1 each in the capital of B. J. Sutherland & Co., Ltd., of which company he had had control during the five years ending with his death. Consequently, for purposes of estate duty, these shares had to be valued by reference to the net value of the assets of the company in accordance with the provisions of s. 50 and s. 55 of the Finance Act, 1940.

D The assets of the company at the date of the deceased's death included five ships, the value of which at that date has been agreed with the estate duty office to be £1,150,000. The cost of these ships to the company for income tax purposes was agreed to be £847,907, and at the date of the deceased's death the company had received capital allowances under the provisions of Part 10 of the Income Tax Act, 1952, leaving "expenditure unallowed" (as defined by s. 297 of the same Act) of £290,749. Accordingly, in the event of a sale of the ships for a sum in excess of the amount of such expenditure unallowed, under the provisions of s. 292 of the Income Tax Act, 1952, a balancing charge would be imposed of an amount equal to such excess, which would result in an assessment to income tax and profits tax at the rates appropriate to the year in respect of which such assessment was made. The ships were in fact sold in the latter part of 1953 and the early part of 1954 for sums amounting in the aggregate to £1,070,505. This gave rise to a balancing charge of £548,318, resulting in an additional income tax assessment on the company for the year 1953-54 at 9s. in the pound, amounting to £246,743 2s. and an additional profits tax assessment at the rate of 22½ per cent. for the chargeable accounting period ending on Mar. 31, 1953, amounting to £123,371 11s. The aggregate of this additional tax liability was £370,114 13s.

E The question raised by the originating summons is whether in valuing the assets of the company at the date of the deceased's death any deduction ought to be made in respect of a claim for additional income tax and profits tax which might arise on a sale of the ships for an amount in excess of the expenditure unallowed in the manner in which such event afterwards happened.

H The answer depends on the true construction of two sections of the Finance Act, 1940. Section 55 must be read first:

I " (1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the five* years ending with his death; . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection.

" (2) For the purposes of such ascertainment as aforesaid—(a) the net value of the assets of the company shall be taken to be the principal value

* Five was substituted for three by the Finance Act, 1946, s. 47 and Sch. 11, Part 1.

thereof estimated in accordance with the said sub-s. (5), less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act, but subject to the modification that allowance shall be made for such a liability as is mentioned in para. (b) of that subsection unless it also falls within para. (a) thereof; . . .”

The value of the assets of the company so ascertained is to be the value of all the shares and debentures of the company so that the value of the shares passing on the death of the deceased represents, of course, an appropriate fraction of the total value. Section 50 (1) provides as follows:

“ In determining the value of the estate for the purpose of estate duty the provisions of s. 7 (1) of the Finance Act, 1894, as to making allowance for debts and incumbrances shall not have effect as respects any debt or incumbrance to which assets of the company passing on the death by virtue of s. 46 of this Act were liable, but the commissioners shall make an allowance from the principal value of those assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) . . .”

It is, I think, unnecessary to refer to the well-known provisions of sub-s. (1) and sub-s. (5) of s. 7 of the Finance Act, 1894. The whole question turns, I think, on the construction of the words “contingent liabilities”. In the OXFORD NEW ENGLISH DICTIONARY (Murray) among the meanings given to the word “liability” are the following:—

“ 1. Law. The condition of being liable or answerable by law or equity.

“ 3. That for which one is liable; *esp. pl.* the debts or pecuniary obligations of a person or company.”

And for the word “liable”:—

“ 1. Law. Bound or obliged by law or equity, or in accordance with a rule or convention; answerable for; legally subject or amenable to.”

Under the word “contingent” are given the following meanings:—

“ 2. Liable to happen or not; of uncertain occurrence or incidence.

“ 8. Dependent for its occurrence or character on or upon some prior occurrence or condition.

“ 9. Law. Dependent on a precontemplated probability; provisionally liable to exist or take effect; conditional; not absolute.”

Now, at the date of the deceased's death there clearly was no presently existing liability for any balancing charge or the income tax and profits tax liabilities which would result from the balancing charge. But the section refers to liabilities which have not matured at the date of the death and to contingent liabilities. Liabilities which have not matured are obviously liabilities which are then binding on the company, but which will not become payable until a future date. Contingent liabilities must be something different from the first named liabilities. The liability of the company to a balancing charge and the consequential income tax and profits tax could arise from the capital allowances which had been received by the company, if there were a sale of the ships, if the sale moneys exceeded the amount of the expenditure still unallowed, and the charge for a balancing charge and income tax and profits tax still remained part of the taxation for the relevant year, and the company continued to carry on business, and the rate of income tax and profits tax would depend on the Finance Act regulating the rates of taxation for the relevant year. All these are contingencies, and an event does not seem to me to be less a contingency because, as in the case of the sale of the ships, it is one which is brought into being at the will of that person who will become liable to the charge, and not independently of his will or

- A decision. But if the liability at the date of the deceased's death is a contingent liability within the meaning of s. 50 of the Finance Act, 1940, it is not to be measured by the amount of the income tax and profits tax which in fact became assessable on the company by reason of the actual sale by the company of the ships in 1953-54. It is something which has to be estimated at the testator's death, and presumably without knowledge of the facts of the sale which actually took place in 1953-54. With so many contingencies of unknown result affecting the matter, the proper estimation (which is referred to the commissioners) is obviously a matter of extreme difficulty; but the even more difficult contingencies of the rates of income tax and the circumstances of the relevant taxpayer were not considered beyond the abilities of a jury in deciding the amount of damages for personal injury by the House of Lords in *British Transport Commission v. Goodyear* (1) ([1955] 3 All E.R. 796). I can see that, viewing the matter from the date of the deceased's death, when there might not be a sale of the ships for years, or, I suppose, at all, the price must be quite unknown, and as the continuance of the provisions for balancing charges, and the rates of income tax and profits tax are matters dependent on the will of Parliament, the estimation of the prospective liability (if any) must be a matter of the greatest difficulty.
- D But I have difficulty in seeing why these are not all contingencies of one sort or another and why the liability which might arise therefrom is not a contingent liability.

- The substantial point which remains is whether I am bound by the decision of the Court of Appeal in *Re Duff, Lakeman v. A.-G.* (2) ([1948] 2 All E.R. 756) none the less to reject the contentions of the plaintiffs (the executors of Sir Arthur Sutherland's will) in the present case and to give judgment for the defendants. In *Re Duff* (2) the point was whether income tax payable at the standard rate for the financial year 1943-44, assessed by reference to the profits of the year 1942-43, during which the deceased died on June 24, 1942, was a contingent liability of the deceased's company for the purposes of s. 50 and s. 55 of the Finance Act, 1940 (the same sections, of course, as those which are relevant in the present case). LORD GREENE, M.R., said that once the point in the controversy was properly appreciated, he did not find that it was a particularly difficult one to deal with. I think that I appreciate the point in the present controversy sufficiently, but I do not find the solution particularly easy.

- The argument in favour of allowance against the company's assets of the amount of the income tax assessment is stated by LORD GREENE as follows
- G (*ibid.*, at p. 758):

- "What is said is this. The profits earned in the year during which the deceased died will form the basis of the assessments for income tax in respect of the next year. Therefore, the profits which are earned during that year in which the deceased died carry, so to speak, in gremio, a liability for tax in respect of the financial year which will only begin after the death of the deceased."

H LORD GREENE, M.R., treats the question as one of the construction of the word "liabilities". He says, referring to s. 50 (1) of the Finance Act, 1940 ([1948] 2 All E.R. at p. 759):

- I "[The words in brackets] deal with two sub-classes of liabilities. Neither of those sub-classes can go beyond the head class of liabilities. In other words, in order to fall within one or other of those two sub-classes, a thing must be a liability. Those two sub-classes are as follows: first, the liabilities 'which have not matured at the date of the death.' That has a very simple meaning. The other class is as regards 'contingent liabilities', which are to be valued by reference to an estimate. In that context what I have to ask myself is this. What is the meaning of 'liabilities', and, in particular, what is its meaning in the phrase 'contingent liabilities'? It is to that simple point that this controversy comes down."

Then, after referring to certain arguments of counsel on the nature of income tax, LORD GREENE, M.R., puts his conclusion in these words (*ibid.*, at p. 760):

"... but, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability—a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date."

SOMERVELL, L.J., and EVERSHED, L.J., concurred in this judgment.

I must confess that I feel doubt whether LORD GREENE's judgment did not concentrate unduly on the word "liability" to the exclusion of the qualifying (and, I should have thought, extending) adjective "contingent"; but I think that I can appreciate what was in LORD GREENE's mind. Some of the meanings attributed to the word "contingent" in the dictionaries certainly suggest that a possibility would satisfy the intention of the word. But LORD GREENE, M.R., plainly suggests that the meaning should be limited to a conditional event under an existing obligation (in the same way perhaps, for instance, in the case of rights that an interest under the will of a deceased person may be contrasted with the mere spes successionis of the heir of a living person). Anyhow, as it seems to me, it is a definite construction put by the Court of Appeal on the material section on which the present case depends, and I must, I apprehend, treat it as binding on me.

It was argued that the language of the court in *Re Duffy* (2) was quite inconsistent with that of the House of Lords in *British Transport Commission v. Gourley* (1); but there does not appear to have been any consideration of *Re Duffy* (2) in the latter case, and the subject-matter was, of course, different. I do not think that I can regard the decision of the Court of Appeal in *Re Duffy* (2) as no longer binding, and I feel that I am compelled to apply the interpretation which the Court of Appeal put on the expression "contingent liabilities".

A great deal of the argument before me was devoted to the question which were the sections which imposed the charge, and the distinction between liability and assessment. Reliance was placed on passages in *Inland Revenue Comrs. v. Wood Bros. (Birkenhead), Ltd.* (3) ([1959] 1 All E.R. 53); *Kirkness v. John Hudson & Co., Ltd.* (4) ([1955] 2 All E.R. 345); *I. R. Comrs. v. Butterley Co., Ltd.* (5) ([1956] 2 All E.R. 197); and *Whitney v. Inland Revenue Comrs.* (6) ([1926] A.C. 37); as well as *British Transport Commission v. Gourley* (1). But I did not find any of the passages, when lifted out of the different contexts in which they appeared, in any way conclusive in regard to the question to be decided in the present case.

Further, the existence at the death of the deceased of sections which will impose a charge in certain events does not really carry the problem any further. It is still necessary that the events shall occur before the charge under the statute can come into existence. Thus one is driven back to the basic question: Is it proper to say that there is a contingent liability under the charging sections when the events which must occur before the charge can arise have still to happen, and such happening is still wholly uncertain and is dependent on a number of factors which may never exist for a number of years, if at all? The Court of Appeal have said that in such a situation there is no liability, even of a contingent nature, and, as I see it, their view is binding on me and I must follow it. If I have misinterpreted the view of the Court of Appeal in this matter, the position will have to be corrected in a higher court.

Declaration accordingly.

Solicitors: Fyfe, Mahon & Pascoff, agents for Kennedy & Foster, Newcastle-upon-Tyne (for the plaintiffs); Solicitors of Inland Revenue (for the defendants).
[Reported by E. COCKBURN MILLAR, *thursford&land*]

WATTS v. WATTS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 3, 4, 1959.]

Issue—*Infant*—*Service*—*Service of petition on infant woman named personally*
—*Guardian ad litem appointed who sought to waive irregularity*—*Whether*
service deemed good service—*Matrimonial Causes Rules, 1957 (S.I. 1957*
No. 619), r. 66 (3).

On May 12, 1959, the wife obtained a decree nisi for the dissolution of her marriage on the ground of the husband's adultery with the woman named, the suit being undefended. It was then sought to expedite the decree absolute. Notice of this application was given to the Queen's Proctor. It was then discovered that the woman named was an infant. The petition had been served on her personally, and not on her father or guardian ad litem as required by r. 66 (3)* of the Matrimonial Causes Rules, 1957. The wife applied by summons that, under the proviso to r. 66 (3), the service on the infant should be deemed good service. The infant's father was present in court, gave evidence, was appointed by the judge guardian ad litem, entered appearance and consented to waive any lack of proper service.

Held: under the proviso to r. 66 (3) of the Matrimonial Causes Rules, 1957, service on the infant would be ordered to be deemed good service.

Levy v. Levy ([1957] 1 All E.R. 478) applied.

[As to service on an infant in a matrimonial cause, see 12 HALSBURY'S LAWS (3rd Edn.) 325, 326, paras. 662, 663, and SUPPLEMENT; and for cases on the subject, see 27 DIGEST (Repl.) 685, 6546-6550, 686, 6561 and 3rd DIGEST SUPP.

For the Matrimonial Causes Rules, 1957, r. 66 (3), see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 251.]

Cases referred to:

- (1) *Stanga v. Stanga*, [1954] 2 All E.R. 16; [1954] P. 10; 3rd Digest Supp.
- (2) *Levy v. Levy*, [1957] 1 All E.R. 478; 121 J.P. 128; 3rd Digest Supp.

Summons.

The husband and wife were married on June 18, 1949, and there were no children of the marriage. By petition dated Mar. 3, 1959, the wife sought dissolution of the marriage on the ground of the husband's adultery with a woman named in the petition. In March, 1959, the petition was served on the woman named by registered post. She signed and returned the acknowledgment of service. The suit was undefended and on May 12, 1959, SIR EDGAR DALE, sitting as a special commissioner, granted the wife a decree nisi and awarded costs against the husband. It was sought to make absolute the decree before the normal three months from the decree nisi had elapsed. Notice of the application was given to the Queen's Proctor. It was then ascertained that the woman named was an infant, aged seventeen years. On June 3, 1959, application was made to SACHS, J., to rectify the position by ordering that the service on the infant herself be deemed good service. She was unrepresented by counsel, but her father was in court. SACHS, J., thereupon appointed the infant's father guardian ad litem, his solicitors, by leave, entered an appearance for him and, to allow the affidavit of fitness to be filed and the consent exhibited, His Lordship adjourned the case to June 4, 1959. On the adjourned hearing an order was

* The Matrimonial Causes Rules, 1957, r. 66 (3), reads as follows: "Where service of any document in a cause to which these rules apply is required to be effected on an infant, the document shall, unless otherwise directed, be served on the father or guardian of the infant or, if he has no father or guardian, on the person with whom he resides or under whose care he is, and service so effected shall be deemed good service on the infant, so however that a registrar may order that service effected or to be effected on the infant shall be deemed good service."

sought whereby the service effected on the infant should be deemed to be good service under the proviso to the Matrimonial Causes Rules, 1957, r. 66 (3).

M. P. Picard for the wife.

The father of the woman named, as her guardian ad litem, was not represented. The husband did not appear and was not represented.

SACHS, J.: By some inadvertence, the woman named, who is an infant, was served with a petition. She was then, in March, 1959, only seventeen years of age and she lived in her father's home. The person who ought properly to have been served under the provisions of the Matrimonial Causes Rules, 1957, r. 66 (3)* was the father himself. The fact that the service had not properly been effected escaped notice until the Queen's Proctor called attention to it when asked whether he had any objection to the decree absolute being expedited the wife having been granted a decree nisi on May 12, 1959, on the ground of the husband's adultery.

Service on the woman named is mandatory (compare *Stangt v. Stangt* (1), [1954] 2 All E.R. 16) and the effect of having failed to comply with the provisions of r. 66 (3) involves serious consequences, for the purported service on the woman named in the present case was a nullity. Application is now made to rectify the position by virtue of the concluding words of r. 66 (3), which provide that service effected on an infant may be ordered to be deemed good service. To those concluding words I shall refer as the "proviso" to the sub-rule in question.

Several authorities were cited to me by counsel for the wife† yesterday, including *Levy v. Levy* (2) ([1957] 1 All E.R. 478). That was a case in which both parties were infants, both were represented by counsel in court and both asked that the proviso be applied. The court acceded to that request in relation to the service which had been effected on the infant respondent personally, instead of on a parent or guardian ad litem. In the interests of infants and persons of unsound mind the importance of guarding jealously the protection given by r. 66 has more than once been stressed in these courts. No less important in the interests of all concerned on questions of status is the need to ensure on the face of the court's record that the procedure followed has been such that it cannot be questioned. In a case such as the present the court should ensure, if practicable, that it has appropriate evidence from a parent or other guardian ad litem either that it is agreed in the interests of the infant that the proceedings should continue as if there had been proper service in the first place, or, alternatively, that there is no valid objection to this course. Moreover, it is desirable that whoever speaks for the child should enter an appearance so as to be able to speak directly to the court and should be on the record for that purpose. Evidence on such a point can normally be given on affidavit and, by leave, arrangements can be made for a general appearance in the appropriate form to be entered. In this way the matter can proceed in a prompt and inexpensive fashion.

In the present case, because there was doubt what was the correct procedure, no affidavit was filed but the father was in court so that he could be referred to if the urgency of the matter so demanded it. As it is desirable that this decree nisi should be followed by a decree absolute as soon as possible if the technicalities of the situation permit, I allowed the father's evidence to be given orally and ascertained that he had had the benefit of the advice of a solicitor. He stated firstly that he already knew that his daughter, the woman named, had received the petition in this cause and signed and returned the acknowledgment of service on the day that the purported service was effected; secondly, that in his own view it was in the interests of his daughter that the cause should proceed

* Rule 66 (3) is printed at p. 687, letter I, ante.

† Counsel cited also *Gore-Booth v. Gore-Booth*, [1953] 2 All E.R. 1000; *Roberts v. Roberts and Peters*, ante, p. 209, and *Thatcher v. Thatcher and Gill*, ante, p. 649.

A as an undefended matter and that that had always been his opinion, and, thirdly, that if he were now served with a copy of the petition he would be prepared to enter an appearance and waive all objections to any prior absence of proper service.

B In those circumstances it was arranged that he should, by leave, enter a general appearance, and this has now been done. He has since then repeated that he desires any irregularity or lack of proper service in the past to be waived in so far as he is entitled so to waive it. His appearance may well of itself constitute a waiver and so cure the situation; but to make things completely sure I propose to make an order in the terms of the proviso of r. 66 (3) of the Matrimonial Causes Rules, 1957. That having been done, I further order that the decree absolute be made forthwith—unless there is any objection.

C *M. P. Picard*: I do not think that the consent of the Queen's Proctor has been obtained. He has been advised of this application.

SACHS, J.: I order that the decree be made absolute at 2 p.m., June 5, 1959, subject to there being any objection from the Queen's Proctor within the next twenty-four hours.

D Order accordingly.

Solicitors: *Attwater & Liell* (for the wife); *Breeze & Wyles*, Enfield (for the guardian ad litem).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

E

F Re TURNER'S WILL TRUSTS. BRIDGMAN AND OTHERS v.
TURNER AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), June 23, 1959.]

G *Trust and Trustee—Variation of trusts by the court—Discretionary trust—Unborn issue and future husband objects of discretionary trust—Whether any "person" includes an unborn or unascertained person in the Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (1) (d).*

The words "any person" in s. 1 (1) (d)* of the Variation of Trusts Act, 1958, include an unborn or unascertained person.

H Under the will of a testator a settled share of his residuary estate was held on trust to pay the income thereof to B. for her life or until some event happened whereby her interest would, if it belonged to her absolutely, become vested in or charged in favour of some other person. On the determination of the life interest in B.'s lifetime a discretionary trust of income would arise in favour of her, her husband, her children and issue; and after B.'s death the settled share was to be held in trust for her children or remoter issue as she should appoint and in default of appointment on trust for her children at twenty-one or, if daughters, on marriage, in equal shares. There was power for B. to appoint a life interest to any husband of hers in part of the settled share. B. married in 1933 and had two children, a son and a daughter, who were born in 1934 and 1936 and were unmarried. B.'s husband died and in 1940 she re-married. She was now fifty-six years of age and there was

* The relevant terms of s. 1 (1) of the Variation of Trusts Act, 1958, are printed at p. 691, letter I, to p. 692, letter C, post.

no child of her second marriage. The approval of the court under the Variation of Trusts Act, 1958, was sought for an arrangement whereby B.'s protected life interest would be enlarged into a life interest not liable to be determined in her lifetime, on terms (a) that she should release her power to appoint capital of the settled share in favour of her children or remoter issue and should release her power to appoint a life interest to any husband of hers, (b) that the settled share should be divided between B. and her son and daughter according to the value of their interests, and (c) that the son and daughter should settle the property that they so received. The trusts of each proposed settlement were for the settlor for life and thereafter for the settlor's children or issue, but each settlement included a power for the settlor with the consent of the trustees to revoke the trusts of the settlement and to direct capital to be paid to the settlor.

Held: the proposed arrangement would be approved under s. 1 (1) (d)* of the Variation of Trusts Act, 1958, and the proviso to s. 1 (1), on behalf of any future husband of B., and would be approved on behalf of unborn issue of B., but, the arrangement being on the facts one which did confer a benefit on unborn grandchildren of B., it was unnecessary to rely on their behalf on the proviso to s. 1 (1).

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

By originating summons, dated May 8, 1959, beneficiaries under the will of the testator, George Lewis Turner deceased, those of the trustees of the will who were not also beneficiaries being respondents, applied for approval, under the Variation of Trusts Act, 1958, of an arrangement varying the trusts of the will on behalf of all persons (including unborn persons) who might become interested under the existing trusts concerning the one-eighth share of the testator's residuary estate held on protective trusts for the applicant, Freda Mabel Bridgman (hereinafter called "Mrs. Bridgman"), during her life. The testator, by his will dated Nov. 20, 1918, directed his trustees in the events which happened to hold one-eighth part of his residuary estate on trusts under which the income of that settled share would be paid to Mrs. Bridgman during her life or until some act or event should have happened whereby the interest thereby given to her would, if belonging to her absolutely, have become invested in or charged in favour of some other person or persons. In the event of the failure or determination in her lifetime of the trust to pay the income of the settled share to her the trustees were, during the remainder of her life or such shorter period or periods as they should in their absolute discretion think fit, to pay all or any part of the income of the settled share or to apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons, namely, Mrs. Bridgman and her husband (if any) and her children and issue for the time being in existence and any other persons for the time being entitled or interested whether absolutely contingently or otherwise to or in the settled share under the trusts limited to take effect after Mrs. Bridgman's death, in such proportions and manner as the trustees should in their absolute and uncontrolled discretion from time to time think proper. From and after Mrs. Bridgman's death the trustees were to stand possessed of the settled share on such trusts for the benefit of her children or remoter issue as she should by deed or deed poll capable or incapable or by will or codicil appoint, and in default of and subject to any such appointment on trust for all or any of her children or child who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares. Power was conferred on Mrs. Bridgman to appoint by will or codicil to any

* The relevant terms of s. 1 (1) of the Variation of Trusts Act, 1958, are set out in p. 691, letter E, to p. 692, letter C, post.

A husband of hers an interest for life or any less interest in any part, not exceeding one half, of the settled share. The testator died on Oct. 2, 1926. Mrs. Bridgman married on Mar. 25, 1933, and her husband died on May 25, 1936. There were two children of this marriage, viz., the applicants Nicholas Charles Haydon and Sara Haydon who were born on Sept. 8, 1934 and Aug. 5, 1936 respectively. Neither of them had married. Mrs. Bridgman married her present husband on Mar. 25, 1940, and there were no issue of this marriage. She was fifty-six years of age at the time of the hearing. Her husband, who was also one of the trustees of the will, Mrs. Bridgman and her two children were the applicants by the originating summons for approval of an arrangement whereby the interest of Mrs. Bridgman in the income of the settled share should be enlarged into an interest for her life which should not be liable to fail or determine during her lifetime in the manner set out in the testator's will on the terms that—

(a) Mrs. Bridgman should release the power conferred on her by the testator's will to appoint capital and income of the settled share in favour of her children and remoter issue and should release the power conferred on her by that will to appoint an interest in the income of the settled share to any husband who might survive her.

(b) Mrs. Bridgman and her two children should divide the settled share between them in specie in accordance with the actuarial value of their respective interests therein.

(c) the two children should settle the parts of the settled share to be taken by them respectively on trust for themselves and their respective issue.

For the respondent trustees it was argued that the court had no power to approve the variation because "any person" in s. 1 (1) (d) of the Variation of Trusts Act, 1958, did not include unborn or unascertained persons.

J. E. Vinelott for the applicants.

J. A. Wolfe for the respondents.

DANCKWERTS, J., after referring to the nature of the application and the trusts of the one-eighth share of the testator's residuary estate, continued: The arrangement proposed is one under which Mrs. Bridgman will release her power of appointment, and then the capital of the fund will be divided on an actuarial basis, which gives seventy per cent. to her and fifteen per cent. to each of her two children, who are over the age of twenty-one, subject to the retention of an appropriate sum to meet death duties in the event of Mrs. Bridgman's dying within five years of the date of the arrangement being approved. It is also part of the arrangement that the two children shall settle their shares on the usual trusts for themselves for life and for their children or issue after their death, but in each of the proposed settlements there is included a provision which will enable the settlor, with the consent of the trustees of the settlement, to revoke the trusts of the settlement and direct the capital to be paid to the settlor.

The question has been raised whether I can approve this arrangement having regard to the facts that the only benefit for unborn issue under the proposed settlements may be defeated, and that no provision whatever is made for any future husband of Mrs. Bridgman, who may become a member of the class entitled to a share under the discretionary trust.

The first point is whether I am under an obligation to require any provision to be made for such persons at all, having regard to the fact that their interests arise under the possible discretionary trust which will only come into operation in the event of Mrs. Bridgman's life interest being forfeited under the trusts of her father's will. The relevant provision is in s. 1 (1) of the Variation of Trusts Act, 1958, which provides that

"... the court may if it thinks fit by order approve on behalf of—(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or (b) any person (whether ascertained or not) who

may become entitled, directly or indirectly, to an interest under the trust, or being, at a future date, on the happening of a future event a person of any specified description, or a member of any specified class or persons, or however that this paragraph shall not include any person who would be of that description, or a member of that class, or that class, or if the said date had fallen or the said event had happened at the date of the application to the court, or (c) any person unborn, or (d) [which is the material provision] any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, any arrangement . . .

"Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

In other words, in cases other than those covered by para. (d) the court must be satisfied that the carrying out of the arrangement would be for the benefit of the person mentioned, but in the case (d) the court may, if it likes, disregard the question whether any benefit is provided or not.

The point has been raised whether "any person" in para. (d) includes an unborn person. My attention has been directed to the fact that in para. (b) the words "whether ascertained or not" have been inserted, and para. (c) deals with an unborn person in terms. Therefore it is argued that I have no power to approve under para. (d) in the case of persons unborn even though such a person is a person who would benefit from a discretionary interest under the protective trusts.

I do not think that that argument is well founded. The words "any person" are perfectly general, and unless restricted in some way must include an unascertained or an unborn person—any person who might take, in other words, under the provisions of the discretionary trust, that is to say, under the exercise of the discretion by the trustees or by whosoever may be entrusted with the duty of distributing. It is true that there is a certain antithesis between para. (b) and para. (c) referring to persons ascertained or not and persons unborn, but it does not seem to be a necessary conclusion from that that persons unborn are excluded from para. (d). It appears to me to be important that one finds just the sort of provision which one would suppose the section had in mind in another Act, namely the Trustee Act, 1925, s. 33 (1) (ii), where the persons who are to take under a discretionary trust under protective trusts are defined by the section as

" . . . the following persons (that is to say)—(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or (b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income there-
of . . . "

That plainly includes the possibility of the persons being interested being either unborn or unascertained. Having regard to that, it seems to me that the provisions in para. (d) of s. 1 (1) of the Variation of Trusts Act, 1958, must have been directed to that particular statutory provision under the statutory protective trusts, and, therefore, that I am under no obligation to require an interest to be provided if some benefit is to be provided for the persons who would otherwise be entitled to the trust property, within para. (d). I am ready, consequently, only with the case of a possible future husband of Mrs. Bridgman, because it seems to me that any grandchildren of hers do take a benefit under the proposed arrangement, having regard to the provisions of the will. Grandchildren would take an interest in capital only if the power of appointment in favour of Mrs. Bridgman's issue were exercised in their favour to the exclusion of children of a son or daughter of hers. That power is going to be released in the present case, and that

- A would cut out their interest. Under the discretionary trust in the will it requires ~~discretion of the trustees to give something or nothing whatever~~. They might be given nothing whatever, even supposing that the discretionary trust ever came into effect. Under the proposed settlement by each of Mrs. Bridgman's children, however, grandchildren will be given directly interests which would only be cut out in the event of the settlor being allowed by the trustees to revoke the trusts
- B so that the settlor can retain capital for himself or herself. Therefore, on balance, it seems to me plain that so far as the grandchildren are concerned the arrangement does confer a benefit on them, and I am prepared to approve the arrangement accordingly.

Order accordingly.

Solicitors: *Freshfields* (for all parties).

- C [Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

D ALBERT D. GAON & CO. v. SOCIÉTÉ INTERPROFESSIONNELLE DES OLEAGINEUX FLUIDES ALIMENTAIRES.

[QUEEN'S BENCH DIVISION (Ashworth, J.), May 11, 12, 13, June 5, 1959.]

Sale of Goods—C.i.f. contract—Frustration—Performance possible by route which was not customary—Closing of Suez Canal—Elements to be considered where frustration alleged from impossibility of shipment by customary route.

E *Force Majeure—Sale of goods—Force majeure clause—C.i.f. contract for the sale of groundnuts—I.O.S.A. Form 38, cl. 8—Closing of Suez Canal—Whether clause brought into operation.*

- By two contracts, dated respectively Oct. 12 and Oct. 31, 1956, sellers in Sudan agreed to sell specified quantities of Sudan groundnuts in shell, c.i.f.
- F Nice and Marseilles respectively, shipment to be made from a Sudanese port under the first contract in October/November, 1956, and under the second contract in November, 1956. Both contracts incorporated the terms of Form 38 of the I.O.S.A. forms of contract, cl. 8 of which provides, among other things, that in all cases of force majeure preventing shipment within the time fixed, the period for shipment shall be extended for not more than two
- G months and "after that, if the case of force majeure be still operating, the contract shall be cancelled". From Sept. 27, 1956, sufficient groundnuts were held to the sellers' order at Port Sudan to fulfil both contracts. On Oct. 29, 1956, armed forces of Israel invaded Egypt; on Nov. 2, 1956, the Suez Canal was blocked to shipping and remained blocked until April, 1957. The sellers chartered two vessels in October, 1956, but the charters were subsequently cancelled by agreement between the charterers and owners, as the
- H Suez Canal was closed. In November, 1956, the sellers became sub-charterers of a third vessel. The sellers did not ship any groundnuts and their contention that the contract was frustrated was referred to arbitration. It was found that at the time of the first contract, Oct. 12, 1956, the parties contemplated shipment by the Suez Canal route; but there was no finding that the sellers or buyers were aware at the time of the second contract that that route was
- I impracticable or what route they had then in contemplation. It was found that the alternative route during the closure of the Suez Canal was by the Cape of Good Hope which was then the shortest practicable route. It was also found that, if after the closing of the canal the sellers had shipped the goods via the alternative route, the buyers could not have rejected the documents and that, though it would have been more expensive to ship goods via the alternative route, this did not make the performance of either of the contracts commercially impossible.

Held: the contracts were not frustrated for the following reasons—

(i) the test in relation to this type of contract was whether an alternative route existed, and if it did, whether performance by that route would render it a thing radically different from that which was undertaken in the contract (see p. 698, letter E, post); on the facts, there was an alternative route by the Cape of Good Hope and neither the additional expense nor the distance nor the character of the voyage were such as to make the performance by that route radically different from performance by the Suez Canal route (see p. 699, letters D to F, post).

Dicta of LORD RADCLIFFE in *Davis Contractors, Ltd. v. Fareham U.D.C.* ([1956] 2 All E.R. at p. 160) applied.

Carapanayoti & Co., Ltd. v. E. T. Green, Ltd. ([1958] 3 All E.R. 115) not followed.

(ii) although, if both parties to the first contract had given their minds to the question, they would have contemplated that shipment would be made by the Suez Canal, yet the contracts would not be frustrated unless the bargains must have been made on the footing that that route would be used, and, on the facts, there was no such fundamental difference between performance by the contemplated route and by the alternative route as would establish this (see p. 699, letter H, to p. 700, letter B, post).

Dictum of LORD RADCLIFFE in *Davis Contractors, Ltd. v. Fareham U.D.C.* ([1956] 2 All E.R. at p. 159) applied.

(iii) shipment had not been so prevented as to bring cl. 8 of form 38 into operation (see p. 700, letter H, post).

[As to shipment of goods under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.]

As to frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 320; and for cases on the subject, see 12 DIGEST (Repl.) 459, 460, 3425-3429.]

Cases referred to:

(1) *Carapanayoti & Co., Ltd. v. Green (E. T.), Ltd.*, [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(2) *Tsakiroglou & Co., Ltd. v. Noble Thorl G.m.b.H.*, [1959] 1 All E.R. 45.

(3) *Ashmore & Son v. Cox (C. S.) & Co.*, [1899] 1 Q.B. 436; 68 L.J.Q.B. 72; 12 Digest (Repl.) 432, 3313.

(4) *Blackburn Bobbin Co. v. Allen (T. W.) & Sons*, [1918] 2 K.B. 467; 87 L.J.K.B. 1085; 119 L.T. 215; 12 Digest (Repl.) 452, 3400.

(5) *Davis Contractors, Ltd. v. Fareham U.D.C.* [1956] 2 All E.R. 145; [1956] A.C. 696; 3rd Digest Supp.

Special Case.

This was an award in the form of a Special Case stated by the Committee of Appeal of the Incorporated Oil Seed Association (hereinafter called I.O.S.A.) under s. 21 (1) (b) of the Arbitration Act, 1950, on an appeal to the committee from the awards of an umpire dated Oct. 23, 1957. By a contract dated Oct. 12, 1956 (referred to hereinafter as "the first contract"), Albert D. Ouon & Co. of Sudan (hereinafter referred to as "the sellers") agreed to sell to Société Interprofessionnelle des Oléagineux Fluides Alimentaires (hereinafter referred to as "the buyers") 1,500 metric tons of Sudan groundnuts in shell at a price of £49 10s. per metric ton, c.i.f. Nice, shipment to be made October-November, 1956. By a further contract dated Oct. 31, 1956 (hereinafter referred to as "the second contract") the sellers agreed to sell to the buyers 1,000 metric tons of Sudan groundnuts in shell, at £54 5s. per metric ton c.i.f. Marseilles, shipment November, 1956. Both contracts incorporated form 38 of the I.O.S.A. forms of contract, cl. 8 of which provides: "In case of prohibition of import or export, blockade of war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed for the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the new

A of force majeure be still operating, the contract shall be cancelled". On Oct. 29, 1956, armed forces of Israel invaded Egypt and on Nov. 2, 1956, the Suez Canal was closed to navigation and remained so closed until Apr. 9, 1957. At the date of the first contract, the usual and normal route for shipment of Sudan groundnuts from Port Sudan to western Mediterranean ports was via the Suez Canal which at that date was open to traffic. At the date of the second contract, Oct. 31, 1956, B the parties knew that Israeli forces had invaded Egypt, and further, on that date, shipping facilities via the Suez Canal had come to a complete standstill. The sellers failed to ship any goods under either contract claiming that they were prevented from doing so because of the events which had arisen in the Middle East which amounted to force majeure or frustration of the contracts. The matter C was referred to arbitration but the arbitrators were unable to agree and they appointed an umpire. The umpire awarded that the sellers were in default in failing to ship the goods and that the buyers were entitled to damages for the default. The sellers then appealed to the Committee of Appeal of the I.O.S.A. who upheld the umpire's award and, at the request of both parties, stated their award in the form of a Special Case on the question of law, whether on the facts which they had found and on the true construction of the contracts, the sellers D were under any liability to the buyers. The relevant findings of fact are set out in the judgment of ASHWORTH, J.

Eustace Roskill, Q.C., and R. A. MacCrindle for the sellers, the appellants.

Sir David Cairns, Q.C., and F. E. J. Allemès for the buyers, the respondents.

Cur. adv. vult.

E June 5. ASHWORTH, J., read the following judgment: This matter comes before me in the form of a Case Stated by the Committee of Appeal of the Incorporated Oil Seed Association, and it raises once more the difficult problem as to the effect on c.i.f. contracts of the closure of the Suez Canal. This problem has already been considered by McNAIR, J., in *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.* (1) ([1958] 3 All E.R. 115), and by DIPLOCK, J., in *Tsakiroglou & Co., Ltd. v. Nobler Thorl G.m.b.H.* (2) ([1959] 1 All E.R. 45). In regard to these two F cases, the latter was decided principally on a special finding in the Case Stated. Inasmuch as there is no finding in the same terms in the present case, the decision of DIPLOCK, J., cannot be regarded as conclusive of the present dispute. So far as the decision of McNAIR, J., is concerned, the sellers contend that in respect of the first of the two contracts which I have to consider there is no material distinction G between the facts in the case before McNAIR, J., and the facts in the case before me, but they concede that in respect of the second contract the situation may be different.

[His LORDSHIP referred to the terms of the two contracts which he had to consider and to cl. 8 of Form No. 38 of the I.O.S.A. forms of contract which form the contracts incorporated (see p. 694, letter I, ante), and continued:] Although H the relevant dates are mentioned in both the decisions already cited, it may be convenient to repeat some of them here. On Oct. 29, 1956, armed forces of Israel invaded Egypt; on Nov. 2, 1956, the Suez Canal was closed to navigation by reason of the physical blocking of the canal, and remained closed to navigation until Apr. 9, 1957. In addition, it is found as a fact that on Oct. 31, 1956 (when the second contract was entered into), the sellers and the buyers knew of the I Israeli invasion of Egypt which had begun two days previously. Further, although there is no finding as to the parties' knowledge thereof, it is found that shipping facilities from Port Sudan via the Suez Canal had come to a complete standstill on Oct. 31, 1956. This finding appears in para. 9 of the Case Stated, and is difficult to reconcile with what appears to be a finding in para. 22 that traffic through the canal was in fact at a standstill from Oct. 28. Since there is no finding that either the sellers or the buyers knew that traffic through the canal was at a standstill either on Oct. 28 or on Oct. 31, 1956, it does not appear to me to be essential to inquire which of the two dates is correct. No question arises as to

inability on the part of the sellers to supply the goods. As from Sept. 27, 1956, A sufficient groundnuts in shell were held to the sellers' order in store at Port Sudan to enable them to fulfil both the first and the second contracts.

In regard to shipping, it is found that on Oct. 23, 1956, the sellers booked liner space for 4,140 tons of groundnuts in shell on the s.s. Mary K for Nice, expected ready to load on Nov. 15-21, but this vessel failed to present herself at Port Sudan as her outward charter was cancelled by her owners owing to the Hungarian revolution and to the fact that she was not fit to sail by the Cape of Good Hope. In addition, the sellers chartered two vessels, one on Oct. 23 and the other on Oct. 31, each for a voyage to the French Mediterranean and each expected ready to load in November, 1956. These two vessels were named respectively the Stelios and the Divina, and in para. 5 of the Case Stated it is found that

"the Suez Canal having been closed to navigation, the charters of the Stelios and Divina were cancelled by agreement between the respective owners and charterers."

The Case Stated contains no explanation why either of these charters was cancelled, and, for my part, I consider that it would be wrong to draw the inference suggested on behalf of the sellers that the cancellation was due to the vessels' inability to sail by the Cape of Good Hope. If that were the reason, the sellers could have called evidence to establish it, as appears to have been done in regard to the Mary K.

In the course of the hearing before me it emerged that the sellers on Nov. 21, 1956, became sub-charterers in respect of a charter of the s.s. Unity made on the same date between the owners' agents and Continental (London) Ltd. The relevant document is, by consent of both parties, deemed to be included in the bundle of charterparties referred to in para. 16 of the Case Stated. This vessel was expected ready to load at Port Sudan about Nov. 29, 1956, and her destination included (at charterers' option) "1/2 safe port(s) Marseilles/Genoa range". The Case Stated contains detailed particulars in regard to other vessels which loaded cargo at Port Sudan for Mediterranean or continental destinations after the physical closure of the Suez Canal and either sailed by the Cape of Good Hope or (in two instances) waited for the canal to open. Inasmuch as the buyers were content to rely on the possibility of shipment on the Stelios, the Divina or the Unity as an effective answer to any contention by the sellers that they were prevented from shipping the goods in such a way as to give rise to frustration or at least to entitle them to rely on cl. 8 of contract I.O.S.A. No. 38, it is, in my view, unnecessary to mention this judgment by quoting the particulars relating to other vessels.

In regard to route, it is found as a fact that at the date of the first contract the usual and normal route for the shipment of groundnuts from Port Sudan to Western Mediterranean ports was via the Suez Canal which was then open to traffic. It is further found that, at that date, both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal. On or very shortly before the date of the second contract, the route via the Suez Canal became for all practical purposes impossible, but there is no finding that either the sellers or the buyers were aware of this, still less that they knew whether the traffic standstill was likely to be of short or long duration. Nor is there any finding as to the contemplation of the parties in regard to route when the second contract was made. There is, however, a finding that

"the alternative route during the closure of the canal was via the Cape of Good Hope which was then the shortest practicable route from Port Sudan to European ports."

There are also mixed findings of law and fact, of which the first two are in the following terms: para. 26:

"(a) If after the closing of the Suez Canal the sellers had shipped the goods

- A via the Cape of Good Hope the buyers could not have rejected the documents.
(b) While it would have been more expensive to ship via the Cape of Good Hope than via the Suez Canal this did not make performance on the first and second contracts commercially impossible."

B At this stage it is convenient to mention two points which were taken, but not argued, on behalf of the sellers. The first was that, in respect of both the first and the second contracts, there was an implied term that shipment should be made by the route customary at the date of the contract. A similar contention was rejected both by McNAIR, J., and by DIPLOCK, J. The second was that the sellers were entitled to rely on the exceptions cl. 8, already quoted, on the basis that the shipment therein referred to meant shipment via the Suez Canal and that such shipment was prevented. DIPLOCK, J., rejected a similar contention
C based on a similar clause. Both the points are open to the sellers in the Court of Appeal, but in the circumstances I do not propose to do more than express my respectful agreement with the decisions already given on them.

I can also conveniently dispose of a point taken on behalf of the buyers, which was considered and rejected by McNAIR, J. It was contended that "a c.i.f. contract is not frustrated by events which prevent the shipping of goods", and
D reliance was placed on the decision in *Ashmore & Son v. C. S. Cox & Co.* (3) ([1899] 1 Q.B. 430). In my judgment that decision does not support the wide contention for which it was relied on, and, if all material facts are contained in the report, I share McNAIR, J.'s doubt whether the decision is consistent with modern authorities, notwithstanding its approval by PICKFORD, L.J., in *Blackburn Bobbin Co. v. T. W. Allen & Sons* (4) ([1918] 2 K.B. 467).

E The real issue in the present case is whether the two contracts or either of them were frustrated. The sellers contend that frustration occurred either by reason of the closure of the Suez Canal on Nov. 2, 1956, or, alternatively, if such closure was not of itself sufficient to frustrate the contracts, because the shipping situation resulting from the closure was so chaotic that it became impossible for the sellers to carry out their obligations under either contract.

F The argument for the sellers starts from the premise that under a contract in the terms of the first and second contracts the sellers' obligations include an obligation to procure a contract of affreightment under which the goods will be conveyed by the usual or customary route to the destination named in the contract. There is ample authority to support this premise, and it was not challenged on behalf of the buyers. As a corollary it should be added that, for the
G purposes of the hearing before me, the sellers acknowledged that the time of performance is the time at which the usual or customary route must be ascertained. Secondly, the sellers rely on the fact, found in the Case Stated, that at the date of the first contract the usual or customary route from Port Sudan to the Mediterranean was via the Suez Canal, and, although there is no specific finding
H either way in the Case Stated, they contend that at the date of the second contract (two days before the closure of the canal) the route via the canal was still the usual and customary route. Thirdly, the sellers rely on the absence in the Case Stated of any finding that another route, in particular the route via the Cape of Good Hope, became at any relevant time a usual or customary route for vessels sailing from Port Sudan to the Mediterranean. The more that is stated is that
I "the alternative route during the closure of the canal was via the Cape of Good Hope which was then the shortest practicable route from Port Sudan to European ports". Accordingly the sellers submit that, in these circumstances, the usual and customary route via the canal having been rendered impossible and there being no other usual or customary route, the contracts were each to be frustrated.

At one stage of the argument the sellers appeared to be contending that this type of contract is frustrated *per se* if the usual or customary route is rendered impossible. The terms of this contention are, in my judgment, much too wide.

be acceptable. There may no doubt be cases in which the impossibility of the usual or customary route would have the effect of frustrating such a contract; for example, a c.i.f. contract in respect of goods to be shipped from a Black Sea port to the Mediterranean might well be regarded as frustrated if the Dardanelles were rendered impassable, but in that case the usual or customary route would be the only possible route. If, however, an alternative route exists, the closure of the usual or customary route does not necessarily frustrate the contract. In this connexion it is, I think, correct to say that the requirement that the goods must be shipped by a usual or customary route is a requirement implied by law for the benefit of a buyer and not a seller. So far as a seller is concerned, his obligation is to arrange shipment from A to B, and, were it not for the requirement as to a usual or customary route, he could select his own route. The fact that he can no longer select what has hitherto been the usual or customary route does not, without more, release him from the primary obligation to arrange shipment from A to B.

As an alternative to the last-mentioned contention, it was submitted that frustration occurs if the usual or customary route is rendered impossible, unless, within the time limited for performance of the contract, an alternative route has become the usual or customary route. In my judgment, this submission does not give effect to the well-established principle that, if frustration occurs, it occurs once and for all. If the closure of the Suez Canal had the effect of frustrating either or both of the contracts in the present case, the contract or contracts were automatically dissolved and were not preserved in a state of suspended animation, the outcome of which depended on an alternative route becoming usual or customary before the end of November, 1956.

In my judgment, in considering whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide (inter alia) whether an alternative route existed, and, if so, whether performance by that route would "render it a thing radically different from that which was undertaken by the contract", to quote the words of LORD RADCLIFFE in *Davis Contractors, Ltd. v. Farnham U.D.C.* (5) ([1956] 2 All E.R. 145 at p. 160). The sellers contend that shipment via the Cape of Good Hope, which was an alternative mode of performing the contracts, would fall within the scope of the words quoted, and the points of difference were said to be (a) expense, (b) distance, (c) the character of the voyage, and (d) a totally different contract of affreightment.

So far as expense is concerned, it seems to me that the finding in para. 26 (b), quoted previously*, precludes me from holding that the increase in expense was sufficient to frustrate the contract. In regard to distance and the character of the voyage, there may well be cases in which buyers could reject documents on the ground, for example, that the goods in question had been shipped by a route which would render them liable to damage or deterioration or unreasonable delay; and, if that route were the only alternative to a usual or customary route which had been rendered impossible, sellers might well claim that the contract had been frustrated. But in the present case it is found in para. 26 (a) that if, after the closing of the Suez Canal, the sellers had shipped the goods via the Cape of Good Hope the buyers could not have rejected the documents. I regard this finding as one of mixed law and fact, and I draw the inference from it that documents covering shipment via the Cape of Good Hope would, in the circumstances, have been in compliance with the contract. In other words, neither distance nor the character of the voyage would have been such as to entitle the buyers to reject the documents. In regard to the fourth suggested difference, namely, that the sellers would have had to arrange a totally different contract of affreightment, I am of opinion that, so far as it goes, the difference so stated is made out, but I am also of opinion that it does not do more than summarise the other suggested differences. If they are not sufficient to "render it a thing radically different from

* See p. 697, letter A, ante.

A that which was undertaken by the contract", this fourth suggested difference will not do so.

In LORD RADCLIFFE's speech, from which I have already quoted, there is a further passage ([1956] 2 All E.R. at p. 160) in the following terms:

B "The court must act on a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

C In the present case an unexpected event occurred, namely, the closure of the Suez Canal, and no doubt it may be said to have involved both inconvenience and material loss. But I am not satisfied that there was also involved such a change in the significance of the obligation as would call the principle of frustration into play. Both before and after the closure of the canal the thing undertaken was the arranging of the shipment of the goods from Port Sudan to the Mediter-

D ranean. After the closure the thing undertaken remained the same, but the manner of performance changed.

E It is clear that the nature and extent of the thing undertaken is a vital factor in considering whether a contract has been frustrated, and when a difference in the length and character of a voyage is said to give rise to frustration, the answer may in some cases depend on whether the contract involved an obligation to perform the voyage itself, or, on the other hand, an obligation to arrange for its performance. I was informed by counsel that issues which had arisen between charterers and shipowners as a result of the closure of the Suez Canal had all been settled, so that there has been no authoritative decision whether a charter-

F party was frustrated, in these circumstances. Whatever may be the right view in respect of that type of contract, I am of opinion that, in the present case, although the performance of the sellers' obligation after the closure of the Suez Canal involved them in greater expense, they would not be performing something radically different from that which they had undertaken to do. In reaching this conclusion I am regretfully conscious that I am differing from that reached by McNAIR, J.,* and, although the facts found in the present case are not precisely the same as those before him, I doubt whether on this point the differences are

G such as to afford any firm basis for distinguishing his case from this.

H I have also considered the problem, so to speak, from the other end, namely, whether the contracts or either of them were made on the basis that, if the Suez Canal was no longer available when the sellers elected to perform, they would be off. The first contract was made on Oct. 12, 1956, and the second was made on Oct. 31, 1956. So far as the first contract is concerned, it is found in para. 20 of the Case Stated that

"both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal."

No doubt they would have done so, but the question is whether they "must have made" their bargain on the basis that what was then the usual or customary route would continue to remain available. To quote again from LORD RADCLIFFE's speech ([1956] 2 All E.R. at p. 159):

"... in my opinion, full weight ought to be given to the requirement that the parties 'must have made' their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract."

The buyers contend that the alleged basis can only exist if there is a fundamental

* See *Carapanagiotis & Co., Ltd. v. E. T. Green, Ltd.*, [1958] 3 All E.R. 115.

commercial difference between performance by the contemplated route and performance by the alternative route. In my view this contention is right, and, inasmuch as I have already in effect held that no such fundamental commercial difference has been established on the facts of this case, it follows that the alleged basis, namely, the continued availability of the Suez Canal, was not the basis on which the parties "must have made" their bargain.

So far as the second contract is concerned, the same reasoning applies, but, in any event, the circumstances in which it was made afford an additional reason for holding that it was not made on the basis suggested. The parties knew that Israeli forces had invaded Egypt on Oct. 29. Moreover, there is no finding in the Case Stated that, on Oct. 31, the parties or either of them contemplated that the Suez Canal would be available, and I confess that, having regard to the situation then prevailing in the Middle East, a finding to that effect would have surprised me. In regard to the second contract, the sellers were described by their counsel as optimists, and such they may well have been, but such a state of mind falls far short of what is required.

I can now deal with the sellers' alternative contention that the contracts and each of them were frustrated by reason of the chaotic shipping situation which prevailed as a result of the closure of the Suez Canal. I can deal at the same time with their contention that shipment was prevented by force majeure within the meaning of cl. 8 of contract I.O.S.A. No. 38, which has already been set out in full. The buyers' answer to these contentions is that, on the facts found in the Case Stated, it is clear that the sellers were not prevented from shipping and that both contracts could have been fully performed if the sellers had been willing to send the goods via the Cape of Good Hope. In particular the buyers rely on paras. 18, 19 and 26 (c)*. I do not think that it is necessary to set out these paragraphs in full, but I ought to refer to the word "Continental" which appears in para. 19. It was contended by the buyers that this word was used by mistake, and that it should be amended to "contractual", and they point to what appears to be a similar slip in para. 23*. The sellers contend that the word "Continental" should stand unaltered, even if the result is to deprive the paragraphs of much, if not all, of their relevance. For my part, although it is not essential for my decision on the two points now under consideration, I think that both in para. 19 and in para. 23 the word intended by the committee of appeal was "contractual".

In my judgment, the facts found in the Case Stated, together with the documents annexed thereto, so far from establishing either of the two contentions put forward by the sellers, establish the contrary. No explanation was offered for their failure to make use of the *Stelios* or the *Divina*; all that is found in the Case Stated is that the charters of those vessels were cancelled by agreement between the respective owners and the charterers (who were the sellers' agents). Moreover, the *Unity* was available for the performance of both the first and second contracts, and I cannot accept the sellers' contention that groundnuts in shell were not contractual cargo for that vessel, especially as a small parcel of such goods was in fact shipped by her. It follows that the sellers were not prevented from shipping the goods so as to bring cl. 8 into operation, nor was there any such chaotic situation in regard to shipping as they suggest. I would add as a matter of caution

* Paragraph 18 found that the sellers could have shipped within the contract period the goods covered by the first and second contracts; para. 26 (c) found that the sellers had shipped goods including groundnut kernels against contracts made at dates later than the dates of the first and second contracts and that they were prevented from fulfilling the first and second contracts by their own election in preferring to fulfil the later contracts.

Paragraph 19 found that the sellers could have procured vessels to load groundnuts in shell at Port Sudan for "Continental" ports with or without transhipment via the Cape of Good Hope; para. 23 found that it was not proved that, after the closing of the Suez Canal, the sellers could have bought afloat sufficient groundnuts shipped in October/November, 1956, for "Continental" destinations via the Cape to have fulfilled the contracts.

A that I am by no means satisfied that, even if the shipping situation had been as serious as the sellers alleged, the first or second contract would have been frustrated. I appreciate that frustration may arise notwithstanding the existence of an exceptions clause which is wide enough to cover the frustrating occurrence, but in the present case I should be inclined to hold that, even if the facts had been as alleged by the sellers, frustration did not arise.

B The question put was whether on the facts found and on the true construction of each of the contracts the sellers were under any liability to the buyers. My answer in respect of each contract is "Yes", and accordingly the appeal fails.

Order accordingly; award of umpire upheld.

Solicitors: *Richards, Butler & Co.* (for the sellers, the appellants); *Rowe & Maw* (for the buyers, the respondents).

C [Reported by WENDY SHOCKETT, Barrister-at-Law.]

D CHAPPELL & CO., LTD. AND OTHERS v. THE NESTLÉ CO., LTD. AND OTHERS.

[P SE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow). April 27, 28, 29, June 18, 1959.]

E *Copyright—Infringement—Music—Record—Manufacture of records for chocolate manufacturers' advertising campaign—Records to be sold by chocolate manufacturers each for sum of money to a purchaser tendering three wrappers from manufacturers' chocolate bars—Sales at that price showed profit—Whether sale by "retail"—Whether price "ordinary retail selling price" as defined—Copyright Act, 1956 (4 & 5 Eliz. 2 c. 74), s. 8 (1), (2)—Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 863), reg. 1 (1) (f), reg. 3.*

F In consequence of the Copyright Act, 1956, s. 8 (1) (b)*, manufacturers of records gave to the owners of copyright in a musical work notice of their intention to make records of the work. By reg. 1 (1) (f) of the Copyright Royalty System (Records) Regulations, 1957†, the notice was required to state the ordinary retail selling price (which was defined in reg. 3‡) at which the records were to be sold to the public, and this was stated by the notice to be
G 1s. 6d. The manufacturers made the records and sold them to chocolate manufacturers for 4d. each, knowing the use to which the chocolate manufacturers intended to put the records. The chocolate manufacturers advertised
H them for sale at 1s. 6d. each, with a stipulation that an intending purchaser must also send three wrappers from their milk chocolate bars. The object of the chocolate manufacturers was to advertise their milk chocolate, but the price enabled them to make a reasonable profit on the sale of a record. The wrappers when received had no value and were thrown away. Unless the sales of the records to the chocolate manufacturers were for the purpose of the records being sold "by retail" within the meaning of s. 8 (1) (e) of the Act*,

* The relevant terms of s. 8 are set out at p. 706, letter H, to p. 707, letter B, post.

I † Regulation 1, so far as relevant, provides: "The notice required by sub-s. (1) and sub-s. (5) of s. 8 of the Act shall contain the following particulars:—... (f) the ordinary retail selling price (as hereinafter defined) of the records, or, where it is intended to reproduce the work on more than one type of record, the ordinary retail selling price of each type of record, the manufacturer intends to make and the amount of the royalty payable on each record".

‡ Regulation 3 provides: "The ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public, or if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily to be sold to the public, exclusive of purchase tax in either case."

the manufacture of the records and their distribution were infringements of copyright under s. 2 (5) (a) and s. 5 (3) of the Act of 1956. The exclusive licencees and the owners of the copyright brought an action against the chocolate manufacturers and the record manufacturers for an injunction to restrain them from infringing copyright in the musical work on the ground that the transaction was not within s. 8 of the Act of 1956.

Held (VISCOUNT SIMONDS and LORD KEITH OF AVONHOLM dissenting): there was no ordinary retail selling price within s. 8 of the Copyright Act, 1956, because money did not constitute the entire consideration for the sales of records some part of which was the benefit to the chocolate manufacturers from the sales of chocolate which they would not otherwise have sold, and, further, the notice given under reg. 1 (1) (f) of the Copyright Royalty System (Records) Regulations, 1957, was defective because it did not disclose the additional non-pecuniary consideration; therefore, the conditions of s. 8 were not satisfied and the chocolate manufacturers and the record manufacturers were not protected by s. 8 from liability for infringement of copyright.

Decision of the COURT OF APPEAL ([1958] 2 All E.R. 155) reversed.

[As to copyright in musical works and records thereof, see 8 HALSBURY'S LAWS (3rd Edn.) 378, 381, paras. 694, 697; and for cases on the subject, see 13 DIGEST (Repl.) 68, 69, 140-147.

For the Copyright Act, 1956, s. 8, see 36 HALSBURY'S STATUTES (2nd Edn.) 86.]

Appeal.

Appeal by Chappell & Co., Ltd. and Wimmeton Music Corporation from an order of the Court of Appeal (JENKINS, ROMER and ORMEROD, L.J.J.), dated Mar. 19, 1958, and reported [1958] 2 All E.R. 155, reversing an order of UPJOHN, J., dated Nov. 14, 1957, in an action by the appellants for an injunction to restrain the respondents, The Nestlé Co., Ltd. and Hardy Record Manufacturing Co., Ltd., from infringing by their servants or agents or otherwise the copyright in the musical work entitled "Rockin' Shoes", under which the appellants, Chappell & Co., Ltd., had been granted an exclusive licence and any other musical work of which the appellants were the owners of the copyright or under which they had been granted an exclusive licence. The facts appear in the opinion of VISCOUNT SIMONDS.

K. E. Shelley, Q.C., and P. J. S. Bevan for the appellants.

G. T. Aldous, Q.C., and J. N. K. Whitford for the respondents, The Nestlé Co., Ltd.

J. M. Cope for the respondents, Hardy Record Manufacturing Co., Ltd.

Their Lordships took time for consideration.

June 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a question of construction of the Copyright Act, 1956, on which there has been a difference of opinion in the courts below, the Court of Appeal by a majority (JENKINS and ORMEROD, L.J.J., ROMER, L.J., dissenting) having reversed the decision of UPJOHN, J. The facts are not in dispute, and the action was tried without pleadings on an interlocutory motion which, by consent, was treated as the trial of the action. The appellants, Wimmeton Music Corporation, are the owners, and the appellants, Chappell & Co., Ltd., their exclusive licencees, of the copyright in a musical work entitled "Rockin' Shoes". The question is whether the respondents The Nestlé Co., Ltd. and Hardy Record Manufacturing Co., Ltd. (whom I will call "the respondents Nestlé" and "the respondents Hardy") have infringed this copyright. It is common ground that they have done so unless they are protected by s. 8 of the Copyright Act, 1956. I will, therefore, set out that section and then state such further facts as appear to be relevant. Section 8 is as follows. [His LORDSHIP read sub-s. (1) and sub-s. (2) which are printed at pp. 706, 707, post,

- A and continued:] Regulations were made under the Act*, of which I think it necessary only to mention reg. 1 (1) (f), which provides that the notice required by sub-s. (1) and sub-s. (5) of s. 8 shall contain the ordinary retail selling price (as hereinafter defined) of the records, or, where it is intended to reproduce the work on more than one type of record, the ordinary retail selling price of each type of record the manufacturer intends to make and the amount of the royalty payable on each record, and reg. 3, which provides that the ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public, or, if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily sold to the public, exclusive of purchase tax in either case.
- B

- C The respondents Hardy are manufacturers of records, the respondents Nestlé are manufacturers of chocolate. The respondents Hardy make use of a process by which a recording can be produced on a thin film of cellulose acetate at a cost enabling them to sell records at a wholesale price of 4d. each. By this process they have produced film records of the musical work "Rockin' Shoes" and sold them to the respondents Nestlé mounted on cards supplied by the latter. A film so mounted is sold by the respondents Nestlé to any member of the public who sends to them a postal order for 1s. 6d. with three wrappers from 6d. bars of Nestlé's Milk Chocolate. A typical offer appeared in the "Daily Mirror" of Sept. 11, 1957, in the words—
- D

- E "Here's how to get each new stars record. Collect three 6d. wrappers from Nestlé's Milk Chocolate. Fill in the coupon and send it with a postal order for 1s. 6d., the price of the record, and your three wrappers. You may order as many records as you like on this coupon, but for each record you must send three wrappers and 1s. 6d. P.O., crossed, payable to The Nestlé Co., Ltd."

- Next to the script that I have cited was a coupon containing the names of a number of musical works including "Rockin' Shoes". All this was part of a full page advertisement of Nestlé's Milk Chocolate, and no one can doubt that the respondents Nestlé's interest in the sale of records was in order to promote the sale of their chocolate, but presumably they were not averse from making such profit as they seem to have made from the sale of records also. The film, as I have said, was mounted on a card supplied by the respondents Nestlé, whose name appears prominently on it. On the back were the words—
- F

- G "Remember, all you have to do to get each new stars record is to send three wrappers from Nestlé's 6d. milk chocolate bars together with postal order for 1s. 6d. and stating which record you want to Nestlé Record Offer P.O. Box 14 Hayes, Middlesex. Don't forget, three wrappers and postal order for 1s. 6d."

- H Before, however, making or permitting a public offer such as I have referred to, it was necessary that the notice prescribed by s. 8 of the Act should be served. This duty falls on the manufacturer and, accordingly, the respondents Hardy entered into correspondence with the Mechanical Copyright Protection Society, Ltd. who were, as I assume, acting on behalf of the appellants. In the first letter which passed between them, dated June 19, 1957, but referring to other musical works than "Rockin' Shoes", the respondents Hardy stated—
- I

"The retail price of the record, and they are being sold individually, not collectively, is 1s. plus three wrappers. Wrappers are valueless and are normally thrown away."

In the ensuing correspondence the society objected that the proposal made by the respondents Hardy did not constitute a sale by retail and that, therefore, the proposed records could not be made under the provisions of s. 8 of the Act. The

* The Copyright Royalty System (Records) Regulations, 1957 (S.I. 1957 No. 860).

respondents Hardy nevertheless, on July 17, 1957, proceeded in relation to "Rockin' Shoes" to give a notice which purported to be the statutory notice. In it they said—

"The ordinary retail selling price of each record will be not greater than 8½d. exclusive of purchase tax and not greater than 1s. inclusive of purchase tax."

By a subsequent letter these figures were amended to 1s. 1½d. and 1s. 6d. respectively. No mention was made of any wrappers. The respondents Nestlé then proceeded to put the proposal into effect and sold the record to members of the public who sent a postal order for 1s. 6d. together with three chocolate wrappers. Forthwith the appellants challenged the validity of their claim to be protected by s. 8. UPJOHN, J., supported their contention and granted the appropriate injunction. The Court of Appeal, on the other hand, taking by a majority the view that the respondents had complied with the section, allowed the appeal and dismissed the action. Faced by this conflict of opinion among learned judges, from any of whom I am reluctant to differ, I feel at liberty to say that I have found unusually great difficulty in reaching my own conclusion.

It appears to me that, in order to comply with the provisions of s. 8 and thus obtain its protection, there are three relevant conditions to be satisfied by the manufacturer of an article which would otherwise be an infringement of copyright. By "relevant conditions", I mean those conditions about which an issue arises in this case. First, there must be a "sale" of the article in question; secondly, the sale must be a "retail" sale; thirdly, it must be possible to predicate of it that there is an "ordinary retailing selling price" of it, for if there is not, an essential part of the prescribed notice cannot be given.

On the first point I cannot feel any doubt. It had not been contended in the course of the case that there was not a sale, until, during the debate in your Lordship's House, that suggestion was made, and I think that, beyond doubt, anyone, who in answer to the advertisement acquired a record, would say that he had bought it and would be surprised that any doubt should be cast on what he regarded as an obvious fact. Whether the consideration or the price that he paid was 1s. 6d. only or 1s. 6d. and three wrappers is a matter not for him but for your Lordships to determine.

Secondly, I think it is clear that the sale is a retail sale. It is a sale to a consuming member of the public, and I know of no other factor which distinguishes a retail sale from other sales. Put negatively, it is not a sale wholesale to a purchaser who proposes himself to sell it retail. In considering this second point, I do not ignore the argument that, in its context in the section, "retail sale" means only what was sometimes called an "ordinary" retail sale, by which, as I understood, was meant a sale in which there was no other element than on the one side an article sold and on the other a payment of money made, and that the transaction was not an "ordinary" retail sale if the purchaser was required to produce three chocolate wrappers in addition to his postal order. This argument is so closely linked with the third condition that there must be an "ordinary retail selling price" that I will consider the two points together.

I think, my Lords, that, on this last matter, some confusion has arisen from treating the word "ordinary" as if it qualified "retail" rather than "price". If there is no retail sale, there can, of course, be no ordinary or other retail selling price. But, given a retail sale, there is no difficulty in ascertaining the ordinary selling price on such a sale. The problem, therefore, and the only problem, is whether there is a retail sale with a retail selling price within the meaning of the section. The contention that it is not is stated in various ways. UPJOHN, J., in a passage cited with approval by ROMER, L.J. ([1958] 2 All E.R. at p. 166) says—

"The vital part of this transaction is to get in three wrappers and that represents a great deal of value to [the respondents Nestlé], because it is evidence of an advertising campaign pushing up their sales. That is the value

A to them. This bears no resemblance at all to the transaction to which in my judgment the section is pointing, i.e., an ordinary retail sale with an ordinary retail selling price. I think it is quite wrong to suppose that the retail selling price here is 1s. 6d. The purchaser has to purchase three bars of chocolate and that is the real value of this transaction to [the respondents Nestlé].”

B ROMER, L.J., himself states the proposition thus (*ibid.*):

C “I cannot help thinking that the owner of the copyright was entitled, under s. 8, to a royalty assessed on the full purchase price of each record sold by retail. Under [the respondents Nestlé’s] method of selling them, the copyright owner gets a royalty assessed on the cash part only of each sale and he gets nothing in respect of the consideration which, although indirect, passes from the customers and is received by the [respondents Nestlé] . . .”

D There are here two somewhat different conceptions. First, the transaction is not such an ordinary retail sale as is contemplated by the section, because the vendor gets something of value, viz., the evidence of an advertising campaign pushing up the sales; secondly, it is not within the section, because the vendor gets from the purchaser a consideration for the sale of the record which the copyright owner does not share, for it is not included in the retail selling price on which the royalty is based. In the latter case the wrappers are treated as part of the consideration moving from the purchaser, in the former as evidence of a collateral advantage which has already accrued to the vendor. It is necessary to distinguish these two aspects of the matter. In the contention that the sale is not an ordinary retail sale and, therefore, not within the section because the vendor gets not only the cash price but also evidence of an advantage already accrued, I see no merit. It is irrelevant what is the vendor’s motive for selling a record for 1s. 6d. if that is the selling price. It may be part of an advertising campaign for the sale of other goods; but there is nothing in the Act which impels me to read into the section a qualification that the selling price is to be disregarded and the article denied protection if the vendor’s motive in fixing it is anything but to obtain the maximum amount commercially possible. The alternative view is that the production of three chocolate wrappers is part of the price of the record and that, as it is incapable of valuation, the necessary particulars cannot be given and the statutory requirements satisfied. This view is to some extent supported by the fact that, in the advertisement and offer, to which I have already referred, the postal order for 1s. 6d. and three wrappers are in one passage included in a single demand. But in the same document the postal order for 1s. 6d. alone is referred to as the price of the record. I cannot draw any safe conclusion from the documents; the question remains open whether the wrappers are part of the selling price.

H In my opinion, my Lords, the wrappers are not part of the selling price. They are, admittedly, themselves valueless and are thrown away, and it was for that reason, no doubt, that UPJOHN, J., was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the purchaser of the record, has in the past bought not from the respondents Nestlé but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the respondents.

I I conclude, therefore, that the objection fails, whether it is contended that (in the words of UPJOHN, J.) the sale “bears no resemblance at all to the transaction to which . . . the section is pointing” or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take

what, with respect, I think is a somewhat artificial view of a simple transaction. A
 What can be easier than for a manufacturer to limit his sales to those members
 of the public who fulfil the qualification of being this or doing that? It may be
 assumed that the manufacturer's motive is his own advantage. It is possible
 that he achieves his object. But that does not mean that the sale is not a retail
 sale to which the section applies, or that the ordinary retail selling price is not
 the price at which the record is ordinarily sold, in this case 1s. 6d. B

An argument was addressed to the House by counsel on either side which
 appeared to be based on the difficulties that are likely to ensue if the one conten-
 tion or the other is accepted. It may be so. It is probable that the draftsman of
 the regulations foresaw some of them and did his best to avoid them. But these
 are not considerations that have weighed with me in interpreting the words of a
 section which appears to be written in plain English. Nor do I need to have C
 recourse to the principle that, since the Act takes away something heretofore
 of common right, it must be strictly and narrowly construed, nor to the principle
 that, since s. 8 constitutes an exception on a general grant, it is the exception
 which is to be narrowly construed. These are maxims to which it is necessary to
 have recourse as a last resort. In the present case, though I take a different view
 from your Lordships with great diffidence, I do not find it necessary to do so. D

I would dismiss the appeal.

LORD REID: My Lords, the respondents The Nestlé Co., Ltd. manufac-
 ture chocolate, including wrapped bars of milk chocolate, which are sold to the
 public at 6d. per bar. As an advertising scheme to promote the sale of their
 chocolate, they published advertisements in September, 1957, in which they E
 offered to supply any one of six named gramophone records in return for a postal
 order for 1s. 6d. and three wrappers. The advertisement produced said:

" Save the wrappers from 6d. blocks. They will help you to get smash hit
 recordings of skiffle calypso swing and ballad by Britains newest stars all
 exclusive to Nestlé's."

Any member of the public could obtain as many records as he wished by sending F
 1s. 6d. and three wrappings for each record. One of these records was a reproduc-
 tion of a dance tune " Rockin' Shoes " of which the copyright belonged to the
 appellants, Wimmerton Music Corporation, the other appellants, Chappell & Co.,
 Ltd., being sole licensees under the copyright. The appellants maintain that the
 manufacture and sale of this record was an infringement of their copyright, and
 they seek an injunction and damages. The respondents maintain that they were G
 entitled to supply records in this way without the permission or licence of the
 appellants because they were authorised to do so by s. 8 of the Copyright Act,
 1956. The relevant part of that section is as follows:—

" (1) The copyright in a musical work is not infringed by a person (in this
 section referred to as ' the manufacturer ') who makes a record of the work
 or of an adaptation thereof in the United Kingdom, if—(a) records of the
 work, or, as the case may be, of a similar adaptation of the work, have pre-
 viously been made in, or imported into, the United Kingdom for the purposes
 of retail sale, and were so made or imported by, or with the licence of, the
 owner of the copyright in the work; (b) before making the record, the manu-
 facturer gave to the owner of the copyright the prescribed notice of his inten-
 tion to make it; (c) the manufacturer intends to sell the record by retail, or
 to supply it for the purpose of its being sold by retail by another person, or
 intends to use it for making other records which are to be so sold or supplied,
 and (d) in the case of a record which is sold by retail, the manufacturer pays
 to the owner of the copyright, in the prescribed manner and at the prescribed
 time, a royalty of an amount ascertained in accordance with the following
 provisions of this section. H

" (2) Subject to the following provisions of this section, the royalty paid I

A tioned in para. (d) of the preceding subsection shall be of an amount equal to six and one-quarter per cent. of the ordinary retail selling price of the record, calculated in the prescribed manner: Provided that, if the amount so calculated includes a fraction of a farthing, that fraction shall be reckoned as one farthing, and if, apart from this proviso, the amount of the royalty would be less than three-farthings, the amount thereof shall be three-farthings."

B Before dealing with these provisions it may be helpful to state briefly the history behind them and the steps which the respondents took to comply with them. Before 1911 it had been held that the reproduction of copyright musical works by mechanical means such as rolls for player pianos was not an infringement of copyright, and gramophone records had been manufactured on a considerable scale and sold without licence or payment of royalty. By the Copyright Act, 1911, it was enacted that copyright included the sole right to make any record or other contrivance by means of which a work might be mechanically performed. But it was provided by s. 19 of the Act that making any such contrivance should not be an infringement if the maker, inter alia, gave the prescribed notice and paid royalties calculated in accordance with the section in respect of all such contrivances sold by him. The provisions of this section are D very similar to the provisions of s. 8 of the Act of 1956.

The respondents Hardy Record Manufacturing Co., Ltd. operate a novel process whereby records which play for about 1½ minutes are made on thin films of cellulose acetate. These films can then be suitably mounted and played in the ordinary way on gramophones. The process is inexpensive and the respondents E Hardy sold to the respondents Nestlé a large number of these recordings at 4d. each. The respondents Nestlé then had them mounted on cardboard mounts which also carried advertisements for their chocolate. The respondents Hardy informed the Mechanical Copyright Protection Society of the project in June, 1957. They said that the retail price of the records was to be 1s. plus three wrappers. The society stated that the proposal did not constitute a sale by F retail and, in consequence, the proposed records could not be made under the provisions of s. 8 of the Copyright Act, 1956; they further stated that they could not countenance the reproduction of their members' copyright music on records for the purpose of advertising the products of another company. After some correspondence, the respondents Hardy gave a notice purporting to be under the Act of 1956 and regulations made under it. This notice included a paragraph:

G " (F) The ordinary retail selling price of each record will be not greater than 8½d. exclusive of purchase tax and not greater than 1s. inclusive of purchase tax."

On July 25, 1957, these figures were altered to 1s. 1½d. exclusive of purchase tax and 1s. 6d. inclusive of purchase tax. The society maintained their views, H and the appellants now contend that this notice was not a valid notice under s. 8 of the Act or the regulations.

The scheme of s. 8 appears to me to be clear. To avoid infringement four conditions must be complied with. Condition (a) limits the class of works for the reproduction of which the manufacturer can rely on this section, and I need not further consider it; (b) requires notice to be given; (c) requires that the manufacturer shall intend the records which he makes to be dealt with in one or other I of three ways; and (d) requires that, if the intention is to deal with them in either of the first two of these ways, a royalty shall be paid. Then sub-s. (2) provides for the amount of the royalty. Condition (b) refers to the prescribed notice, and sub-s. (2) refers to royalty calculated in the prescribed manner. " Prescribed " means prescribed in regulations made by the Board of Trade, and the Copyright Royalty System (Records) Regulations, 1957, have been so made. On the view which I take of the case, it is unnecessary to base my judgment on the terms of these regulations. One argument submitted for the respondents

would, if correct, mean that some of them are ultra vires. My view of the section does not involve any such result in the present case, and it would not be right to speculate whether, in some other case, some inconsistency might emerge between the provisions of the Act and those of the regulations.

It appears to me that all four statutory conditions are intended to be complied with before a record is made or anything is done which, apart from s. 8, would amount to an infringement. Otherwise it could not be known when the record was made and sold by the manufacturer whether making the record was an infringement or not: that would depend on whether the condition was subsequently complied with or not. The respondents constructed a powerful argument on the basis that condition (d) only comes into operation after a record has been sold by retail and that no royalty is payable until then. But I do not so read the section. I think that the regulations rightly provide that, in his notice under (b) the manufacturer must state what is to be the ordinary retail selling price of the record and that determines the amount of the royalty. And, again, I think that the regulations rightly provide for the manufacturer paying the royalty at a much earlier stage than after sale by retail. The manufacturer pays royalty on records which he intends to be sold by retail. Apart from the last purpose set out in condition (c), he is not entitled to make them for any other purpose. And if later someone disposes of a record in some other way no part of the royalty can be recovered.

I can now turn to what appears to me to be the crucial question in this case: was the 1s. 6d. an "ordinary retail selling price" within the meaning of s. 8? That involves two questions, what was the nature of the contract between the respondents Nestlé and a person who sent 1s. 6d. plus three wrappers in acceptance of their offer, and what is meant by "ordinary retail selling price" in this context. To determine the nature of the contract, one must find the intention of the parties as shown by what they said and did. The respondents Nestlé's intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate. Their offer was addressed to everyone. It might be accepted by a person who was already a regular buyer of their chocolate; but, much more important to them, it might be accepted by people who might become regular buyers of their chocolate if they could be induced to try it and find they liked it. The inducement was something calculated to look like a bargain, a record at a very cheap price. It is in evidence that the ordinary price for a dance record is 6s. 6d. It is true that the ordinary record gives much longer playing time than the Nestlé records and it may have other advantages. But the reader of the respondents Nestlé's offer was not in a position to know that. It seems to me clear that the main intention of the offer was to induce people interested in the kind of music to buy (or, perhaps, get others to buy) chocolate which otherwise would not have been bought. It is, of course, true that some wrappers might come from chocolate which had already been bought, or from chocolate which would have been bought without the offer, but that does not seem to me to alter the case. Where there is a large number of transactions—the notice mentions 30,000 records—I do not think we should simply consider an isolated case which would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement that wrappers should be sent was of great importance to the respondents Nestlé; that would have been no point in their simply offering records for 1s. 6d. each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (a) does something of value to the supplier and (b) pays money. The consideration is both (a) and (b). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the respondents Nestlé but there must have been many cases where it did. I do not see why the possibility

A that, in some cases, the acquisition of the wrappers did not directly benefit the respondents. Nestlé should require us to exclude from consideration the cases where it did; and even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement.

I do not think that it matters greatly whether this kind of contract is called a sale or not. The appellants did not take the point that this transaction was not a sale. But I am bound to say that I have some doubts. If a contract under which a person is bound to do something as well as to pay money is a sale, then either the price includes the obligation as well as the money, or the consideration is the price plus the obligation. And I do not see why it should be different if he has to show that he has done something of value to the seller. It is, to my mind, illegitimate to argue—this is a sale, the consideration for a sale is the price, price can only include money or something which can readily be converted into an ascertainable sum of money, therefore anything like wrappers which have no money value when delivered cannot be part of the consideration. The respondents avoid this difficulty by submitting that acquiring and delivering the wrappers was merely a condition which gave a qualification to buy and was not part of the consideration for the sale. Of course, a person may limit his offer to persons qualified in a particular way, e.g., members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be re-acquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales. The purchaser of records had to send three wrappers for each record, so he had first to acquire them. The acquisition of wrappers by him was, at least in many cases, of direct benefit to the respondents Nestlé, and required expenditure by the acquirer which he might not otherwise have incurred. To my mind, the acquiring and delivering of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases.

Is such a transaction within the contemplation of s. 8? I proceed on the view that it was a sale, and, if so, it was a sale by retail and not by wholesale. But sub-s. (1) and sub-s. (2) must be read together in light of the apparent object of the section. Its object appears to me to be twofold, to benefit the public and to protect the financial interest of the owner of the copyright. The section makes it possible for records to be available to the public for the manufacture of which the owner might not have granted a licence. And it protects the copyright owner by requiring royalties to be paid on the ordinary retail selling price. Where records are sold in the ordinary way of business, it can be assumed that, in his own interest, the manufacturer will fix a full price to cover not only the cost of production and his own profit but also the profit required by retailers. But where there is a special order and none of the records made are to be sold in the ordinary way but all are to be sold, as here, in an unusual way in order to promote a scheme for advertising, quite a different business from selling records, the protection of the copyright owner is not at all secure. In such a case, the retailer will get the manufacturer to fix such a retail selling price as will best suit him, and this may be something quite different from an ordinary economic price. If the respondents are right, the owner of the copyright gets nothing in respect of the advantage to the retailer arising from the requirement that wrappers must be acquired and delivered, and he would get nothing in respect of any collateral advantage accruing to an advertiser however clear or however valuable. It is true that the price of 1s. 6d. left the respondents Nestlé with a profit after paying the cost of innumeration, postage, and other expenses, though we do not know whether the profit was as great as retailers normally require. But the original proposal in this case was to sell at 4s. plus three wrappers, and it might have suited the respondents Nestlé to sell at 6d. or 6d. plus six wrappers. It might even suit a particular advertiser to sell at less than the price which he paid to the manufacturer.

In its context, I cannot interpret the phrase "ordinary retail selling price" as applying to all sales, however extraordinary in character, and as meaning whatever money price may be charged irrespective of the type of transaction or of conditions attached to the sale or of collateral advantages accruing to the seller or of whether the money price is really the whole consideration for the sale. I am of opinion that the respondents' Hardy's notice that the ordinary retail selling price was 1s. 6d. was invalid, that there was no ordinary retail selling price in this case and that the respondents' operations were not within the ambit of s. 8. They were, therefore, infringements of the appellants' copyright and, in my judgment, this appeal should be allowed.

LORD TUCKER: My Lords, this case has in its course through the courts resulted in a very narrow division of judicial opinion which shows that the point in issue, though short, is one of considerable difficulty. The conclusion which I have reached can, however, be stated quite shortly. I do not doubt that these records were supplied by the manufacturers "for the purpose of being sold by retail" within the meaning of s. 8 (1) (c) of the Copyright Act, 1956. I think the contrast throughout the section is between retail and wholesale sales, and I can find no justification for limiting the sales to ordinary retail sales, nor do I find it easy to define what is an ordinary retail sale, but this does not, in my opinion, conclude the matter. The royalty has, by sub-s. (2), to be calculated on the basis of the "ordinary retail selling price". This does not mean the price prevailing on an ordinary retail sale but the ordinary price obtainable on a retail sale, and I think the ordinary price so obtainable envisages a money sum constituting the entire consideration for the sale. Otherwise it would be impossible to calculate the royalty percentage payable in cases where the money value of the additional consideration is incapable of valuation. The fact that the retailer may choose to sell at a loss cannot affect the proper interpretation of the section or justify a sale by him for a sum of money plus the delivery of a number of wrappers or other articles which he desires to obtain for reasons which he considers beneficial to his trade. The ordinary retail selling price as prescribed by reg. 3 of the Copyright Royalty System (Records) Regulations, 1957, provides that it is to be calculated "at the marked or catalogued selling price of single records to the public". The records in question are marked as follows:—

"Remember, all you have to do to get each new stars record is to send three wrappers from Nestlé's 6d. milk chocolate bars together with postal order for 1s. 6d."

Under reg. 1 (1) (f), the notice required by sub-s. (1) of s. 8 must state the ordinary retail selling price as defined by reg. 3. In the present case, the notice, as amended, stated that

"The ordinary retail selling price of each record will be not greater than 1s. 1½d. exclusive of purchase tax and not greater than 1s. 6d. inclusive of purchase tax."

This statement does not disclose the entire consideration but only that part of it that is expressed in terms of money and is, therefore, in my opinion, defective. It is necessarily defective because it is impossible to state "the ordinary retail selling price" envisaged by sub-s. (2) if the money price is only part of the consideration.

If this is not the correct view, it follows that there would be no infringement if the retailer sold each record for a penny plus one hundred wrappers, and I cannot believe that this could have been intended by those who framed this section and fixed the percentage of royalty on the basis of the ordinary retail selling price which must, I think, envisage a retail sale where the whole consideration is a sum of money.

It being conceded that, if the notice given under reg. 1 (1) (f) is defective, the protection of s. 8 is lost and the notice given being, in my view, necessarily

A defective in view of the nature of the consideration, it follows that there has in this case been an infringement of the appellants' copyright. I should add that I do not feel able to accept the view that the requirement with regard to the wrappers merely constituted a limited class of the public who, having qualified for inclusion in the class, then became entitled to purchase for 1s. 6d. This seems to me an unnecessarily artificial description of what is on its face one indivisible transaction.

B For these reasons I would allow the appeal.

C **LORD KEITH OF AVONHOLM:** My Lords, were it not that a majority of your Lordships think differently I would have contented myself with expressing my complete concurrence with the judgment of JENKINS, L.J., in the Court of Appeal. I find the appellants' case somewhat elusive as it seems to oscillate between considering whether the sale of the record here is an ordinary retail sale and considering whether there is an ordinary retail selling price of the record. I can find no warrant in s. 8 of the Copyright Act, 1956, for the view that it contemplates two kinds of retail sale, ordinary retail sale and some other kind of retail sale which is not ordinary. Subsection (1) of the section refers four times to retail sales, and when, in sub-s. (2), reference is made to ordinary retail selling price, the only meaning I can take from that is a reference to the ordinary selling price of the retail sales mentioned in sub-s. (1). As JENKINS, L.J., points out ([1958] 2 All E.R. at p. 161), this is also the view taken in the regulations made under the Act where, in the absence of a marked or catalogued selling price, the phrase is defined as "the highest price at which single records are ordinarily to be sold to the public". In my opinion, there is, or is intended to be, a sale of the record here and it is a retail sale. The only question, as I see it, is: "Is there an ordinary retail selling price on which the royalty can be calculated?"

E As I agree with JENKINS, L.J., that the production of three wrappers of three 6d. bars of chocolate is merely a qualification for purchasing the record I will say only a few words on the contrary view that it is part of the consideration for the purchase of the record incapable of monetary assessment. To the respondents The Nestlé Co., Ltd. these pieces of paper are worthless. The respondents Nestlé are, no doubt, pleased to see that somebody has been buying their chocolate. They would know that anyhow, without the production of chocolate wrappers, from the figures of their turnover. The wrappers represent a liability to the respondents Nestlé rather than an extra consideration if it be assumed, as I think it must, that, on presentation of the wrappers and the tender of 1s. 6d., the respondents Nestlé are bound to sell the record. But that is because the offer they have made has been accepted by a member of the public. If it be said that the sale of the record is of value to the respondents Nestlé because it promotes the sale of their chocolate, the same can be said of advertising their chocolate in the press or in a number of other ways. Such overheads, like other overheads, go to increase the cost of production and, unless compensated by increased sales, may go to increase the price of the chocolate. But the retail price of 6d., or whatever it is, is just the price of the chocolate and nothing else. In the present case, there is no reason for assuming that the price paid by the purchaser is paid for anything but the chocolate. As the facts show, there is ample profit to the respondents Nestlé in the sale of the record alone and no reason to attribute something extra in the sale of the chocolate.

I It was suggested that for six wrappers and 1s. 3d. they might sell the record for 1s. 3d. They might if it was a business proposition and they chose so to encourage the sale of the chocolate. That would leave the problem as before. If, for some reason which it is difficult to imagine, they were to make alternative offers of a record for 1s. 6d. on production of three wrappers or for 1s. 3d. on production of six wrappers, that might suggest that the wrappers for some reason were worth one penny each. But that would certainly not mean that someone could compel a sale of a record for 1s. 9d. and no wrappers. The suggestion that three wrappers

represent some intangible consideration seems to be entirely unreal. It only makes sense if it be assumed that, in the sale of the chocolate, the purchaser was paying something less than 1s. 6d. for the chocolate and the balance towards the purchase of the record. I have already dealt with that argument. I would only add that the purchase of the chocolate is (or would normally be) a contract with the retailer, and there is nothing to suggest that the 1s. 6d. is anything more than the ordinary retail selling price of the chocolate sold, as other chocolate and other comestibles often are, in wrappers to keep them clean or to identify them or for advertising purposes. There may be some cases where containers have some intrinsic value which increase the selling price, but that is not this case. I agree with JENKINS, L.J., that the price of 1s. 6d. was wholly attributable to, and exhausted by, the purchase of the chocolate.

The letterpress in the advertisement "Fill in the coupon and send it with a postal order for 1s. 6d., the price of the record, and your three wrappers" and on the cardboard mount of the record "Send three wrappers from Nestlé's 6d. milk chocolate bars, together with postal order for 1s. 6d." is, in my opinion, entirely consistent with, indeed, in my opinion, goes to support, the view that the ordinary retail selling price of the record is 1s. 6d.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, s. 8 of the Copyright Act, 1956, provides for a royalty of an amount, subject to a minimum, equal to 6½ per cent. of the ordinary retail selling price of the record. This necessarily implies, in my opinion, that a sale to be within the section must not only be retail but one in which there is no other consideration for the transfer of property in the record but the money price. Parliament would never have based the royalty on a percentage of a money price if the section was to cover cases in which part, possibly the main part, of the consideration was to be other than money. This is in no sense a remarkable conclusion as in most sales money is the sole consideration. It was not argued that the transaction was not a sale.

The question, then, is whether the three wrappers were part of the consideration or, as JENKINS, L.J., held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store. I think that they are part of the consideration. They are so described in the offer, "They", the wrappers, "will help you to get smash hit recordings". They are so described in the record itself—

"all you have to do to get [such new] record is to send three wrappers from Nestlé's 6d. milk chocolate bars together with postal order for 1s. 6d."

This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that, when received, the wrappers are of no value to the respondents The Nestlé Co., Ltd. This I would have thought to be irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration. For these reasons, I would allow the appeal.

Appeal allowed.

Solicitors: *Syrett & Sons* (for the appellants); *McKenna & Co.* (for the respondents, The Nestlé Co., Ltd.); *Howe & Rake* (for the respondents, Hardy Record Manufacturing Co., Ltd.).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

JOHN MILLER (SHIPPING) LTD. v. PORT OF LONDON AUTHORITY.

[CHANCERY DIVISION (Roxburgh, J.), April 14, 1959.]

B

Discovery—Original summons—Need for showing special circumstances.

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises for own business—Discovery relating to intention to occupy—Undertaking to occupy premises—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (g).

C

An affidavit filed on behalf of responsible landlords opposing the application of their tenants by originating summons for a new tenancy of business premises offered an undertaking that immediately vacant possession was obtained the premises would be occupied by the landlords for the purposes of their business. The ground of opposition was that provided by s. 30 (1) (g) of the Landlord and Tenant Act, 1954, viz., that on the termination of the tenancy the landlord "intends to occupy the holding for the purposes . . . of a business to be carried on by him therein". The tenants applied for discovery with a view to disputing the fixity of the landlords' intention to occupy the premises.

D

Held: discovery would not be ordered unless special circumstances were shown and none in favour of granting discovery had been shown (*Re Borthwick*, [1948] 2 All E.R. 635, followed); moreover, the offer of the undertaking was evidence of a settled intention on the part of the landlords and was a special circumstance against ordering discovery, as it was an undertaking that would be acceptable at the trial (*Espresso Coffee Machine Co., Ltd. v. Guardian Assurance Co., Ltd.*, [1959] 1 All E.R. 458, applied).

E

Per CURIAM; on proper terms before final order the court might allow the landlords to resile from the offer of the undertaking, but the court would then be willing to consider anew an application for discovery on the footing that the undertaking had been withdrawn.

F

[As to the ground of opposition based on a landlord's intention to occupy a holding, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

For the Landlord and Tenant Act, 1954, s. 30 (1) (g), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

G

Cases referred to:

(1) *Re Borthwick, Borthwick v. Beauvais*, [1948] 2 All E.R. 635; [1948] Ch. 645; [1949] L.J.R. 50; 2nd Digest Supp.

(2) *Espresso Coffee Machine Co., Ltd. v. Guardian Assurance Co., Ltd.*, [1959] 1 All E.R. 458.

(3) *Lennox v. Bell*, (May 31, 1957), unreported.

H

(4) *Billy's Goods, Ltd. v. Phillips Furnishing Stores, Ltd.*, [1957] 2 All E.R. 223.

Procedure Summons.

By an originating summons the applicants, who were the tenants of business premises of which the respondents were the landlords, claimed an order for the grant by the respondents to the applicants pursuant to the Landlord and Tenant Act, 1954, of a new tenancy of the premises. The landlords opposed the application under s. 30 (1) (g) of the Act of 1954 and stated by their affidavit that on the termination of the current tenancy the landlords intended to occupy the premises for the purposes of their own business. The estate officer of the landlords deposed by affidavit that he was authorised to offer, on behalf of the landlords, an undertaking to that effect. The applicants applied for discovery, and on that point the originating summons was adjourned into court as a procedure summons.

I

Christopher Friday for the applicants, the tenants.

Michael Athery, Q.C., and *Oliver Lodge* for the respondents, the landlords.

ROXBURGH, J.: This procedure summons relates to an application by A
originating summons for a new lease of business premises, under the Landlord
and Tenant Act, 1954, to which s. 30 of that Act applies. One of the ground
on which under s. 30 (1) the landlord can oppose an application is that in para.
(g) (subject to a point which does not arise in the present case), namely

"that on the termination of the current tenancy the landlord intends to B
occupy the holding for the purposes, or partly for the purposes, of a business
to be carried on by him therein . . ."

In this application the estate officer of the respondents, the Port of London
Authority, first of all states that he is the estate officer of that body and has held
that position for upwards of nine years, and he further states (and this is the only
reason why I am reading this paragraph) that he is "authorised by the said C
authority to make this affidavit on their behalf". He then exhibits some resolu-
tions of the authority and makes some statements, to which I do not propose to
refer, in support of the plea that the authority, the landlords, intend to occupy
the holding for the purposes of its business. But he does say (and this is the point
on which my judgment will turn):

"I am authorised by the Port Authority to offer an undertaking on D
behalf of the Port Authority that immediately vacant possession of the rooms
at present occupied by the applicants is obtained by the Port Authority
they will be occupied by the Port Authority for the purposes of the Port
Authority's business."

The application now before the court is for discovery. Special circumstances
are not alleged by affidavit in support of the application but my judgment will E
not turn on the question whether or not there ought to have been such an
affidavit. It is admittedly an application for discovery with a view to disputing,
if possible, the fixed and settled intention of the authority to occupy the premises
for the purposes of its business.

The general practice was laid down by the Court of Appeal a long time ago.
It is stated in these words by LORD GREENE, M.R., in *Re Borthwick, Borthwick* F
v. Beauvais (1) ([1948] 2 All E.R. 635 at p. 636):

"In the procedure by originating summons where the issues are not defined
in the way in which they are defined in pleadings, but are shown in general
affidavits in which the relevant evidence appears, affidavits which can, if
necessary, be cross-examined to, there is really no room in practice for the
application of the rather strict rules relating to discovery which take place G
in ordinary actions conducted with pleadings. The view that ROXBURGH, J.,
took, and I think rightly took, was that the discovery in proceedings in the
Chancery Division by originating summons ought only to be ordered in very
special cases where the facts are such as to justify such an order being made.
The application which was made to ROXBURGH, J., was an application, not H
under this code contained in Ord. 54F, but for discovery under the general
jurisdiction of the court. The judge had no hesitation in saying what, in my
opinion, is right - that there is in this case no such right to discovery as is
conferred by the Rules of the Supreme Court in relation to matters conducted
by pleadings. He took the view further that an application for a special
order for discovery in proceedings of this kind on originating summons
ought to be by a specific application, and that it should be supported by a
special affidavit setting out the reasons why it is said discovery should be I
granted."

That is the general practice and has subsisted at any rate, since 1948, and I
believe long before that. Therefore (omitting, as I do, from consideration the
question whether the application ought to be dismissed because there is no
a special application nor a special affidavit) the question is: Are there special
circumstances in this case? In my view, there are special circumstances in this

A case, but they are entirely against the granting of this discretionary order. The Port of London Authority, through its estate officer, offers an undertaking that I have read. I cannot for myself imagine any better evidence of a fixed and settled intention than that offer when made by a body which is in a position to sustain the penal consequences of a breach of the undertaking. The point is dealt with in *Espresso Coffee Machine Co., Ltd. v. Guardian Assurance Co., Ltd.* (2) ([1959] 1 All E.R. 458) and I was referred to, and propose to read, a passage from the judgment of ROMER, L.J. After dealing with the other evidence of a fixed and settled intention, ROMER, L.J., said (*ibid.*, at p. 463):

"When one adds to that the fact that learned counsel was authorised to offer, and did offer, to the court the undertaking in the form which my Lord has read [substantially in the same form as in the present case] the matter really seems to be put beyond any doubt. Some undertakings, of course, are unacceptable. In *Lennox v. Bell* (3) ((May 31, 1957), unreported), one of the cases to which HARMAN, J., referred, the court was offered an undertaking but knew perfectly well that the person who offered it was incapable of carrying it out. When the undertaking is offered by a responsible body like the landlords in this case, no such criticism can be levelled. It was an undertaking which the learned judge was prepared to accept, and which he did accept; and in regard to such an undertaking I would only quote a passage . . . from the judgment of DANCKWERTS, J., in *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* (4) ([1957] 2 All E.R. 223 at p. 225) where he said: ' . . . the undertaking seems to me to compel fixity of intention . . . ' I know of no better way of describing it than that description given by DANCKWERTS, J., and it appears to me that, the undertaking having been given and accepted, it is perfectly decisive of the fixity of intention which, I agree, is a requisite element."

I respectfully adopt that phrase, which is really very concise and clear: "the undertaking seems to me to compel fixity of intention."

Counsel has suggested that as I am not the trial judge this is not an offer to me which I can immediately accept, because I am not trying the case. I think that it is an offer to me, because, although this is not the final hearing, it is an interlocutory application in this case, and any order which I make will be in this very case. But, on the other hand, I agree that it would not be convenient or in accordance with practice that I should accept that undertaking at this stage in advance of the trial. That makes no difference to my view of the present application, for this reason: I have no doubt that, on proper terms, before the final order, the court might allow the Port of London Authority to resile from that offer; but, if it did, it goes without saying that the court would make quite certain that that change of policy *ex hypothesi* taken at a very late stage in the case should not prejudice the tenant, and it is quite certain that the court would then be willing to consider anew an application for discovery on the footing that the undertaking had been withdrawn.

I accordingly dismiss this application.

Application dismissed.

Solicitors: *Harold Benjamin & Collins* (for the applicants); *G. D. G. Perkins* (for the respondents).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NOTE.

Re ROYAL NAVAL AND ROYAL MARINE CHILDREN'S
HOMES, PORTSMOUTH, LLOYDS BANK, LTD. AND OTHERS
v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Roxburgh, J.), June 4, 1959.]

Charity—Scheme—Jurisdiction of court to vary trusts—Enlargement of powers of investment—Interim order—Proposed change in legislation as to trustee securities.

[As to the jurisdiction of the court to vary charitable trusts by way of scheme, see 4 HALSBURY'S LAWS (3rd Edn.) 418, para. 870, and, generally, as regards the jurisdiction by way of scheme, *ibid.*, pp. 309, paras. 634 et seq.; and for cases on the subject, see 8 DIGEST (Repl.) 450, 451, 1458-1483.]

Case referred to:

(1) *Re Royal Society's Charitable Trusts, Royal Society v. A.-G.*, [1955] 3 All E.R. 14; [1956] Ch. 87; 3rd Digest Supp.

Adjourned Summons.

The applicants, as trustees of charitable funds, applied by originating summons for an order enlarging by way of scheme the powers of investment of the trustees.

J. A. Gibson for the applicants, the trustees.

Denys B. Buckley for the respondent, the Attorney-General.

ROXBURGH, J., having referred to an announcement* that an Act for amending the range of investments authorised as trustee investments was in contemplation, and having intimated that his view on the following point of principle was in harmony with that of the Attorney-General, stated his conclusion that any further orders made to enlarge the range of investments of charitable funds by way of scheme should be interim orders, limited to take effect until the law regulating the investment of trust moneys generally should be amended by Parliament. His LORDSHIP further stated that the range of investments authorised by his order was substantially the same as that adopted by VASEY, J., in *Re Royal Society's Charitable Trusts, Royal Society v. A.-G.* (1) ([1955] 3 All E.R. 14), as there should be uniformity of practice in such matters.

His LORDSHIP approved a scheme which, so far as is material to the point of principle stated above, provided:

"(a) unless and until the law relating to the investment of trust moneys generally shall be amended by Parliament (but without prejudice to any investment made pursuant to this order prior to the aforesaid Act of Parliament coming into effect)—

"(i) [the fund] shall be divided into two parts of which one part (hereinafter called 'the Free Fund') shall at the date of division have twice the value of the other part (hereinafter called 'the Restricted Fund');

"(b) moneys forming part of the Restricted Fund and requiring investment may be invested only in or upon the range of investments authorised by s. 1 of the Trustee Act, 1925, for the investment of trust moneys (hereinafter called 'the authorised range');

"(c) subject to the provisions hereinafter contained moneys forming part of the Free Fund and requiring investment may in addition to the authorised range be invested in or upon any of the following investments and such investments may be varied for others of a like nature . . ."

There then followed the extended range of investments, and a provision that a

* See "The Times" newspaper, May 14, 1959.

A competent professional adviser of not less than fifteen years' standing in any of the professions of a stockbroker, merchant banker, or member of a finance house should be employed to keep the trust investments under review and to recommend any changes which he might from time to time consider to be desirable.]

Order accordingly.

Solicitors: *Mills & Morley*, agents for *Bramsdon & Childs*, Portsmouth (for the applicants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re WRAGG (deceased). HOLLINGSWORTH AND ANOTHER v. WRAGG AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.JJ.), June 25, 1959.]

Will—Income of residuary estate—Surplus income after gift of two annuities—Capital of residue to be divided after death of first annuitant—No express disposition of surplus income—Gift of capital “after the death of” person having a limited interest during her life.

By his will a testator devised and bequeathed all his real and residuary personal estate to his trustees on trust for sale and conversion, and after giving directions as to the occupation of his residence by his wife and others, he directed his trustees to hold his residuary estate “(c) Upon trust to pay my wife during her life a weekly payment of such sum as after deduction of income tax will leave in the hands of my said wife the clear weekly sum of £3 10s. my trustees being empowered to resort to both capital and income to pay the said weekly sum. (d) Upon trust to pay to my brother . . . during his life a weekly payment of such sum as after deduction of income tax will leave in the hands of my brother the clear weekly sum of 10s. my trustees being empowered to resort to both capital and income to pay the said weekly sum. (e) After the death of my wife and after setting aside a sufficient part of my estate to pay the said weekly payment of 10s. to my brother . . . during his life Upon trust to divide my residuary estate into seven equal parts” and to hold those parts on trust for seven named persons. The testator further directed that his residence and the fund set aside to provide his brother's annuity should ultimately become subject to the trusts set out in sub-cl. (e). On the question how surplus income arising during the lifetime of the testator's widow ought to be dealt with,

Held: the income during the widow's lifetime was undisposed of by the will and devolved as on the testator's intestacy, because on the true construction of the will there was no reason to depart from the ordinary literal meaning of the words “After the death of my wife” in cl. 5 (e), and those words ought not, therefore, in this will to be construed as meaning “subject to my wife's interest” so as to entitle the seven ultimate beneficiaries to the surplus income.

Re Shuckburgh's Settlement ([1901] 2 Ch. 794) distinguished.

Re Gillett's Will Trusts ([1949] 2 All E.R. 893) considered.

Appeal allowed.

[As to gifts subject to prior interests, see 31 *TRUSTS & TAXES* (2nd Ed. 1957) para. 426; and for cases on the subject, see 44 *TRUSTS & TAXES* 10,001 to 10,050.]

Cases referred to:

- (1) *Re Blake, Berry v. Geen*, [1938] 2 All E.R. 362; 107 L.J.Ch. 173; sub nom. *Berry v. Geen*, [1938] A.C. 575; 159 L.T. 122; Digest Supp.
- (2) *Re Shuckburgh's Settlement, Robertson v. Shuckburgh*, [1901] 2 Ch. 794; 71 L.J.Ch. 32; 85 L.T. 406; 37 Digest 447, 510.

- (3) *Re Burden, Mitchell v. St. Luke's Hostel Trustees*, [1948] 1 All E.R. 31; [1948] Ch. 160; [1948] L.J.R. 631; 2nd Digest Supp.
- (4) *Weatherall v. Thornborough*, (1878), 8 Ch.D. 261; 47 L.J.Ch. 658; 39 L.T. 9; 37 Digest 146, 724.
- (5) *Re Robb's Will Trusts, Marshall v. Marshall*, [1953] 1 All E.R. 920; [1953] Ch. 459; 3rd Digest Supp.
- (6) *Re Gillett's Will Trusts, Barclays Bank, Ltd. v. Gillett*, [1949] 2 All E.R. 893; [1950] Ch. 102; 2nd Digest Supp.
- (7) *Bettie v. Holyson*, (1864), 10 H.L. Cas. 656; 33 L.J.Ch. 601; 10 L.T. 202; 11 E.R. 1181; 37 Digest 132, 621.
- (8) *Re Jobson, Jobson v. Richardson*, (1889), 44 Ch.D. 154; 59 L.J.Ch. 245; 62 L.T. 148; 44 Digest 1040, 8967.
- (9) *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570; 75 L.J.Ch. 321; 94 L.T. 593; 44 Digest 1140, 9860.

Appeal.

This was an appeal by the first defendant from an order of DANCKWERTS, J., dated Nov. 14, 1958. The plaintiffs, the trustees of the will of Stephen Wragg, deceased, asked by their originating summons dated June 25, 1958, whether the income of the net residue of the estate accruing during the life of the testator's widow (after meeting thereout the payments mentioned in cl. 5 (c) and (d) of the will) was (i) payable to the persons entitled under cl. 5 (e) of the will, or (ii) to be dealt with as on the testator's intestacy, or (iii) to be subject to some other (and if so what) trusts. DANCKWERTS, J., held that the surplus income was not undisposed of, but was payable to the residuary legatees.

H. E. Francis for the first defendant, the widow.

Charles Sparrow for the plaintiffs, the trustees.

G. M. Parbury for the remaining defendants, the residuary legatees.

LORD EVERSHED, M.R.: I will ask ROMER, L.J., to deliver the first judgment.

ROMER, L.J.: This appeal has been very well argued by counsel on both sides, by Mr. Francis for the appellant and Mr. Parbury for the respondents. It is an appeal from a decision of DANCKWERTS, J., on a question of construction of a nature which quite frequently comes before the court. It arises out of the will of a Mr. Stephen Wragg, the will being dated Oct. 24, 1949. Mr. Wragg died on Sept. 14, 1957, leaving, as I understand, a net estate of about £10,000, of which some £8,000 consists of investments, and £2,000 represents approximately the value of the house in which he lived and with regard to which he made certain dispositions by his will.

The will is not a lengthy document, and I had better read most of it. After appointing by cl. 1 two gentlemen as executors and trustees, and after bequeathing by cl. 2 all his household furniture and household goods to his wife absolutely, the testator devised and bequeathed (by cl. 3) all his real and residuary personal estate to his trustees on the usual trusts for sale and conversion. By cl. 4 the testator provided:

"My trustees shall permit my wife Sarah Wragg to occupy my house in which I now reside known as 34 Burns Lane Warsop aforesaid during her lifetime and after her death shall permit Annie Reast . . . widow and Elizabeth Wragg . . . spinster to occupy the said house during their joint lives and the survivor thereof to occupy the said house during her lifetime and until the death of such survivor no sale shall be effected of the said house."

Clause 5 provided:

"My trustees shall hold the net proceeds of the said sale and conversion and my ready money upon the following trusts: (a) Upon trust to pay thereout all my just debts and funeral and testamentary expenses. (b) Upon trust to invest the residue after such payment in their names in any

A investments authorised by law and to stand possessed of such investments
and all parts of my estate for the time being unsold (hereinafter called 'my
residuary estate'). (e) Upon trust to pay my wife during her life a weekly
payment of such sum as after deduction of income tax will leave in the hands
of my said wife the clear weekly sum of £3 10s. my trustees being empowered
to resort to both capital and income to pay the said weekly sum. (d) Upon
B trust to pay to my brother Ernest Wragg of 58 Booth Street Cleckheaton
during his life a weekly payment of such sum as after deduction of income
tax will leave in the hands of my said brother the clear weekly sum of 10s.
my trustees being empowered to resort to both capital and income to pay
the said weekly sum. (e) After the death of my wife and after setting aside a
sufficient part of my estate to pay the said weekly payment of 10s. to my
C brother Ernest Wragg during his life Upon trust to divide my residuary
estate into seven equal parts and to hold each such equal seven parts upon
the following trusts respectively . . ."

The testator then named seven individuals each of whom would take one-
seventh part of the residuary estate on its division. That was followed by a
proviso which I need not read, in regard to the substitution of issue of any of the
seven named beneficiaries who might die during the testator's lifetime. Clause
D 5 proceeded:

"(f) Upon the death of the survivor of my wife and the said Annie Reast
and Elizabeth Wragg and after the sale of my house 34 Burns Lane Warsop
aforesaid my trustees shall hold the proceeds thereof on the same trusts as
those declared in cl. 5 (e) hereof. (g) Upon the death of my brother Ernest
E Wragg my trustees shall hold that part of my estate set aside to pay to him
the weekly sum of 10s. during his life upon the same trust as those declared
in cl. 5 (e) hereof."

There is surplus income arising from the trust estate after paying the two annu-
ities or weekly sums bequeathed to the testator's widow and brother, and the
question is as to its destination during the remainder of the life of the testator's
F widow, she being still living.

On Nov. 14, 1958, DANCKWERTS, J., made an order on the originating summons
in this matter holding (in effect) that the surplus income to which I have referred
should go to the seven persons entitled to the corpus of the estate under cl. 5 (e)
of the will. Against that decision the widow has appealed. She has contended
before us that the income is undisposed of during her lifetime and that she is
G entitled to it as being the person on whom any undisposed-of estate devolves.
We were given a note of the learned judge's judgment, a short note taken by
counsel, and it is to this effect:

"Now the position is that there is no express gift of income after providing
for the annuities. The question is a familiar one. Is there an intestacy, or
does the surplus income go with the final gift? There are authorities, such as
H *Re Blake, Perry v. Gee* (1) ([1938] 2 All E.R. 362), in which the court has
come to the conclusion that there is no gift of the surplus income until the
death. That rule probably defeats the intention of the testator. There is
another line of cases, such as *Re Shuckburgh's Settlement, Robertson v. Shuck-*
burgh (2) ([1901] 2 Ch. 794) and *Re Burton, Mitchell v. St. Luk's Hostel*
Trustees (3) ([1948] 1 All E.R. 31) in which the words can be read as 'subject
I to' the prior interests. The line between them is very fine. Prima facie,
when a testator makes a will he means to make an effective will and does
not mean to leave an intestacy. It would be odd in this case if the wife took
the whole income. The courts have allowed small indications to support a
construction which avoids an intestacy. Here, I think there are sufficient
indications in cl. 5 (e), (f) and (g) to show that the testator intended the trusts
of that clause to take effect subject to the earlier provisions of the will."

It appears to me that this question is essentially one of construction to be decided

on the terms of this particular will. Prima facie, a gift to B "after the death of A", must take effect according to its terms and cannot operate so long as A is still alive. Accordingly, in the present case, cl. 5 (c)—which on the face of it is a gift in equal shares to seven named persons of the capital of the estate and of that alone—does not become effective until the death of the testator's widow, and the seven ultimate beneficiaries can take nothing during her lifetime. However, these beneficiaries claim the surplus income on the footing that it is income of the residuary estate and that the words "After the death of my wife" mean no more than "subject to my wife's interest", i.e., subject to her weekly sum of £3 10s. tax free.

This interpretation has undoubtedly been put on similar words in some of the reported cases, of which perhaps the best known example is *Re Stockbridge's Settlement* (2) which is one of the cases to which the learned judge referred in his judgment. Counsel for the residuary legatees submitted that the words in cl. 5 (e) "After the death of my wife" ought to receive that interpretation, so as (in effect) to accelerate the interests of the ultimate beneficiaries so far as the surplus income is concerned. For my part, taking the will as a whole, I can see no sufficient reason why the words "After the death of my wife" should not receive their ordinary and natural meaning. But apart from that, it seems to me that it is impossible to substitute "subject to my wife's interest" for the words which in fact appear. The reason for that is that after the relevant words at the beginning of cl. 5 (e) there follow the words "and after setting aside a sufficient part of my estate to pay the said weekly payment of 10s. to my brother Ernest"; and as a question of construction it seems quite clear to me that that direction to set aside was to take effect on the death of the wife and not before. If that view is right, it is impossible to fit in with the substitution contended for, because the substitution would leave the point of time for setting aside the relevant part of the fund in the air and undefined.

Counsel for the residuary legatees says that that does not follow because under the directions in the will the trustees could set aside that part of the fund in the widow's lifetime as well as after her death. I cannot, however, accept this. Under cl. 5 (e) the trustees are empowered to resort to both capital and income of the residuary estate to pay the brother's weekly sum, and they could do that during the widow's lifetime. That is quite a different thing from setting aside a part of the estate to pay the weekly sum, and was a step which the trustees were only directed to take after the widow's death. In my judgment this is the only sensible result of reading sub-cl. (d) and sub-cl. (e) in conjunction with each other; and if the direction to set aside a part of the estate was intended to operate while the widow was still alive it is difficult to see why the direction was not included together with the power in sub-cl. (d) rather than inserted separately in sub-cl. (e).

The next point which counsel for the residuary legatees took was that the trust declared by sub-cl. (c) in favour of the capital beneficiaries was what he described as the "master" trust. He pointed out that emphasis, or great significance, was attributed by the testator to that conception by the introduction of such provisions as sub-cl. (f) and sub-cl. (g). Under sub-cl. (f) he directed (although there was in fact no need for such a direction) that, on the death of the three persons to whom he had given residuary rights in relation to his house and after the sale of his house, the trustees should hold the proceeds thereof on the same trusts as those declared in cl. 5 (c). Counsel said that that was quite an unnecessary direction, and he rightly said so, but he used it as an indication as showing that the testator regarded sub-cl. (c) as the principal trust declared by his will and as an indication that he intended everything that he had just expressly disposed of to go in accordance with the terms of cl. 5 (c). Counsel for the residuary legatees referred similarly, and for the same purpose, to sub-cl. (g), which deals with the ultimate destination of the part of the estate which he had directed to be set aside for the benefit of his brother Ernest. While appreciating the force of what counsel said on that point, I do not think that it really carries

A him very far on his path. It is true that both these provisions were unnecessary, but I do not find in them any indication which would lead me to the conclusion that "After the death of my wife", in sub-cl. (e), should be read as "subject to my wife's interest."

B Further and finally, counsel for the residuary legatees said that if in fact, on the true construction of this will, there is a partial intestacy, i.e., a partial
 B intestacy in respect of the surplus income during the widow's lifetime, it would be odd that that should go to a person, viz., the widow, as an augmentation of a weekly sum which has already been expressly given to her, that is to say her weekly sum of £3 10s. free of tax. That point I agree has some little substance in it, and as a matter of construction, if the testator in fact intended his wife to have any surplus income arising during her lifetime, it was a very oblique way
 C of giving it to her: it would have been very easy for him, in sub-cl. (e), to have given her not only the weekly sum of £3 10s. but also any surplus income arising during her lifetime from the estate as well. It may very well be, I think, that the
 D testator never applied his mind to this surplus income at all, which would not amount and does not amount to any very considerable sum; and alternatively he may have thought that as it would be quite small he was quite content to leave its destination to the law, whether his widow or anybody else should thereby become entitled to it.

It appears from the notes of the learned judge's judgment which I have read that he thought there were sufficient indications in sub-cl. (e), sub-cl. (f) and sub-cl. (g) of cl. 5 to show that the testator intended the surplus income to go to the ultimate beneficiaries. With great respect, I am unable to reach that
 E conclusion myself. As to sub-cl. (e), this appears to me to be simply a trust for the distribution of corpus after the widow's death, and there is no reference anywhere at all in it as to income. Sub-clause (f) does not seem to affect the matter one way or the other. As counsel for the residuary legatees pointed out, it was superfluous. I think myself that it was designed to direct expressly the
 F destination of the proceeds of the house after the last of the residential beneficiaries had died. Sub-clause (g) is also colourless, on the view which I have already expressed that the trustees were only to set aside a part of the estate for the brother's benefit after the widow's death. On that view, sub-cl. (g) was based on the assumption that the brother would survive the widow and the setting
 G aside of a part of the estate, and was saying (though quite unnecessarily) that on the brother's death the part so set aside should be dealt with in accordance with sub-cl. (e) and become divisible, along with the rest of the capital of the estate, among the seven beneficiaries.

As I say, it appears to me that this is wholly a question of the construction of this particular will, and on the true construction of this will it does appear to me that during the widow's lifetime this surplus income is undisposed of and does not go to the seven beneficiaries named in sub-cl. (e) but does go to the wife, she
 H being entitled as on an intestacy.

We were, however, quite rightly, referred to certain authorities on this matter; and on the point that normally words such as "after the death of A" should receive their ordinary and natural meaning, we were referred to *Weatherall v. Weatherall* 44 (1878), 8 Ch.D. 261; *Re Blake* (1); *Re Robb's Will Trusts*, *MacLeod v. Marshall* (5) ([1953] 1 All E.R. 920); and *Re Gillett's Will Trusts*, *Everingham Bank Ltd. v. Gillett* (6) ([1949] 2 All E.R. 893). In all those cases, as I
 I say, the ordinary meaning was given to such words as those which arise in this case. I do not propose to refer to any of those authorities except to a passage in the judgment of Evershed, J., in *Re Gillett* (6). In that case a testator who died on Dec. 24, 1942, by his will bequeathed annuities to four persons for their respective lives. He directed

"that in order to meet the said annuities my trustees shall . . . have power to utilise and employ capital or income or both . . . And as to any balance

remaining of my residuary trust funds after the provision and payment of all the aforesaid annuities my trustees shall stand possessed thereof . . . In trust on the decease of the survivor of the above first named four annuitants . . .

in varying specified proportions for seventeen named persons absolutely, but liable to be divested by certain substitutional gifts. He made no disposition of any surplus income there might be from the residuary trust funds pending the death of the survivor of the four annuitants; and after the death of two of them there was such a surplus. The learned judge held that the surplus income was undisposed of by the will. There were other points arising in the case as well, but he dealt with that particular point in his judgment. He said ([1949] 2 All E.R. at p. 897):

"It may be straining language and logic to treat a contingent gift as an immediate gift to take effect only on a certain event, and this is not the way in which the rule is stated in *Becton v. Hodyson* (7) ((1864), 10 H.L. Cas. 656). However this may be, it would be impossible (in the absence of a special context) to construe a gift timed to take effect on the happening of an event which must happen sooner or later as a gift of anything before that time, because such a construction is excluded by necessary implication, and, accordingly, a deferred or future gift could not carry intermediate income unless there were a rule of law that intermediate income not otherwise disposed of passed with the principal as accessory thereto. *Re Blake* (1) shows that no such rule is applicable to future or deferred gifts which are indefeasible . . . Undoubtedly, words may be found in a will which would be apt to attach intermediate income to a future gift whether defeasible or indefeasible, and counsel for the third defendant submitted that apt words are to be found in this case. The gift is of any balance remaining of the residuary trust fund after providing for annuities out of capital or income or both, and at one time I was inclined to hold that such a gift extended to the balance of a mixed fund of capital and past income not required to answer the annuities, but counsel for the fourth and fifth defendants has convinced me that, as the residuary trust fund is expressly defined in such a manner as to exclude income, I must construe the balance of that fund as meaning so much of the capital thereof as has not been required to answer the annuities."

Counsel for the widow, not unnaturally, fastened on those words of the learned judge: "as the residuary trust fund is expressly defined in such a manner as to exclude income" — and said that that is precisely what is to be found in cl. 5 (c) of the testator's will in the present case.

There were three cases cited to us in which language such as "after the death of so and so" was interpreted as meaning "subject to the interest of" the named person; and those cases were *Re Shuckburgh's Settlement* (2) (to which I have already referred); *Re Jobson, Jobson v. Richardson* (8) ((1889), 44 Ch.D. 154); and *Re Barben* (3). But I will not refer to them because each of them contained some special context which enabled the court to depart from the strict meaning of the phrase "after the death of A", and I need only say that in my judgment no comparable context appears in the will now before us.

In conclusion, I would only add that the court should not in all cases lean too heavily against a construction which involves a partial intestacy, as was pointed out by ROMER, L.J., in *Re Edwards, Jones v. Jones* (9) ([1906] 1 Ch. 570, for the reasons which the lord justice there indicated.

For the reasons which I have attempted to explain, I would allow this appeal.

PEARCE, L.J.: I agree.

LORD EVERSHED, M.R.: I also agree; and only add a few words because on a matter of construction we are differing from DANCKWYERS, J. I do not say as much (but I associate myself fully with ROMER, L.J., in thinking that reference to cases of divided annuities, since decisions must in those cases always depend on the particular instrument, there under review.

- A I feel, if I may say so, some sympathy for the learned judge's view, since when a will has been (as this obviously was) professionally prepared there is a natural inclination against a result that means that the draftsman left a lacuna in his draft. Still, as ROMER, L.J., has pointed out, the court should not, I think, on that ground alone, lean too heavily against a construction that produces an intestacy; and certainly cannot, in order to avoid that result, misconstrue the language of the instrument. I may perhaps also add that in these matters naturally the Court of Appeal may have to take a rather stricter view than a judge of first instance.

- The words that we have to construe are perfectly simple English words — "After the death of my wife". It is no doubt true that in certain contexts (and the two cases referred to by DANCERWERTS, J., of *Re Shackburgh's Settlement* (2) ([1901] 2 Ch. 794) and *Re Burden* (3) ([1948] 1 All E.R. 31) are illustrations of this result) the court may conclude that, by a formula such as "after the death of A", the testator meant no more and no less than "subject to what has gone before". But is there here a context which requires a departure from the ordinary meaning of the words in favour of such a view? For the reasons which ROMER, L.J., has given, and which I fully share, I think the answer is No.
- D Particularly, as I think, the opening words of cl. 5 (e) of the will, to which ROMER, L.J., has alluded, seem to negative such a conclusion; for (as ROMER, L.J., has pointed out) the formula "After the death of my wife and after setting aside" etc. seems inevitably to direct attention to one point of time which the testator has had in mind as being the relevant point of time for the coming into operation of that which follows; and I think (if I may say so) that that consideration is the best answer to counsel for the residuary legatees' argument which he called the argument of the "master" trust.

- If one looks at the will as a whole, one finds indeed that there is some inelegance in preparation; because the will starts with a general devise and bequest of all the property on trust for sale and then the trusts of the proceeds of sale are separated from the initial devise and bequest by the intrusion of provisions about the testator's house which in part may be responsible for the present difficulty. The learned judge was of opinion that the view which was contrary to that which commended itself to him would probably defeat the intention of the testator. I venture respectfully rather to doubt that. If you had asked the testator the general question "Do you intend to die partially intestate?", he might well have said "No". But the question is, what did he intend to do with any surplus income? My reading of cl. 5 indicates that he may well have doubted whether there would be any surplus; for he made express direction that the two annuities should be paid if necessary out of the capital. My own strong impression, I confess, on reading this will, is that he had not applied his mind at all to the question what would happen to any surplus income in any year if there was such surplus; and if he did not apply his mind to it I find it difficult to suppose that he had any intention in regard to it. I am not, for my part, satisfied on this will that he intended that, if there was a small surplus, it should be divided into sevenths amongst the persons later mentioned.

- For these reasons, in addition to those which ROMER, L.J., has stated, I have come myself, I confess, to a clear conclusion that there is nothing in the context of this will which would justify interpreting the simple words "After the death of my wife" so as to give them any other than their ordinary meaning; and I would, therefore, allow the appeal.

Appeal allowed.

Solicitors: Peacock & Goldard, agents for Elliot, Smith & Co., Mansfield (for the first defendant); Sharpe, Pritchard & Co., agents for Horrap White, Vallance & Dawson, Mansfield (for the plaintiffs and the remaining defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BAINES v. TWEDDLE.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), June 16, 17, 1959.]

Sale of Land—Contract—Rescission—Condition for vendor's rescinding for objection with which unable to comply—Mortgaged property sold free from incumbrances—No inquiry made before contract whether mortgagees would join in conveyance—Refusal of mortgagees to join in conveyance—Whether vendor lost right to rescind by reason of recklessness in signing contract—Law Society's Conditions of Sale (1953), cl. 10 (1).

The vendor contracted to sell for £580 the unincumbered fee simple of land which at the date of the contract was subject to a mortgage to a building society to secure repayment by monthly instalments of some £2,900 and interest, and was subject also to a second mortgage for £600. The vendor was five months in arrears with payments to the building society under the mortgage. Apparently the vendor did not inform his solicitor of this. The contract incorporated the Law Society's Conditions of Sale (1953), cl. 10 (1) of which provides that if a purchaser "takes or makes any objection or requisition as to title, conveyance or otherwise which the vendor is unable or, on the ground of unreasonable expense, unwilling to remove or comply with, and does not withdraw the same . . . the vendor may rescind . . . the contract . . ." The vendor, before signing the contract, asked his solicitor's clerk (the solicitor being absent) whether this was "all right with the building society" and was told in reply "Oh, yes, Mr. F. [the principal] has that in hand"; whereon the vendor signed the contract. The vendor was not told that any steps had been taken to obtain the second mortgagee's consent. The building society refused to join in the conveyance to the purchaser. The purchaser was unwilling to accept, as a completion of the contract, the conveyance of the equity of redemption, and the vendor purported to rescind the contract under cl. 10 (1). In an action by the purchaser the court assumed, on the question whether the vendor had validly rescinded, that the non-joinder of the mortgagees was a matter that was within the scope of cl. 10 (1).

Held: although the circumstances in which a right of rescission arose under cl. 10 (1) were stated therein in unqualified terms, and although the vendor had acted honestly, yet the protection afforded by the clause was not available to him because, in signing the contract without ascertaining that the mortgagees would concur in the conveyance, he had on the facts taken such a risk as amounted to recklessness and fell short of what a prudent vendor entering into contractual relations with a purchaser was bound to do; accordingly the purchaser was entitled to damages.

Dictum of COLLINS, M.R., in *Re Jackson & Haden's Contract* ([1905] 1 Ch. at p. 422) and dictum of P. O. LAWRENCE, J., in *Morrell v. Schuster* ([1920] 2 Ch. at p. 255) applied.

Quære: whether the vendor would have been entitled to the protection of cl. 10 (1) had he been informed by his solicitor that the mortgagees would join in the conveyance, and that information proved to be wrong (see p. 728, letter I, to p. 729, letter E, and p. 733, letters E to G, post).

Appeal allowed.

[As to the exercise of a contractual right of rescission of a contract for the sale of land, see 29 HALSBERY'S LAWS (2nd Edn.) 258, para. 380; and for cases on the subject, see 40 DIGEST (Repl.) 99, 100, 749, 759.]

Cases referred to:

(1) *Re Jackson & Haden's Contract*, [1905] 1 Ch. 603, *aff'd*, C.A., [1906] 1 Ch. 411, 73 L.J. 226, 94 L.T. 418; 40 DIGEST (Repl.) 100, 742.

- A (2) *Merritt v. Shuster*, [1920] 2 Ch. 240; 89 L.J.Ch. 399; 123 L.T. 405; 40 Digest (Repl.) 99, 748.
- (3) *Re Deighton & Harris's Contract*, [1898] 1 Ch. 458; 67 L.J.Ch. 240; 78 L.T. 430; 40 Digest (Repl.) 97, 735.
- (4) *Nellthorpe v. Holgate*, (1844), 1 Coll. 203; 8 Jur. 551; 63 E.R. 384; 40 Digest (Repl.) 220, 1788.

B Appeal.

This was an appeal by the plaintiff from an order of VAISEY, J., made on July 23, 1958, whereby he dismissed the plaintiff's claim for specific performance of a contract for the sale of land to him and gave judgment for the defendant, the vendor, on his counterclaim for the sum of £100. The plaintiff by his statement of claim claimed (i) specific performance of a contract of sale made on Aug. 29, 1955, (ii) alternatively, damages for breach of contract, and (iii) a declaration that he was entitled to a lien on the said property for his deposit (together with interest thereon) and any damages and costs awarded in the action. The defendant contended that he was entitled to rescind and had rescinded the contract for sale under cl. 10 of the Law Society's Conditions of Sale (1953), and that he had revoked the licence of the plaintiff to occupy the said property, and he counterclaimed for (i) a declaration that the contract of sale was rescinded by him on Aug. 31, 1956, (ii) possession of the premises, and (iii) mesne profits from Sept. 19, 1955, until delivery of the premises.

J. E. Vinelott for the plaintiff, the purchaser.

Charles Sparrow for the defendant, the vendor.

E LORD EVERSHED, M.R.: This appeal, which has arisen in an action for specific performance of a contract for the sale of land, has raised some points of no little difficulty. The actual question with which alone we must deal may, however, be shortly stated; it is whether in the circumstances which I shall state the defendant (the respondent) who was the vendor under the contract, was entitled to rescind that contract in the way in which, and at the time when, he did. It will be necessary to lay the foundation for what follows with some statement of the facts which must be detailed at any rate as to part of them.

F The contract itself is dated Aug. 29, 1955. It related to a piece of land illustrated on the plan attached to the contract, plot number 422, which was, as we understand, part of a larger area owned by the vendor; and it was required by the purchaser in order to be used by him in connexion with his other land, for agricultural purposes. The sale, judged by the purchase price, was not one of very great substance; for that price was £580, of which, in accordance with normal practice, £58 was paid by way of deposit. The property is described as follows:

H "All that close or parcel of ground containing according to the ordnance map [a certain area which is identified on the plan] together with a right of way . . . Except and reserved unto the Church Commissioners for England their successors and assigns the mines quarries and minerals in or under the said hereditaments . . . and also except and reserved unto the vendor and his successors in title and his or their servants workmen and others authorised by him or them the right to enter the said close or parcel of land "

for limited purposes. The contract, after stating the root of title, said further:

I "The property is sold subject to (a) a proportionate part of a tithe redemption annuity of £1 6s. 8d."

There was no statement of the nature of the interest which the vendor was to convey, but in the circumstances as I have stated them it cannot be open to any doubt whatever that the bargain was for the sale of the fee simple of the land, unincumbered, subject only to the reservations and qualifications which I have stated. Counsel for the vendor has not contended otherwise—indeed he could not possibly have so contended.

At the time when this bargain was made the vendor had, in fact, executed A
two mortgages which affected this plot; the first was to a building society, the
Darlington Building Society, and the total amount outstanding on the mortgage
was £2,900 odd. Not only so, but it also emerged that the vendor had fallen into
serious arrears with the instalments payable under that mortgage, five instal-
ments then being outstanding, a total of some £105. In addition, there was a
second mortgage or equitable charge on the property, and I assume (although I B
do not exactly know) other property also, for £600; that mortgage was in favour
of a Mr. Solomon Abrahams. It will be appreciated that neither of these incum-
brances was referred to in the contract and if, therefore, the vendor was to per-
form the contract according to these terms, it would be necessary for him either
to discharge the mortgages (or discharge them as far as related to plot 422) or to
procure the mortgagees and chargee to join in the conveyance to the purchaser. C

I must finally state, because it is of great importance, that the situation between
the vendor and the building society, viz., the fact that he was five instalments
in arrears, was obviously one which he thought might possibly make the building
society not entirely amenable to every suggestion which he might make. It
appears to have been in his mind somewhat vaguely that Mr. Abrahams would
get a small percentage, and that the total purchase price to be received, viz., D
£580, would go to the building society. To jump ahead in my introduction, it
must be said that when the building society were asked if they would assist the
vendor by joining in the conveyance, they flatly refused and from their refusal
they have never since, so far as I know, resiled at all. It is not entirely insignifi-
cant to state that the refusal of the building society to assist the vendor became,
according to the pleadings, known to the vendor within a very few days after the E
contract, viz., on Sept. 1, 1955. We were informed that the purchaser was told
of this particular difficulty a month after the contract; but on Sept. 19, 1955,
the vendor allowed the purchaser to pay the entire balance of the purchase price,
which was put on deposit in the joint names of the two solicitors concerned, and
the purchaser thereon went into possession, in accordance with a clause in the
conditions of the contract. As things have turned out, I need not say anything F
more about that aspect of the case. I understand that it was an argument in the
court below that even though the vendor were disentitled to rescind he rightly
determined his licence to the purchaser to occupy the land, so as to give to the
vendor the right to a claim for damages for trespass, which is a subject-matter
of the counterclaim; but as it has now transpired, it can be taken that if the
right to rescind was not available then no such right for damages subsists in G
favour of the vendor.

I must now turn to the contract. The contract incorporated the Law Society's
Conditions of Sale, 1953. That is a substantial document, and cl. 8, cl. 9 and cl.
10 relate to the matter of "Abstract, requisitions and power to rescind". In
particular, cl. 10 (1) reads as follows:

"If a purchaser takes or makes any objection or requisition as to title, H
conveyance or otherwise which the vendor is unable or, on the ground of
unreasonable expense, unwilling to remove or comply with, and does not
withdraw the same within ten days after being required in writing so to do,
the vendor may rescind [subject as therein stated] the contract by notice
in writing delivered to the purchaser or his solicitors."

Paragraph (2) deals with certain consequences to which I need not allude. I

I have said that it became unfortunately, but quite clearly, manifest that this
vendor would not be able to obtain the mortgagees' concurrence in the convey-
ance. It, therefore, followed that the best that he could do by way of compliance
with his bargain was to offer to the purchaser a conveyance of the equity of
redemption subject to the building society mortgage of nearly £3,000 and to
Mr. Abrahams' second charge; in other words he could not convey that which
he had contracted to convey, namely the unincumbered fee simple. Not only so,

A but instead of something which I assume would have been worth £580 or thereabouts, the equity of redemption, the subject of these charges, quite clearly would not be worth a penny piece. It is, therefore, not to be wondered at that the purchaser was unwilling to accept as a completion of this bargain a conveyance of the equity of redemption. Accordingly, after the passage of a good deal of time, when, I do not doubt, great efforts were probably made by the vendor to see if he could persuade the mortgagees to help after all, the vendor's solicitor wrote the letter which the condition I have read requires, calling on the purchaser to withdraw the objection within ten days. It will be observed that in order to bring himself within the condition the vendor has to say that the purchaser is taking or making an objection to the title, conveyance or otherwise, and that if the vendor is unable or, for reasons stated, unwilling to comply with the objection and thereupon calls on the purchaser to withdraw it, then if the purchaser does not withdraw it, his contractual right to rescind arises.

I confess that for my part I felt some doubt whether the situation which arose here between these two contracting parties, fits within the scope of this condition at all. This after all, was not in the ordinary sense an objection or requisition of the kind that arises when requisitions on title are delivered; it went to the root of the subject-matter of the contract. But I shall assume for the purpose of this judgment that since an incumbrance is clearly something affecting the title, it should be properly said that a refusal by the purchaser to accept a conveyance of the equity of redemption, instead of the unincumbered fee simple which the vendor had promised to convey, did constitute an objection within cl. 10. On that point I should, perhaps, add this: We were referred—and it is, for present purposes, really the foundation of the case law on the whole subject-matter of this appeal—to the case in this court of *Re Jackson & Haden's Contract* (1) ([1906] 1 Ch. 412). In that case the vendor had contracted to sell to the purchaser a residence, and the terms of the contract made it quite plain that he was contracting to sell the entire interest in the residence and land on which it stood, including mines and minerals thereunder. In point of fact, the vendor did not have the mines and minerals, which had been reserved in the conveyance to him and, therefore, he was quite unable to convey them to the purchaser. He said that he thought it was a matter of such notoriety in the district that the mines and minerals were reserved that the purchaser knew it and was not expecting them. It was, therefore, a case in which he could not convey that which he had promised to convey because he could not include the minerals. There was a rescission clause comparable to that with which we are concerned and BUCKLEY, J., had in the first instance, as I understand it, taken the view that the objection which the purchaser took to having the purchase conveyed sans minerals was not within the condition at all. In this court, COLLINS, M.R., as I read his judgment, thought that prima facie it was. I felt, and I confess I still feel, some slight doubt in my mind whether ROMER, L.J., or COZENS-HARDY, L.J., were as clear as the Master of the Rolls on that point; but, however that may be, in *Merrett v. Schuster* (2) ([1920] 2 Ch. 240), P. O. LAWRENCE, J., clearly expressed the view that the scope given by COLLINS, M.R., to a condition of this kind should now be accepted. For the purpose of this case, therefore, I am willing to assume that the objection of the purchaser in this case was an objection within the scope of cl. 10. It is clear, as I have already said, that the necessary procedure was adopted within the terms of the condition so that if there is no other defect in the vendor's claim he has exercised a contractual right of rescission.

On the face of this condition the right appears to be unqualified; if a purchaser takes or makes any objection which the vendor is unable, or on the grounds of unreasonable expense, unwilling to remove, etc. then the vendor may rescind the contract. Naturally enough it has been the main burden of the argument of counsel for the vendor that this was the bargain which the purchaser made. It gave the vendor this apparently unqualified right of rescission and the purchaser must accordingly accept the consequences. I only venture, by way of

comment on that, to remind the vendor that he on his part contracted to sell an unincumbered fee simple and nearly three weeks after doing so allowed the purchase money to be paid into the joint account. This condition, however, which is one of considerable antiquity, though quite unqualified in terms, nevertheless has had a qualification undoubtedly imposed on it by decisions of the court. I refer again to *Re Jackson & Haden's Contract* (1). In that case the qualification was expressed first in this language by COLLINS, M.R. ([1906] 1 Ch. at p. 422):

"As I have already said, numerous cases have been most carefully set before us, which I have had the opportunity of examining as they were read, and it seems to me that, in every case where the vendor was allowed to avail himself of a stipulation like this, there was always absent that element of shortcoming on his part which, though falling short of fraud or dishonesty, might be described as 'recklessness'."

ROMER, L.J., said this at the end of his judgment, quoting ([1906] 1 Ch. at p. 424) from the earlier case of *R. Deighton & Hurrell's Contract* (3) ([1898] 1 Ch. 458 at p. 464):

"As RIGBY, L.J., said [in that case] it would not, in my opinion, be right here to enable the vendor to 'ride off upon a condition to rescind which was obviously not framed with reference to any such case as' that which has arisen."

I should add that in *Re Jackson & Haden's Contract* (1), on the facts which I have already stated, the court came to the conclusion that the defendant could not rely on this condition for rescission. In the present case, when the purchaser challenged the vendor's right to rescind, the answer of the vendor was that at the time he signed this contract to convey the unincumbered fee simple he reasonably believed that the building society would be willing to join in conveying to the purchaser the property comprised in the agreement. I do not omit to notice that he did not think fit even to refer to any views which he held about Mr. Solomon Abrahams; but still that was his plea. No particulars were asked of it and he, therefore, set forth to prove that he did so reasonably believe. I think there may be no doubt that if, for example, he, the vendor, had before signing this contract, been given an assurance of some sort by the building society: I will not refer again to Mr. Solomon Abrahams—that they would join in conveying this property and then the building society changed its mind, then on the authorities the vendor would be entitled to rely on the power to rescind; in other words, I accept, in the language of the Master of the Rolls in *Re Jackson & Haden's Contract* (1), that if the vendor here is to be disabled for asserting his contractual right to rescind, he must be shown to have had that shortcoming, which although not amounting to anything in the nature of dishonesty, could be described as recklessness. I must say at once that there is no shred of a suggestion that the vendor was dishonest or acted otherwise than in perfect good faith. What he said in support of his plea of reasonable belief was that he had asked his solicitor whether it would be all right and that he relied on what he understood to be the solicitor's assurance.

That raises another point of some difficulty. I shall come presently to see what the solicitor, according to the vendor, said; but assuming for the moment that the vendor was assured by his own solicitor, who was acting for him in the sale, that all would be well, is that necessarily sufficient for the purpose of the condition? To put the matter in its strongest form, supposing that the solicitor, though giving that assurance, was himself grossly reckless or although it is not about it or knew perfectly well that the building society would not join, what then is the position? If the matter were one in which the general law of principal and agent was in all respects applicable, there would obviously be a very strong case for saying that the vendor could not shelter behind his solicitor and that,

- A if his solicitor is reckless, then he, as his solicitor's principal, must be regarded as reckless too; and our attention was directed to the instance where a party to a contract may be held to have constructive notice, through his solicitor, of charges or other defects of title*. Moreover, there may be on this matter a question whether the same result should necessarily apply if the agent whose advice was sought was not a solicitor but was, say, a bailiff or some other servant,
- B whom the vendor asked to make inquiries and by whom he was told, I am assuming falsely, that the inquiries had been made and were satisfactory. As I have said, the argument is a strong one for the view that the principal in this matter must be liable for any relevant defects in the acts of an agent in the performance of his duty. But the question here is whether this is a case in which the general principles of agency must be applied. As I have said, we are here
- C concerned with a condition which, on the face of it and according to its language, is quite unqualified. Given the facts, then the vendor may rescind the contract; no qualification whatsoever is expressed in the condition, or at any rate no qualification that is relevant to the argument. But the court, moving past the qualification on the condition which I have illustrated by my reference to *De Joux v. Haden's Contract* (1), the true question, therefore, is: how far does that qualification go?
- D If in truth it be established that the vendor goes to a competent solicitor, a professional man and an officer of the court, a solicitor, and on getting the advice, that he honestly and reasonably believes, and all is well, has he, the vendor, sufficiently cleared his conscience, so to speak, that he can then invoke, if he wishes, his powers under this condition? That point is one which, I confess, troubled me, but in the end of all I am glad to say that I find it unnecessary to decide it, and I shall therefore leave it to be decided when it has to be decided. For the moment, I will assume that if the vendor here established that he had obtained advice and the advice was such that he was reasonably entitled, without recklessness or shamming which could be called recklessness, to assume without more ado that his question of the title was all right, I will assume, as I say, that he is then entitled to invoke the power of reversion. But was he so
- E entitled? I have come to the conclusion, after careful consideration of the facts, that this vendor, notwithstanding what passed, according to his own evidence, between himself and his solicitor, cannot be acquitted of that shamming which can be called recklessness. I must, therefore, return to the facts.

I have already said—and this is a not unimportant matter—that the vendor, at the relevant time just before this contract, had fallen seriously, or at any rate appreciably, into arrears with his instalment payments with the building society, five of these being in arrears. That was a matter to which the judge alludes at the end of the evidence, in a passage in the transcript to which I shall later refer, and the vendor plainly knew that he might not find the building society very amenable. In his evidence in chief two questions—and they were the only two relevant questions—were put to the vendor and answered as follows:

- H Q.—Did you tell [the solicitors] that [the land] was subject to a mortgage? A.—Yes, and I asked my solicitor to contact the building society and see what they had to say about it. He said he thought it would be all right, but he would contact them."

I The actual date of this conversation was very shortly before the contract was presented for signature. On Aug. 22, 1955, the contract was presented to the vendor for signature. I should say here, because it appears in the next answer, that the name of the partner of the firm of solicitors concerned was Mr. Freeman. The second question and answer to which I want to refer were as follows:

Q.—Was that permission [of the building society] obtained when you knew? A.—As far as I knew, no, because I was asked to sign the contract

* Cf., Law of Property Act, 1925, s. 199 (1) (ii).

on the 29th and Mr. Freeman was not there himself. His clerk asked me to sign—a Mr. Scott—and before signing I said to him: ‘This is all right with the building society?’ He said: ‘Oh, yes, Mr. Freeman has that in hand’, so I signed the contract.”

That is all. I cannot refrain from saying again that no reference whatever was made to the second mortgagee, Mr. Solomon Abrahams. On that evidence in chief the matter rested, so far as the vendor's case was concerned. On those answers, the vendor thought that in all the circumstances he might take the risk on what the clerk had said. But he must have been perfectly well aware that he was taking a risk and a real risk because, according to the information which Mr. Scott had given him the solicitor had not done that which he, the vendor, had asked him to do, namely to contact the building society. That seems to be the inevitable inference from the answer beginning “As far as I knew, no”—that is, the permission had not been obtained. Moreover, if one is going to say that one asked advice and that one acted reasonably in accepting it, the first thing that one must show is that in asking the advice one gave one's adviser all the material information. There is no suggestion in this evidence that the vendor ever told Mr. Freeman that the real trouble might turn out to be that he, the vendor, was five instalments in arrears with the building society. It may be—I know not—that there had been some passages of arms with the building society. If, in the ordinary case, one says to one's solicitor “I am selling land which is subject, with other land, to a mortgage; do you think the mortgagee will join?”, the solicitor may reasonably say “Oh, that will be all right”. Here, however, a large sum was owing and the vendor was seriously in arrears, and that might very well affect the complaisance of the mortgagees. Counsel for the purchaser asked further questions and it is on one of the answers given that counsel for the vendor particularly relies. It will be noted that in the second answer that I read, Mr. Scott is not alleged to have said: “It is all right” or anything of that sort; what the clerk said, when the vendor asked if it was all right with the building society, was “Oh, yes, Mr. Freeman has that in hand”. In cross-examination, counsel for the purchaser asked the vendor: “Did you ask if they had actually obtained that consent?” The answer was: “I understood they had obtained it”. That, I observe, is inconsistent with the other answer; and then the answer continues “The clerk said Mr. Freeman had it in hand. He said it would be all right, and I took that for granted”. Let me repeat that I am not suggesting for a moment that the vendor has been guilty of any lack of candour or perfect good faith. He had been in the witness-box for some time, but it is to be noted that this answer is not entirely consistent with the one which he had given before. Still, if the matter had rested there, counsel for the vendor might have said: “Well, on the whole I had been told by Mr. Freeman's clerk that it would be all right”—i.e., that the building society would concur. The cross-examination proceeded and one of the other answers of some importance which came out was in answer to the judge: “Did you ask your solicitors if they had interviewed the building society?” Now observe the answer: “Yes, I asked the clerk (Mr. Scott). He did not seem to know”. Then the vendor repeated: “He said Mr. Freeman had it in hand and it was all right”. Later again, he said the same thing about Mr. Freeman having it in hand and it was at this stage, in answer to a question by the learned judge, that there emerged the facts about the arrears of the instalments. Finally, I come to some questions on the next page where counsel for the purchaser took up the tale about Mr. Abrahams. It will suffice if I read one question and answer:

“Q.—What did this clerk [Mr. Scott] say about the steps that Mr. Freeman had taken to get the consent of Mr. Abrahams. A.—He did not tell me he had taken any steps at all. He said he had it in hand.”

The impression that that evidence gives to my mind is quite plain and it is this. Mr. Scott, when he was asked on the vital day, viz., the day when the contract

- A was signed, what the situation was about the building society, clearly did not himself know at all; he told the vendor that Mr. Freeman, the solicitor, "had the matter in hand", obviously meaning that he was "dealing with it" (and therefore, plainly, had not yet reached a conclusion). The inference which I draw, and which happens to be in accordance with the facts as we know them, is that Mr. Freeman had not then contacted the building society at all. For,
- B if he had done so, he would have been bound as a competent solicitor to have told Mr. Scott that he had done so and that the building society were unwilling to join, and to have advised a postponement of the signing of the contract. Then it is said that I did not see the witnesses and it is asked whether I should draw that conclusion. I am happy to say, however, that the learned judge, who did see them, drew, so far as I can see, exactly the same conclusions. For he said
- C to the vendor, who was still in the witness-box:

"You really had no ground at all to suppose that the building society were going to do exactly what you asked. It would have been very surprising if they had, considering that your instalments were in arrear over £100."

- I entirely indorse that expression of view by the judge, which coincides exactly with the impression which I formed on the evidence. There then followed an argument, and eventually the learned judge came to the conclusion that the vendor was reasonably entitled to suppose that the building society situation had been dealt with. The vital passage in the judgment is this:
- D

- E "It is the whole point of the power to rescind that, if it happens before the matter is completed, he [the vendor] is in some way protected from giving effect to his bargain: he does what an honest man would have done and says, 'I am sorry, but I find I cannot do what I meant to do under this contract, but here is a provision which enables me to get out of it and to be relieved of my obligation under it and I propose to do that,' and that is what he did. Now the defence to this case is really simply this: 'You ought not to have believed what your solicitors told you when they assured you it would be all right and they had the matter in hand; indeed it was unfortunate that you accepted what the solicitors told you.' But I cannot imagine any man in the position of this defendant, who, as they have said, was by profession a district meat agent under the Ministry of Food, telling his solicitor, 'What do you tell me that for; is it true?'"
- F

- G If the solicitor had told the vendor and assured him *inter alia* that it would be all right and that the building society would join in the conveyance, then (on the assumption that I am making about the vendor not in that respect being bound by the recklessness of his agent, the solicitor) I would agree, with the conclusion that the judge reached in favour of the vendor. I regret to say, however, that I am unable to accept the view here expressed that the solicitor did ever so advise the vendor. I have been at some pains to refer to the relevant
- H passages in the transcript and I repeat, as the learned judge himself expressed it when the vendor was still in the witness-box:

"You really had no ground at all to suppose that the building society were going to do exactly what you asked . . ."

- I think that it is quite clear that what Mr. Scott, the clerk, told the vendor on the day when the contract was signed fell very far short of any such assurance as the learned judge assumed in the passage that I have read. I think that it is plain that this vendor, who, I repeat, obviously got the impression that Mr. Scott really knew nothing about it at all, took a serious risk, and taking that risk (since as he says the other party must abide by the terms of the contract including cl. 10) *eo primum facie* he must abide by his bargain in respect of the unincumbered fee simple.
- I

I think that this case falls within the type of case in which this apparently unqualified condition is not available to protect the vendor; and with all respect,

therefore, to the view of the learned judge, I think that in holding that the vendor had validly rescinded, he came to an erroneous conclusion. It is a narrow point and it has raised with it these other questions of difficulty which in the circumstances I do not find it necessary to answer.

For the reason which I have tried to state I think that there was here a short-coming which could properly be described as "recklessness" on the part of the vendor, though it was not accompanied by the smallest lack of good faith or anything in the nature of dishonesty. There was obviously no great hurry over this matter: the contract was dated Aug. 29, 1955, and it was not until after another year that he came to rescind. I cannot think that the vendor can be excused because he chose to take as I think he undoubtedly did, a considerable risk when he signed the contract at a time when Mr. Scott obviously knew nothing about it, and the inference from what he said was that Mr. Freeman had not then done as he, the vendor, had asked him to do, viz., contact the building society, let alone Mr. Abrahams.

I would, therefore, allow the appeal and hold that there having been no valid rescission, the plaintiff, the purchaser in this case, who does not now, and cannot, ask for specific performance, is entitled to damages on the basis of a breach of contract.

ROMER, L.J.: I agree. It is quite clear that a vendor is under a duty to his purchaser to satisfy himself before he signs a contract of sale that he will be in a position to convey what he is contracting to sell, and that duty was recognised by COLLINS, M.R., in *Re Jackson & Hobbs's Contract* (1) ([1906] 1 Ch. 412) to which LORD Evershed, M.R., has referred in his judgment. COLLINS, M.R., after referring to a decision of KNIGHT BRUCE, V.-C., in *Nelthorpe v. Holgate* (4) ((1844), 1 Coll. 203) said ([1906] 1 Ch. at p. 421):

"Now, what is the element that the Vice-Chancellor is seeking for there which determines the case? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty: but, at the same time, there must be a falling short on his part—he must have done less than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do . . ."

With LORD Evershed, M.R., I decide this case on the narrow ground that the vendor fell short of a proper discharge of that duty, the duty to which COLLINS, M.R., referred, both with regard to satisfying himself as to the building society concurring in the sale and releasing the property from their security, and similarly with regard to Mr. Abrahams, the second mortgagee, doing the same. My Lord has already referred sufficiently to the evidence which was called before the learned judge and it seems quite clear to me that so far as the building society was concerned the vendor was content to rely on the somewhat shadowy assurance he received from Mr. Freeman and from Mr. Scott, the managing clerk, that the matter was "in hand" and that "everything would be all right". Inasmuch as he was already in trouble with the building society in the matter of his instalments, I should have thought it behoved him in discharge of his obligation to the purchaser to make sure that the building society would not raise any trouble or difficulty about releasing this part of their security so that it could be conveyed to the purchaser free from their mortgage.

With regard to Mr. Abrahams, the evidence would seem to show that he really gave no thought to Mr. Abrahams' mortgage at all, despite the fact that the second mortgage would be security for a sum that was greater than the proposed purchase price of the property. It was not as though there was any real hurry about the transaction; as far as I know, the contract could have been signed the next day or the day after that without any harm or trouble coming to anybody, and I think that in discharge of his duty to the purchaser, the vendor, before signing the contract, ought to have made perfectly sure either over the

A telephone with Mr. Freeman, or in some other way, not only that the matter was in hand but also that those mortgagees would in fact concur in the sale so that the purchaser would get what he contracted to get, viz., the unincumbered fee simple of this property. But the vendor did not do so. He was content to rely on those rather vague and unsubstantial assurances from Mr. Freeman and Mr. Scott, and it seems to me that in these circumstances he really brings himself within the passage from the judgment which P. O. LAWRENCE, J., delivered in *Merrett v. Schuster* (2) ([1920] 2 Ch. 240) to which the Master of the Rolls has already made reference. There the learned judge said ([1920] 2 Ch. at p. 255):

“In my judgment the cases establish that a vendor ought not to be held disentitled to exercise a clear and unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold in a case where the statement has been made under the bona fide belief that it is true and there exists some substantial ground for such belief. Such a case, in my judgment, differs materially from a case in which the vendor either knows that the statement is untrue (as in *Jackson & Haden's Case* (1)), or has no belief in the truth of the statement (as in *Nelthorpe v. Holgate* (4)), and differs also from the case where the vendor though believing the statement to be true has no ground, or only a fanciful and unsubstantial ground for such belief.”

It is very likely that the vendor did believe that everything would be all right and that these mortgagees would concur; but it seems to me that the evidence shows that, in the language of P. O. LAWRENCE, J., he had “only a fanciful and unsubstantial ground for such belief”, and accordingly he cannot rely on the contractual right to rescind the contract conferred on him by cl. 10 of the General Conditions of Sale. That is the ground on which I myself prefer to deal with this appeal, and in particular I desire to express no conclusion on what I think is a difficult question, whether, if the vendor had asked for an assurance from his own solicitors that the mortgagees would in fact concur and the solicitor wrongly and negligently had given him that assurance, he would have been precluded from relying on cl. 10 of the conditions. The courts have put a gloss on conditions couched in such terms as that; and the answer to the question would depend on the extent of the restriction which the decisions have imposed on the exercise by vendors of their legal rights in this regard. It may be that a vendor would only be affected by his own personal default or failure of duty; on the other hand, it may be that he would be equally affected by the default of his solicitors acting as his agents, though he himself was blameless. That is a point which I think does not arise for decision on this present appeal and I prefer to express no view on it.

For the reasons which LORD EVERSHED, M.R., has stated, and which I have endeavoured to state, I agree that the appeal must be allowed.

PEARCE, L.J.: I agree with what my Lords have said. The vendor was well aware of the mortgages, although, in his own words, he had asked his solicitors to see what the building society had to say about it and the solicitor “thought it would be all right”. The vendor knew that his ability to sell depended on his being able to come to some arrangement both with Mr. Abraham and with the building society with whom he was substantially in arrears, and with whom he probably expected to have some difficulty. This was not a matter of legal complexity; it was a matter of making some practical working arrangement with the mortgagees. To sign the contract without being sure that some arrangement had been made was extremely rash. Although the vendor raised the question with his solicitors’ clerk before signing, he got no satisfactory answer from the clerk who “did not seem to know”. He was not told that any steps had been taken but merely that “the matter was in hand”. A reasonably prudent man would, I think, have said: “I cannot tell until you have found

out for certain that an arrangement has been made and that I can convey the property ”.

In my opinion there has been something of the nature of recklessness on the part of the vendor; he has certainly “done less”, to quote the words of COLLINS, M.R., to which my Lord has already referred, “than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do”.

For that reason, he is not, on the authorities, entitled to rescind under cl. 10. Indeed, where the defect in title is, in view of all the circumstances, so radical and extensive, I would myself feel some doubt whether cl. 10 applied at all. If the vendor is for this purpose responsible for the failure of the solicitors in respect of the matter which he entrusted to them, his failure is clear beyond argument; but I agree with my Lords that it is not necessary to decide that point now. Whilst I appreciate the matters which weighed with the learned judge, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook*, agents for *Dowling & Hewitt*, Bishop Auckland (for the plaintiff); *Butt & Bowyer*, agents for *Latimer, Hinks, Marsham & Little*, Darlington (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade and Winn, J.J.), June 29, 1959.]

Criminal Law—Practice—Prison Commissioners' report before sentence of borstal training, corrective training or preventive detention—Copy to be given to offender—Proof—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 20 (8), s. 21 (5).

LORD PARKER, C.J.: The court is finding over and over again that it is impossible to tell from the transcript in any particular case whether the Prison Commissioners' report* has ever been handed to the offender or his counsel or solicitor, as required by s. 21 (5) and s. 20 (8) of the Criminal Justice Act, 1948†. Even when subsequent inquiries are made, it is difficult to find out what happened. The court thinks that the handing of a copy should be a routine matter, and that it should be accompanied by some oral observation, such as: “I now hand you the report”, which will appear on the transcript. The proper time for doing this will be after the notices of previous convictions have been proved, and this, indeed, was stated to be the proper course by LORD GODDARD, C.J., in *R. v. Dickson* ([1949] 2 All E.R. 810 at p. 812)‡.

[Reported by KEVIN WINSTAIN, Esq., Barrister-at-Law.]

* For an instance of the attention paid by the Court of Criminal Appeal to the Prison Commissioners' report in relation to sentence where the prisoner has committed an offence after absconding from borstal or when released on licence, see *R. v. Xosell*, [1958] 2 All E.R. 567.

† See 28 HALSBURY'S STATUTES (2nd Edn.) 372, 370.

‡ *R. v. Dickson*, [1949] 2 All E.R. 810; [1950] 1 K.B. 394; 113 J.P. 534, 34 Cr. App. Rep. 9, 2nd Digest Supp.

A

BERNSTEIN v. BERNSTEIN.

[CHANCERY DIVISION (Roxburgh, J.), June 12, 25, 1959.]

Contempt of Court—Committal—Ex parte application—Jurisdiction of High Court—Order made by County Palatine Court on ex parte application—Jurisdiction of High Court to make that order an order of the High Court—Ward of court taken out of jurisdiction—Court of Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43), s. 15—R.S.C., Ord. 52, r. 3.

B

C

On May 8, 1959, on the applicant's motion made ex parte, the Chancery Court of the County Palatine of Lancaster made an order committing the respondent to prison for his contempt in removing an infant who was a ward of that court out of the United Kingdom and the jurisdiction of the court. It appeared that the respondent had taken the infant to Israel. The applicant now moved ex parte in the Chancery Division for that order to be made an order of that Division, under the Court of Chancery of Lancaster Act, 1850, s. 15. There was no evidence that the respondent intended to come within the jurisdiction of the court.

D

Held: the order would not be extended because the court's discretion under s. 15 so to extend the order ought not to be exercised unless, at the time of its exercise, the court had itself jurisdiction to make an order for committal; and the court had no such jurisdiction to make an order ex parte in the present case because it was not satisfied that the delay caused by proceedings in the ordinary way by notice to the respondent would or might entail irreparable or serious mischief within R.S.C., Ord. 52, r. 3.

E

[As to service of notice of motion for committal, see 8 HALSBURY'S LAWS (3rd Edn.) 39, para. 66; and for cases on the subject, see 16 DIGEST 66, 67, 766-776.

For the Court of Chancery of Lancaster Act, 1850, s. 15, see 5 HALSBURY'S STATUTES (2nd Edn.) 228.]

F

Cases referred to:

- (1) *Duke v. Clarke*, [1894] W.N. 100.
- (2) *Dunmore v. Wharam*, (1898), 67 L.J.Ch. 221; 78 L.T. 38; 16 Digest 195, 1005.
- (3) *Re Eans, Eans v. Noton*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; 16 Digest 9, 21.
- (4) *Favard v. Favard*, (1896), 75 L.T. 664; 16 Digest 54, 597.
- (5) *O'Donovan v. O'Donovan*, [1955] 3 All E.R. 278 n.; 3rd Digest Supp.
- (6) *Phillips v. Phillips*, (May 23, 1955), unreported.

G

Motion.

The applicant moved ex parte that the order dated May 8, 1959, made in the Chancery Court of the County Palatine of Lancaster, committing the respondent to prison for contempt of court, might be made an order of the Chancery Division of the High Court.

H

L. A. Cohen for the applicant.

Cur. adv. vult.

June 25. ROXBURGH, J., read the following judgment: The Court of Chancery of Lancaster Act, 1850, s. 15, provides:

I

"... Whenever a plaintiff or defendant in any suit or proceeding in which a decree or order shall have been made by the said County Palatine Court shall reside or withdraw his person or goods out of the jurisdiction of the said court, and also whenever any decree or order of the same court cannot be fully enforced by reason of the nonresidence of any party to be bound thereby within the jurisdiction of the said court, then and in every such case it shall be lawful for Her Majesty's High Court of Chancery, upon the application of any person entitled to the benefit of such decree or order, and upon the

production of a transcript of such decree or order, or such part thereof respectively as cannot be enforced for the reasons aforesaid, under the signature of the registrar of the said County Palatine Court, and an affidavit that by reason of such nonresidence or removal as aforesaid such decree or order, or such part thereof as aforesaid, cannot be enforced, to make such decree or order, or so much thereof respectively as cannot be enforced for any of the reasons aforesaid, a decree or order of the said High Court of Chancery, and thereupon such decree or order, or such part thereof respectively as aforesaid, shall and may be enforced against such of the parties bound by the same as shall be within the jurisdiction of the said High Court of Chancery, and all proceedings shall and may be had thereupon, as if such decree or order had been originally made by the said High Court of Chancery, and all the reasonable costs and charges of and consequent upon such application shall and may be recovered in like manner as if the same were part of such decree or order."

The phrase "it shall be lawful" indicates that I have a discretion in the matter. It was long ago laid down that such an application should be made *ex parte*, and this motion is so made, though whether that is consistent with the present Rules of the Supreme Court, I do not pause to inquire.

There are a few cases in the reports in which such orders have been made. For example, in *Duke v. Clarke* (1) ([1894] W.N. 100), where the practice was laid down, an order was extended to enable a party to levy execution for costs. One of the orders so extended was an order giving leave to issue a writ of attachment, but it does not appear to have been made *ex parte* in the Palatine Court; *Dunmore v. Wharam* (2) (1898), 67 L.J.Ch. 221. There is no reported case in which a committal order has hitherto been extended. The Vice-Chancellor's order is such an order, and it was made *ex parte*:

"Upon motion *ex parte* this day made unto this court by . . . counsel for the applicant . . . this court doth order that the said respondent . . . do stand committed to Strangeways Gaol in the City of Manchester for his contempt in removing . . . the . . . infant who is a ward of this court out of the United Kingdom and the jurisdiction of this court without leave and in preventing her from being in the custody of the applicant . . ."

The affidavit in support of the motion before the Vice-Chancellor had proved that the respondent had written a letter on Apr. 30, 1959, stating that he was leaving with the ward of court for Israel, and there was evidence that father and daughter had left for Israel on that day. The affidavit sworn in support of this application does not give any reason for supposing that the father intends to come within the jurisdiction of this court. It merely states:

"I verily believe that the said order operates only within the jurisdiction of the Court of Chancery of the County Palatine of Lancaster and that unless the said order is enlarged by this honourable court the respondent may return with impunity to any part of the United Kingdom which is not within the jurisdiction of the Court of Chancery of the County Palatine of Lancaster. For the foregoing reasons I verily believe that it is desirable and necessary that the aforesaid order of the Court of Chancery of the County Palatine of Lancaster be made an order of this honourable court."

As I have a discretion to exercise on this *ex parte* application, I have come to the conclusion that I ought not to extend an *ex parte* committal order unless I should have jurisdiction myself to make such an order in the circumstances prevailing, not on May 8, 1959, but today; and, in my judgment, I should not have jurisdiction to do so.

Under the old Chancery practice, leave to issue a writ of attachment could be obtained *ex parte*, but an order for committal never could. A writ of attachment was and is appropriate to enforce an order to do something. An order for com-

A initial was and is appropriate to punish disobedience consisting of doing something which ought not to be done: see *Re Eccius, Eccius v. Nolen* (3) ([1893] 1 Ch. 252), and the certificate of Mr. Registrar LAYNE there set out (*ibid.*, at p. 259 n.). Thus distinction was abolished by the Supreme Court of Judicature Act, 1875, s. 16 and Sch. 1, and R.S.C., Ord. 44, r. 2, provides:

B “No writ of attachment shall be issued without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment is to be issued.”

The procedure now in force in the Chancery Division of this court is embodied in R.S.C., Ord. 52, r. 3, as follows:

C “Except where according to the practice existing immediately before Nov. 1, 1875, any order or rule might be made absolute *ex parte* in the first instance, and except where notwithstanding r. 2 a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just: and any party affected by such order may move to set it aside.”

D Counsel for the applicant relied on *Favard v. Favard* (4) ([1896] 75 L.T. 664), and *O'Donovan v. O'Donovan* (5) ([1955] 3 All E.R. 278 n.). *Favard v. Favard* (4) was a motion for a writ of attachment. R.S.C., Ord. 68, r. 1, provides that E (with an immaterial exception):

“nothing in these rules . . . shall affect the procedure or practice in . . . (d) proceedings for divorce or other matrimonial causes.”

F Endowed accordingly with a freedom with which I am not endowed, JERNE, P. proceeded to apply to a writ of attachment the old Chancery practice which allowed an *ex parte* application, saying (75 L.T. at p. 665): “. . . I do not see how this court can have more power than the Court of Chancery possessed”. The ratio decidendi of that case might have led to an expectation that where an *ex parte* committal order was asked for in the Probate, Divorce and Admiralty Division, it would be refused, because that was not allowed even by the old Chancery practice. This did not happen in *O'Donovan v. O'Donovan* (5) or apparently in *Phillips v. Phillips* (6) ([1955] unreported). But I do not enjoy the freedom which these judges all had. I am bound by the rules, and I have no jurisdiction to order committal or attachment *ex parte* unless satisfied that “the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief”. I am not satisfied of this. The difficulty will be to find the respondent within the jurisdiction of this court, if he ever comes within it, and this will be so whether I accede to or refuse the present application. If H the applicant takes the appropriate steps promptly when he is found, he will not have come here with impunity.

I Therefore, I should have no jurisdiction to make an *ex parte* committal order myself in the circumstances in evidence today, and, as that is so, I am not prepared to extend to cover this jurisdiction an *ex parte* order made in another jurisdiction. I would adopt a few words from the judgment of LINDLEY, L.J., in *Re Eccius* (3) ([1893] 1 Ch. at p. 265): “. . . it seems a strong thing to put a man in prison without his having notice of the application”. The motion is accordingly dismissed.

Motion dismissed.

Solicitors: Hatchett, Jones & Co., agents for Theo. M. Cohen, Manchester (for the applicant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. HARMAN.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Donovan and Salmon, J.J.), May 11, 1959.]

Criminal Law Appeal—Sentence—Recognisance estreated and, if default in payment, further six months' imprisonment—Appeal against further six months' imprisonment—Order made "on" conviction—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 3 (c), s. 21.

The appellant failed to surrender to his bail for trial on indictment for office-breaking and larceny, and was subsequently arrested. At his trial he pleaded guilty to the offences with which he was charged and was sentenced to three years' imprisonment. The chairman of the court further ordered the appellant's recognisance of £100 to be estreated, and, in default of payment thereof, imposed on him a term of six months' imprisonment to be consecutive to the sentence of three years' imprisonment already passed on him. The appellant appealed against the sentence of six months' imprisonment.

Held: the Court of Criminal Appeal had no jurisdiction under s. 3 (c)* of the Criminal Appeal Act, 1907, to hear the appeal, because an "order of the court made on conviction", within the definition of "sentence" in s. 21† of the Act of 1907, meant an order made as a consequence of conviction, and the sentence of six months' imprisonment in default of payment of the estreated recognisance had nothing to do with the conviction.

R. v. London Sessions, Ex p. Beaumont ([1951] 1 All E.R. 232) approved.
Appeal dismissed.

[As to the jurisdiction of the Court of Criminal Appeal, see 10 HALSBURY'S LAWS (3rd Edn.) 521, para. 957.

For the Criminal Appeal Act, 1907, s. 3, s. 21, see 5 HALSBURY'S STATUTES (2nd Edn.) 928, 939.]

Case referred to:

(1) *R. v. London Sessions, Ex p. Beaumont*, [1951] 1 All E.R. 232; [1951] 1 K.B. 557; 115 J.P. 104; 2nd Digest Supp.

Appeal.

The appellant, James Alfred George Harman, had been granted bail in his own recognisance of £100 while awaiting trial at the County of London Sessions on two charges of office-breaking and larceny committed on July 18, 1958. He did not surrender to his bail and was arrested on Jan. 15, 1959. At his trial on Feb. 10, 1959, he pleaded guilty to the charges and was sentenced to three years' imprisonment, and his recognisance of £100 was ordered to be estreated. Later that day the chairman told the appellant that the alternative, if he failed to pay the £100, would be a further six months' imprisonment consecutive on the sentence of three years' imprisonment already passed on him. The appellant appealed against that further sentence of six months' imprisonment.

P. A. Bruce for the appellant.

H. F. Cassel for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court. The appellant, together with two other men, pleaded guilty at London Sessions to office-breaking and larceny, and he was sentenced to three years' imprisonment. Apparently, he was on bail at the time of his trial and he failed to surrender, and, in sentencing him to three years' imprisonment, the learned chairman said this:

* The terms of s. 3 (c) are printed at p. 739, letter C, post.

† The definition of "sentence" in s. 21 is printed at p. 739 letter D, post.

A "For this offence I think the appropriate sentence is that you go to prison for three years. Your recognisance will be estreated; and you will have to report within the provisions of the Criminal Justice Act*."

Later on that day, the chairman, addressing the appellant, said:

B "Harman, I estreated your recognisance of £100 this morning, but I omitted to tell you what the alternative is if you do not pay. The alternative is a further six months, to be consecutive on the three years to which I sentenced you†."

C The appellant now appeals to this court, not against his sentence of three years' imprisonment, but against what he says is a sentence of six months' imprisonment consecutive on the three years if he does not pay the £100. As is well known, the jurisdiction of this court is limited by the Criminal Appeal Act, 1907, and, in regard to sentences, the jurisdiction is given by s. 3 in these terms:

"A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

D By s. 21 of the Act of 1907, the definition section:

"The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted . . ."

E On that, counsel for the appellant says that, whatever may have happened in any other case, in this case the order of six months' imprisonment was an order of the court made on conviction, that is at or about the time of conviction and with reference to the person convicted. That, no doubt, is true, but it seems perfectly clear to this court, quite apart from authority, that, where s. 21 of the Act of 1907 says "any order of the court made on conviction", it must mean "made as a consequence of conviction". Indeed, the matter has already come before the Divisional Court, in *R. v. London Sessions, Ex p. Beaumont* (1) ([1951] F 1 All E.R. 232), in regard to corresponding words in s. 36 (2) of the Criminal Justice Act, 1948. By s. 36 (1): "A person convicted by a court of summary jurisdiction shall have a right of appeal . . ." Section 36 (2) reads:

"For the purpose of the last foregoing subsection, the expression 'sentence' includes any order made on conviction by a court of summary jurisdiction . . ."

G In *R. v. London Sessions, Ex p. Beaumont* (1) the Divisional Court held that the words "any order made on conviction" meant any order made as a consequence of a conviction and not an order made at the time of conviction.

H The court feels that the present case is a very plain case and that the sentence of six months' imprisonment had nothing to do with the conviction. It may have been given at the time of, and while, sentencing the appellant on conviction, but it had nothing to do with the conviction, any more than if he had been acquitted and the recognisance had been estreated and a period of imprisonment ordered in default of payment. Accordingly, there is no jurisdiction in this court to entertain the appeal and it is dismissed.

Appeal dismissed.

I Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by KEVIN WINSTAIN, ESQ., Barrister-at-Law.]

* See s. 22 of the Criminal Justice Act, 1948; 28 HALSBURY'S STATUTES (2nd Edn.) 373.

† See s. 14 of the Criminal Justice Act, 1948; 28 HALSBURY'S STATUTES (2nd Edn.) 364.

MAXINE FOOTWEAR CO., LTD. AND ANOTHER v. CANADIAN GOVERNMENT MERCHANT MARINE, LTD.

[PRIVY COUNCIL (Viscount Kilmauir, L.C., Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning), May 26, 27, 28, June 22, 1959.]

Privy Council—Canada—Shipping—Carriage by sea—Contract incorporating Hague Rules—Goods lost as result of fire after loading completed, but scuttling of ship—Whether carrier entitled to immunity—Water Carriage of Goods Act, 1936 (R.S.C. 1952 c. 29), schedule, art. III, r. 1, art. IV, r. 1, r. 2 (a), (b).

The appellants were shippers and a consignee of goods of which the respondents were carriers under a contract of carriage that was made subject, by clause paramount, to the Canadian Water Carriage of Goods Act, 1936, which incorporated the Hague Rules. After the appellants' goods had been loaded on the ship, ice from three scupper pipes was thawed by an employee of an independent contractor on the authority of the master of the ship. The officer of the ship who gave instructions for and supervised the thawing was negligent and, as a consequence of this, the thawing process resulted in a fire starting in cork insulation of the pipes. The fire spread, the ship had to be scuttled and the goods were lost. In an action by the appellants to recover damages for non-delivery of the goods the respondents contended that they had exercised due diligence to make the ship seaworthy "before and at the beginning of the voyage" within art. III, r. 1* of the schedule to the Act of 1936 (since the ship was seaworthy at the time of loading and the moment of the beginning of the voyage was never reached) and were entitled to immunity under art. IV, r. 1* and r. 2 (a), (b)*.

Held: the appellants were entitled to recover damages for non-delivery of the goods for the following reasons—

(i) the obligation under art. III, r. 1, to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage" continued over the whole period from the beginning of the loading until the ship sank; the negligence of the ship's officer, having occurred during that period, constituted a failure by the respondents to fulfil their obligation to exercise due diligence, and

(ii) art. III, r. 1 was an overriding obligation and, as the respondents had failed to fulfil it and that failure had caused the loss, they were not entitled to immunity under art. IV.

Appeal allowed.

[**Editorial Note.** The Canadian Water Carriage of Goods Act, 1936, which incorporates the Hague Rules, is in similar terms to the Carriage of Goods by Sea Act, 1924, schedule.

As to the obligation of a carrier under the Carriage of Goods by Sea Act, 1924, schedule, art. III, r. 1, to exercise due diligence to make the ship seaworthy, see 30 HALSBURY'S LAWS (2nd Edn.) 611, para. 771.

For the Carriage of Goods by Sea Act, 1924, schedule, art. III, art. IV, see 23 HALSBURY'S STATUTES (2nd Edn.) 887, 889.]

Cases referred to:

(1) *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.*, (1937), 58 Lloyd's Rep. 33; Digest Supp.

(2) *Dobell & Co. v. S.S. Rossmore Co.*, [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 41 Digest 429, 2697.

(3) *Stag Line, Ltd. v. Foscolo Mango & Co., Ltd.*, [1931] All E.R. Rep. 666; [1932] A.C. 328; 101 L.J.K.B. 165; 146 L.T. 305; Digest Supp.

* The full and correct text of art. III and art. IV are set out at pp. 741, 742, post.

A Appeal.

Appeal by shippers, Maxine Footwear Co., Ltd., and a consignee of cargo, J. Eric Morris, from a judgment of the Supreme Court of Canada (KERWIN, C.J., TASCHEREAU, CARTWRIGHT, FAUTEUX and ABBOTT, J.J.), dated Oct. 1, 1957, dismissing an appeal by the appellants from a judgment of the Exchequer Court of Canada (CAMERON, J.), dated Feb. 14, 1956, which affirmed a judgment of the Admiralty Court for the District of Quebec (ARTHUR I. SMITH, J.), dated June 3, 1952. On May 11, 1943, the appellants had commenced an action against the respondents, Canadian Government Merchant Marine, Ltd., for damages for the loss by fire of the appellants' goods shipped in the respondents' motor vessel *Maurienne* in February, 1942. The facts are set out in the judgment of the Board.

C *C. Russell Mackenzie, Q.C.* (of the Canadian Bar), and *S. O. Olson* for the appellants.

L. Lalonde, Q.C. (of the Canadian Bar), and *J. F. Donaldson* for the respondents.

D **LORD SOMERVELL OF HARROW:** This is an appeal from a judgment of the Supreme Court of Canada (KERWIN, C.J., TASCHEREAU, FAUTEUX and ABBOTT, J.J., CARTWRIGHT, J., dissenting) dated Oct. 1, 1957, dismissing an appeal from a judgment of the Exchequer Court of Canada (CAMERON, J.) which, in turn, had dismissed an appeal from a judgment of the Admiralty Court for the District of Quebec (ARTHUR I. SMITH, J.) whereby the appellants' action as shippers against the respondents as carriers for non-delivery of their goods was dismissed. The first named appellants were shippers and the second named appellant was a consignee of cargo loaded on board the m.v. *Maurienne* (hereinafter called "the ship") at Halifax, N.S., in February, 1942, to be carried to Kingston, Jamaica. The cargo and ship were destroyed by fire before she left Halifax. The second named appellant has assigned his rights to the first named appellants. The registered owner of the ship was His Late Majesty King George VI represented by the Honourable the Minister of Transport of the Dominion of Canada. The respondents originally submitted that the contract of carriage on which the appellants rely was with the Crown and not with the respondents. This point failed in all courts below and was not taken before their Lordships. The contract of carriage was subject to the Canadian Water Carriage of Goods Act, 1936. The following provisions of that Act are material.

"Article III. Responsibilities and Liabilities.

G "1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to, (a) make the ship seaworthy; (b) properly man, equip, and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

"2. Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

H "Article IV. Rights and Immunities.

I "1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of para. 1 of art. III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from, (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management

of the ship; (b) fire, unless caused by the actual fault or privity of the carrier; (c) perils, danger, and accidents of the sea or other navigable waters; (d) act of God; (e) act of war; (f) act of public enemies; (g) arrest or restraint of princes, rulers or people, or seizure under legal process; (h) quarantine restrictions; (i) act or omission of the shipper or owner of the goods, his agent or representative; (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; (k) riots and civil commotions; (l) saving or attempting to save life or property at sea; (m) warpage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) insufficiency of packing; (o) insufficiency or inadequacy of marks; (p) latent defects not discoverable by due diligence; (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

"3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants."

The cargo consisted of three wooden crates and one drum of shoe leather and shoe findings. It was delivered to Canadian National Railways in Montreal on or about Jan. 26, 1942. Canadian National Railways issued a through bill of lading which contained a clause paramount stating that the bill of lading had effect subject to the provisions of the Water Carriage of Goods Act, 1936. The bill of lading being subject to the Act, such a clause had to be inserted under s. 4 of the Act. The ship arrived at Halifax on Saturday, Jan. 31. It has been common ground that the appellants' cargo was loaded in No. 3 hold. The loading of this hold probably began on Tuesday, Feb. 3, and finished on Friday, Feb. 6. In the view which their Lordships take, the precise times do not matter. The loading of all cargo was completed at about 8.15 on Friday evening. The intention was to sail on Saturday. On the morning of Friday it was found that three scupper pipes passing through No. 3 hold and discharging from the bath, toilet and galley sink were blocked by ice at the point at which they met the ship's side. The master instructed one of the officers to have these pipes thawed out. This work was done between 3 and 4 p.m. on Friday afternoon by an employee of a Halifax firm, Purdy Bros., who used an acetylene torch. There was cork insulation round the pipes. The heat of the acetylene torch acting on the cork started a fire. This was detected at about 11.30 p.m. In spite of efforts to extinguish the fire, it spread and at about 5.30 a.m. on Saturday, Feb. 7, the master was forced to order the scuttling of the ship which resulted in the loss, *inter alia*, of the appellants' cargo. It was found by the learned trial judge and admitted before their Lordships that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire, and the man operating the torch should have been warned or some other method used.

On the pleadings, the appellants claimed for their goods; the respondents relied on the immunities under art. IV, r. 1 and r. 2 (a) and (b). They further submitted that they had performed their obligations under art. III, r. 1. The appellants submitted that the respondents had not exercised due diligence to make the ship seaworthy within art. III, r. 1; that the unseaworthiness so resulting caused the damage; and that, in these circumstances, the respondents could not rely on the immunities under art. IV. The learned judge in Admiralty found that the fire was due to the heat generated by the acetylene torch, and this in turn was the ship unseaworthy. This was rejected by the appellants that the presence of no torch is not unseaworthy. The learned judge and this finding was not a controlling warranty. He held that, on the evidence, the appellants'

A cargo had been loaded before the attempt to thaw the ice had begun and that the ship was seaworthy at the "loading stage". He further held that the question of seaworthiness for the voyage never arose as the ship never sailed. In these circumstances, the respondents were entitled to rely on art. IV.

B One of the questions for decision in this appeal is whether the qualified obligation under art. III, r. 1, applies only at stages or is a continuing obligation from at any rate the beginning of the loading down to the beginning of the voyage. The Exchequer Court on appeal held that the fourth officer and possibly the captain and chief engineer were negligent in relation to the use of the acetylene torch. CAMERON, J., held that the presence of ice did not make the ship unseaworthy. He went on to consider ([1956] Ex. C. R. at p. 240) whether

C "in the negligent use and application of the acetylene torch, the respondent failed before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy, and the holds and all other parts of the vessel in which goods were carried, fit and safe for their reception, carriage and preservation, as required by r. 1 of art. III."

D If the respondents had not so failed they would be entitled to immunity under art. IV. The learned judge held that the obligations under art. III had been fully carried out before the thawing out operations started. He further held that, on this basis, the fire arose from negligence in the management of the ship. The respondents were, therefore, entitled to the benefit of r. 2 (a) of art. IV. The court considered various authorities on what constituted management. It was further held that the respondents could rely on r. 2 (b) in that the negligence of the respondents' servants did not constitute actual fault or privity of the carrier.

E In the Supreme Court, the majority held that, on the evidence, the appellants' goods were not stowed until after the commencement of the fire. On the assumption that a plaintiff can only rely on unseaworthiness at the commencement of the loading and that, for this purpose, the commencement of the loading means the commencement of the loading of each shipper's parcel and not the commencement of loading any cargo, the appellants had, therefore, established a breach of art. III subject to due diligence. The Supreme Court held that the respondents had established due diligence. This was on the basis that due diligence need only be exercised by the owners personally or those who act for the owners in a managerial capacity, that is a class similarly restricted to that to which fault or privity has to be brought home under the fire clause. There was no evidence that members of that restricted class knew that the pipes were frozen or that an acetylene torch was to be used. CARTWRIGHT, J., dissenting, agreed with the finding that the appellants' goods were not stowed until after the commencement of the fire. He held that an owner only escapes liability for damage caused by unseaworthiness if due diligence has been exercised not only by himself but by his experts, servants or agents. He further held that this failure to exercise due diligence caused the fire which amounted to unseaworthiness and caused the loss.

H He would have entered judgment for the appellants.

The question as to the scope of due diligence was dealt with by this Board in *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.* (1) ([1937], 58 Lloyd's Rep. 33 at p. 40):

I "The condition [that is of the exercise of due diligence to make a vessel seaworthy] is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co. v. S.S. Rosemore Co.* (2) ([1895] 2 Q.B. 408)."

The failure to exercise due diligence by the fourth officer was, therefore, if the matter becomes relevant, a failure to exercise due diligence by the carrier within art. III, r. 1. On this point their Lordships agree with CARTWRIGHT, J.

Before proceeding to consider the arguments, it is convenient to state certain conclusions which appear plain to their Lordships. From the time when the ship caught on fire she was unseaworthy. This unseaworthiness caused the damage

to and loss of the appellants' goods. The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.

Logically the first submission on behalf of the respondents was that, in cases of fire, art. III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under art. IV, r. 2 (b). If this were right, there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed. In their Lordships' opinion, the point fails. Article III, r. 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of art. IV cannot be relied on. This is the natural construction apart from the opening words of art. III, r. 2. The fact that that rule is made subject to the provisions of art. IV and that r. 1 is not so conditioned makes the point clear beyond argument.

The further submissions by the respondents were based, as they had to be, on the construction of art. III, r. 1. It was submitted that, under that article, the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage. It is difficult to believe that this construction of the word "before" could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law. It is worth, therefore, bearing in mind words used by LORD MACMILLAN in *Stuy Lion, Ltd. v. Foscolo Mango & Co., Ltd.* (3) ([1931] All E.R. Rep. 666 at p. 677), with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague Rules as does the present Act.

"It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance."

In their Lordships' opinion, "before and at the beginning of the voyage" means the period from at least the beginning of the loading until the vessel starts on her voyage. The word "before" cannot, in their opinion, be read as meaning "at the commencement of the loading". If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words "at least". On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage to, and loss of, the appellants' goods. The appellants are, therefore, entitled to succeed.

It became, therefore, unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were not stowed until after the commencement of the fire. It is also unnecessary to consider the earlier cases as to "stages" under the common law. The doctrine of stages had its anomalies, and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain parts of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be allowed and judgment entered for the appellants for \$2,801.33. The respondents must pay the appellants' costs of this appeal and in the courts in Canada.

Appeal allowed.

Solicitors: *Waltons & Co.* (for the appellants); *Richards, Butler & Co.* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

CAVANAGH v. ULSTER WEAVING CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Jenkins), May 11, 12, 13, June 18, 1959.]

B

Safe System of Working—Extent of master's duty—Defence—Good practice of trade followed—Whether conclusive that there was no evidence of negligence to go to jury.

Appeal—Judge and jury—Negligence—Defence that good practice of trade followed—Whether case should have been withdrawn from jury.

C

The appellant, a labourer employed by the respondents, was carrying a bucket of cement weighing some three stones down a roof ladder laid flat against the slated aspect of a slanting roof. He put the bucket down on a plank before starting to descend the ladder facing forwards. Having placed his feet in a position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and in so doing he slipped and fell some six feet against a sloping glass roof opposite him and injured himself. There was no handrail with which he could support himself with one hand as he descended the ladder with the bucket in the other hand, nor was there any protection to save him from the glass in the opposite roof if he should slip. He was wearing rubber boots which had been provided by the respondents in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder. In an action by the appellant against the respondents for damages for personal injuries, there was evidence that the rubber boots were two sizes larger than they should have been for a man with feet the size of the appellant's. An expert witness for the respondents was asked in relation to the system adopted for the carrying of cement on the roof, how far "this set up" was in accord with good practice, and he testified that it was perfectly in accord with good practice. His evidence was uncontradicted. A submission on behalf of the respondents that there was no evidence of negligence to go to the jury was disallowed. The jury found that the respondents had been negligent. On appeal from an order of the Court of Appeal in Northern Ireland setting aside the judgment and directing judgment to be entered for the respondents,

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Held: the jury's verdict on negligence should not have been disturbed, as the expert evidence for the defence, establishing practice in the trade, was not in the circumstances of this case conclusive of the issue of negligence in favour of the respondents.

Dictum of LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1909 S.C. at p. 809) explained; dictum of LORD COHEN in *Morris v. West Hartlepool Steam Navigation Co., Ltd.* ([1956] 1 All E.R. at p. 402) approved.

H

Per LORD SOMERVELL OF HARROW (LORD TUCKER concurring): courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily in actions for damages for negligence if the formula of "reasonable care in all the circumstances" is applied whatever the circumstances (see p. 751 letter I, and p. 750, letter C, post).

Appeal allowed.

I

[As to master's duty to provide and maintain a reasonably safe system of working, see 25 HALSBURY'S LAWS (3rd Edn.) 512, para. 979; and for cases on the subject, see 34 DIGEST 194-196, 1580-1601.]

Cases referred to:

(1) *Morton v. William Dixon, Ltd.*, 1909 S.C. 807.

(2) *Morris v. West Hartlepool Steam Navigation Co., Ltd.*, [1956] 1 All E.R. 385; [1956] A.C. 552; 3rd Digest Supp.

(3) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

- (4) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; A 55 J.P. 660; 34 Digest 202, 1657.
- (5) *Gallagher v. Balfour, Beatty & Co., Ltd.*, 1951 S.C. 712; 3rd Digest Supp.
- (6) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.

Appeal.

Appeal by Michael Cavanagh from an order of the Court of Appeal in Northern Ireland (LORD MACDERMOTT, C.J., CURRAN, L.J., and SHELL, J.), dated June 16, 1958, allowing an appeal by the respondents, Ulster Weaving Co., Ltd., from a verdict and judgment of BLACK, L.J., sitting with a jury, dated Jan. 21, 1958, in an action by the appellant against the respondents for damages for personal injuries sustained by him in an accident on Oct. 27, 1953, in the course of his employment as a labourer with the respondents. The facts are set out in the opinion of LORD TUCKER at p. 747, post.

James McSparran, Q.C., Charles Stewart, Q.C., and J. P. Higgins (all of the Northern Ireland Bar) for the appellant.

F. A. L. Harrison, Q.C., Robert Lowry, Q.C., and C. B. Shaw (all of the Northern Ireland Bar) for the respondents.

Their Lordships took time for consideration.

June 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have been privileged to read the opinion which my noble and learned friend, LORD TUCKER, is about to deliver and I concur in it. The evidence given by the expert called for the defence in regard to what was called "the set up", which was not seriously or perhaps at all challenged, was of very great weight, but I cannot say that it was so conclusive as to require the learned trial judge to withdraw the case from the jury. There were other matters also which they were entitled to take into consideration, and it was for them to determine whether, in all the circumstances, the respondents had taken reasonable care. I do not think that the learned judges of the Court of Appeal were justified in concluding that reasonable men might not find the verdict which this jury found. If I may respectfully say so, I think that the error of the majority of the court lay in treating as conclusive evidence which is not conclusive however great its weight, particularly where it has to be weighed against other evidence. But that does not mean that the familiar words of LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1) (1909 S.C. 807 at p. 809*) which have been so often quoted both in Scottish and English cases are not to be regarded as of great authority in determining what is, in all the circumstances, reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice, system or set up, call it what you will, which has been widely used without complaint, could not rely on it as at least a *prima facie* defence to an action for negligence, and I would say with the greatest respect to those who think otherwise that it would put too great a burden on him to require him to prove that the circumstances of his own case were "precisely" similar to those of the general practice that I have assumed. But these are not questions that arise on the present appeal, and I am content to move that the appeal be allowed with costs here and below.

LORD TUCKER: My Lords, the evidence before the jury viewed, as it must be, in the light most favourable to the appellant, has been described in detail in the judgment of the lord chief justice (LORD MACDERMOTT) in the Court of

* "Where the negligence of the employer consists of what I may call a fault of omission. I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

A Appeal in Northern Ireland, and I do not propose to do more than point out what, in my view, the jury may have considered its salient features.

The appellant was carrying a bucket of cement weighing some three stones down a roof ladder laid flat against the slated aspect of a slanting roof. He had come along a gangway of planks laid across the transverse sides of the roof and had put the bucket down on the plank before starting to descend the ladder facing forwards; having placed his feet in position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and in so doing he slipped and fell a distance of some six feet against the sloping glass roof opposite him. He was wearing rubber boots which had been provided for him by the respondents in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder. A pair of boots was put in evidence by the respondents during the appellant's evidence without objection and, though never strictly proved by the respondents as being the actual boots worn by the appellant at the time of the accident, were accepted by him as similar to those which he was wearing. There was evidence that these boots were, in fact, two sizes larger than they should have been for a man with feet the size of the appellant's. The ladder down which he had to descend was at an angle of approximately thirty-seven degrees and its rungs were about 1½ inches from the slates of the roof. There was no handrail with which the appellant could support himself with one hand as he descended with the bucket in the other hand, nor was there any protection to save him from the glass in the opposite roof if he should slip, which was a contingency made more probable in the case of a man wearing rubber boots two sizes too big with wet soles. The jury had before them a model of the ladder and were given a demonstration of how the boots would fit on to the rungs.

My Lords, in this summary of the facts I have purposely omitted one piece of evidence, viz., that given by an expert called for the defence with regard to practice. It was this evidence which the majority of the Court of Appeal in Northern Ireland considered decisive in favour of the respondents' case. I will return to it later. For the moment I will deal with the submission of counsel for the respondents that, apart from any evidence as to practice, the trial judge should have ruled that there was no evidence of negligence fit to be left to the jury. This submission was based partly on the ground that the appellant had never specifically alleged in his pleading that a handrail or handhold should have been provided nor had he set out precisely what positive safeguards should have been provided, and in part on an answer given by the appellant to the judge to the effect that there was no connexion between the accident and the rubber boots.

With regard to the pleading, it had been alleged that safe means of access to his work had not been provided, that he had been required and permitted to descend the ladder whilst carrying a bucket of cement without adequate or any means of supporting or steadying himself, and that a safe system of work had not been provided whereby, inter alia, the appellant would not have been required or permitted to use a ladder which, owing to its position and construction, was an unsafe means of communication. Evidence was given by an expert witness for the appellant that there was nothing that a man could hold on to when walking down, and the expert for the defence stated in cross-examination that, for a man wearing rubber boots which were wet and carrying a bucket of cement, it would be desirable that he should have a handhold. In this state of the pleading and evidence, I have no doubt that the trial judge would have been wrong if he had withdrawn from the jury the absence of a handrail or handhold as an element proper for their consideration in all the circumstances of this case.

With regard to the rubber boots, the trial judge's report of the evidence shows that the appellant, in answer to a question from the judge, said: "There is no connexion between the accident and the rubber boots." It was argued that this answer ruled out the rubber boots from consideration as having any bearing on the case. The judge, in a note at the end of his report, says that the appellant,

whilst giving his evidence, frankly and candidly sometimes gave his answers without sufficient consideration, and, referring specifically to the answer cited above, said that, if the appellant had really addressed his mind to the matter, he would probably have answered quite differently. However this may be, the answer should not be considered in isolation. The witness had just previously said: "I say the boots could have caused the accident." Later he said: "What caused the accident was me walking in the gully in the wet and the roof ladder being slippery." Your Lordships have not seen a shorthand note of the evidence and do not, therefore, know the precise form of the questions which elicited these answers. The jury saw and heard the witness, and were in any event entitled to form their own view of the cause or causes of the accident in the light of all the evidence. In my view, neither of the submissions referred to above can be sustained.

My Lords, this brings me to what is a more important part of the case, namely, the evidence as to practice and the views of the majority of the Court of Appeal as to the effect of this evidence. The appellant in his statement of claim had not alleged that the respondents were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. The respondents called as an expert a civil engineer who was asked this question: "How far does this set up accord with good practice?" He answered:

"For the type of access to building work I would say that it is perfectly in accord with good practice. I have very considerable experience of such work on roofs for over twenty years."

I would draw attention to the fact that the words "this set up" came from counsel and it was never explained precisely what constituted "the set up" and, in particular, whether the practice which he described as "good" included the use of rubber boots such as those produced in evidence. It was said that this evidence stood unchallenged, but, as I read the note of the cross-examination, it looks as if it may have been directed in part at any rate to stress the use of the rubber boots as a feature peculiar to the present case to distinguish it from general practice. However this may be, and whatever is the proper view of the effect of LORD DUNEDIN's well-known words in *Morton v. William Dixon, Ltd.* (1) (1909 S.C. 807 at p. 809*), it was for the jury to assess the value to be attached to such sketchy evidence as this given without any explanation as to what was covered by the words "set up". They may well have considered it insufficient, more especially if they attached importance to the use of wet rubber boots on a ladder of this kind. Assuming, however, that the practice spoken to should be read as including the use of wet rubber boots on this ladder, what is the bearing of such evidence on the ultimate decision of judge or jury?

My Lords, I have already expressed my views on the value of this kind of evidence in *Morris v. West Hartlepool Steam Navigation Co., Ltd.* (2) ([1956] 1 All E.R. 385 at p. 400) which I need not repeat, but it was not necessary for me in that case to refer to the language of LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1). I would, however, desire to express my agreement with what was said by my noble and learned friend, LORD COHEN, in *Morris's* case (2) where, after reviewing what had been said on this subject in *Paris v. Stepney Borough Council* (3) ([1951] 1 All E.R. 42), and considering the language used by PARKER, L.J., in the case under consideration, he said ([1956] 1 All E.R. at p. 402):

"I think that the effect of their Lordships' observations is that, when the court finds a clearly established practice 'in like circumstances', the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one." Later (*ibid.*) he equates the word "folly" as used by LORD DUNEDIN and LORD NORMAND to "unreasonable or imprudent", thereby emphasising that LORD DUNEDIN could not have been intending to extend the employer's common

* See footnote, p. 746, ante.

A law liability beyond that which had been laid down in *Smith v. Baker & Sons* (4) ([1891] A.C. 325) and many subsequent cases in this House. To give to the word "folly" any other meaning would necessarily have this result. This is made plain by the submission of the respondents' counsel in the present case to the effect that, even if the evidence might otherwise warrant a finding of want of reasonable care, the case should have been withdrawn from the jury on the ground that, as a matter of law, it could not, in view of the evidence of practice, be held to amount to "folly".

My Lords, I would respectfully accept the statement of the law on this subject in the present case by the lord chief justice (LORD MACDERMOTT) who, it may be observed, was a party to the decision in *Paris v. Stepney Borough Council* (3) in your Lordships' House. CURRAN, L.J., who with SHEIL, J., formed the majority in the Court of Appeal, took the view that, once practice was established, this was conclusive in favour of the respondents. He said that, where positive evidence is adduced for the defendant that an employer has not omitted to do anything that is commonly done by other persons in like circumstances,

"Such a fact is clearly relevant, and once it is established, it is my opinion that a finding by the jury that it was folly in the [respondents] to neglect to provide something else, cannot be justified."

Counsel for the respondents did not seek to support this as a correct statement of the law. SHEIL, J., appears to have considered the system apart from the rubber boots, and reached the conclusion that it could not be considered folly to omit to provide a handrail. As to the boots he said:

"It may well be that these boots were the cause of this accident and BLACK, L.J., thought they were a cause, but it is too much to attribute to the [respondents] responsibility for an accident thus caused."

I do not think that the rubber boots can be eliminated from the case. They had to be taken into consideration with all the other circumstances. Furthermore, I do not think that the learned judge gave sufficient weight to the fact that he was setting aside a verdict of a jury and not reviewing a decision of a judge sitting alone.

For these reasons, I would allow this appeal on the ground that the jury's verdict on common law negligence should not have been disturbed. In these circumstances, I do not think that it is necessary or desirable to express a concluded view on the respondents' liability under s. 27 (1) of the Factories Act (Northern Ireland), 1938, which is the only other ground of liability now relied on. The question whether the provision of rubber boots constitutes a part of "the means of access" to the place of work raises a question of some difficulty which it may be better to decide if and when it arises in a case in which it is possible to ascertain whether or not the tribunal of fact regarded them as the sole or a contributory cause of the accident in question.

There remains only the question of damages. The respondents contend that the jury's assessment of £6,520 (reduced to £5,868 by reason of the appellant's contributory negligence) should be reduced on the ground that it was excessive. The appellant's right arm was badly lacerated and after two or three weeks was amputated three inches above the elbow. He suffered much pain during the unsuccessful efforts to save the arm. The stump was healed before he left hospital. He wears an artificial limb and artificial hand. When examined by a doctor in January, 1958, over four years after the accident, he complained of coldness towards the end of the stump. This condition was confirmed by the doctor who thought it unlikely to improve. He was aged twenty at the time of the accident and was employed as a labourer at £4 15s. a week. His loss of wages down to the date of trial amounted to £180, by which time he had obtained employment as a gateman at £5 7s. In addition to the pain and suffering and the permanent diminution in his enjoyment of some of the amenities of life, the jury had, of course, to consider what he might reasonably have been expected to earn during

a working life of perhaps forty-five or fifty years, taking account of the fall in the value of money, the tendency for wages to rise and the possibility of his improving his status in the labour market contrasted with his present position and future prospects in the event of an increase in the number of unemployed. When all these matters have been weighed in the balance and finally evaluated most favourably for the appellant, the figure of £6,520 is appreciably higher than I should have thought it proper for a judge to award. But your Lordships are not dealing with the award of a judge with whose estimate of damages an appellate court, though slow to interfere, is entitled and, indeed, bound to reconsider by way of rehearing. I do not think that the present award is so extravagant as to compel your Lordships to infer that the jury, properly directed as is admitted, must have taken into consideration matters which were inadmissible or irrelevant and arrived at an estimate which no twelve reasonable men could have reached so as to require your Lordships to order a new trial on the question of damages. On this part of the case also, I am in agreement with the view expressed by the lord chief justice.

Since writing the above I have had an opportunity of reading the opinion which is to be delivered by my noble and learned friend, LORD SOMERVELL OF HARROW, and I desire to express my agreement therewith.

I would, accordingly, allow the appeal and restore the judgment of the trial judge in accordance with the verdict of the jury.

LORD KEITH OF AVONHOLM: My Lords, I agree that this appeal should be allowed substantially for the reasons given in the speech delivered by my noble and learned friend, LORD TRUCKER. We are concerned here, in my opinion, with an act or acts of commission and it was conceded that, if this were so, much of the argument presented by counsel for the respondents disappears. The appellant was, in my opinion, in the circumstances of this case, placed in some peril by the acts of the respondents, his employers. He was far from being an experienced man in roof work. He had not worked on roofs until his employment on this particular job some three or four weeks before the accident. He was faced with carrying a heavy bucket of cement down a roof (or crawling) ladder, in an upright position on a slope of thirty-seven degrees without any adequate handhold and wearing rubber boots which were wet and would naturally tend to slip from the somewhat precarious grip which his heels had on the rungs of the ladder and which, further, were probably two sizes too large for him. The boots were supplied by the respondents' foreman, who must have had full knowledge of the circumstances in which the appellant was working. I am quite unable to hold that there was no evidence on which the jury could hold, as they did, that the respondents were negligent. If this is so, it is unnecessary to consider the statutory breach on which the appellant also relied.

I would add, however, a few words on the Dunedin formula, as it was called, in *Morton v. William Dixon, Ltd.* (1) (1909 S.C. 807 at p. 809*), particularly as I was a member of the court which had occasion to consider that formula in *Gallagher v. Balfour, Beatty & Co., Ltd.* (5) (1951 S.C. 712). The dictum of Lord DUNEDIN was used with reference to an alleged act of omission in providing a safe system of work. In the sphere of negligence, in the relationship of master and servant, I find the borderline between acts of omission and acts of commission very fine. It might be said to be an act of commission to put an employee to work in a place which was obviously unsafe. In the present case, it might be that giving the appellant rubber boots for his work could have been neutralised by providing some countervailing precaution which would exclude any charge of negligence and so it might be suggested that the cause of the appellant's injury was an act of omission rather than of commission. The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle. All that Lord DUNEDIN

* See footnote, p. 746, ante.

A meant, in my opinion, was that, if a plaintiff was complaining of a particular act of omission as constituting negligence, there were two ways in which he might endeavour to show this, by proving that the omission complained of was a precaution commonly undertaken by others in like circumstances, or was so obvious "that it would be folly in anyone to neglect to provide it". It is on the second alternative that discussion has generally turned. But I see no particular difficulty. There is no magic in the word "folly". It gives the formula the characteristic that was described by LORD NORMAND in *Paris v. Stepney Borough Council* (3) ([1951] 1 All E.R. 42 at p. 49) as "trenchant". But the language could be phrased otherwise without any loss of meaning. LORD DUNEDIN might equally have said: "It would be stupid not to provide it", or "that no sensible man would fail to provide it", or "that common sense would dictate that it should be provided". LORD COOPER himself, who was particularly averse from watering down LORD DUNEDIN's language, on three separate occasions in his judgment in *Gallagher's case* (5) used "inexcusable" as the equivalent of "folly". With this may be read the passage from LORD NORMAND's judgment in *Paris v. Stepney Borough Council* (3) (*ibid.*) that the formula "does not detract from the test of the conduct and judgment of the reasonable and prudent man". In *General Cleaning Contractors, Ltd. v. Christmas* (6) ([1952] 2 All E.R. 1110), my noble and learned friend, LORD TUCKER, said (*ibid.*, at p. 1120): "It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject." In *Morris v. West Hartlepool Steam Navigation Co., Ltd.* (2) ([1956] 1 All E.R. 385), LORD COHEN said (*ibid.*, at p. 401) that he agreed with PARKER, L.J., that "folly" was not to be read as "ridiculous" and did not think that that was the sense in which LORD DUNEDIN used it. I refrain from quoting observations in a similar sense from others of their Lordships in the cases cited. LORD DUNEDIN cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has, or has not, been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of omission or an act of commission. But where it is an act of omission that is alleged, I think it will be found, in the absence of evidence of practice, that the circumstances will rarely, if ever, lead judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can readily be understood and commands itself to common intelligence as something to be required. LORD DUNEDIN was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.

I think the appeal should be allowed.

H LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend, LORD TUCKER, and only wish to add some observations on the use of phrases or formulae as superseding in particular circumstances the normal formula of "reasonable care in all the circumstances".

I While the doctrine of common employment was part of our law, fine distinctions were drawn as to the circumstances in which an employer might be held liable notwithstanding that doctrine. Now that common employment has been abolished those distinctions need no longer be drawn. I suggest with all respect that courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I have called the normal formula—that is reasonable care in all the circumstances—is applied whatever the circumstances. LORD DUNEDIN's observation (1909 S.C. at p. 809*) was, in its context, clearly only intended to apply where the practice proved was clearly proved and where the circumstances covered by the practice were precisely similar to those in which

* See footnote, p 746, ante.

the accident happened. There may be many cases in which, although the circumstances are not precisely similar, evidence of practice should be given some, though less, weight. In any case, the formula seems to suggest, though this cannot have been intended, that, if a plaintiff calls no evidence of practice, he must establish folly in order to make out a *prima facie* case. In my view, it would be unfortunate if courts had to consider what amounted to folly. I do not pretend to have considered every gloss on "reasonable care" which may from time to time have been cited as helpful but, speaking for myself, I think the fewer the formulae the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another.

LORD JENKINS: My Lords, I concur with the opinion of my noble and learned friend, LORD TUCKER, with which I am in complete agreement. I would allow the appeal.

Appeal allowed.

Solicitors: *Neil Maclean & Co.*, agents for *D. P. Marrinan*, Belfast (for the appellant); *Goldingham, Wellington & Co.*, agents for *Henry J. Catchpole*, Belfast (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* HUDSPETH.

[CHANCERY DIVISION (Vaisey, J.), June 30, July 1, 1959.]

Surtax—Undistributed income—Relief to taxpayer on subsequent distribution—Direction by commissioners—Subsequent distribution exceeding profits available for distribution in relevant years—Extent of relief—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 245, s. 249 (5).

In the years ending on Mar. 31, 1951 and 1952, a company made net profits of about £8,032 and £7,019 (after provision for taxation of £8,563 and £7,947) and it distributed dividends of £2,300 and £2,500 (both gross) respectively. In 1955 it received notice from the Special Commissioners of Income Tax that they had computed the actual income from all sources of the company for surtax purposes under s. 21 of the Finance Act, 1922, at £16,824 and £15,906 for the two years respectively and had apportioned these amounts among the shareholders. In February, 1956, the company passed a resolution that, as the profits of the two years had been subjected to surtax, they should be distributed in the form of a dividend to shareholders, of whom the taxpayer was one. The aggregate sum so received by the taxpayer as dividend was £7,820, less income tax at the standard rate. The gross amount (£7,820) was an amount exactly equivalent to the sum of the parts of the £16,824 and £15,906 which had been apportioned to the taxpayer for the purpose of charging the company to surtax. The taxpayer included the sum of £7,820 in his income tax return for the year of assessment 1955-56 and claimed relief from surtax for that year on this sum under s. 249 (5)* of the Income Tax Act, 1952. The commercial profits actually made by the company for the years ending Mar. 31, 1951 and 1952 (as distinct from the notional sums deemed to be apportionable as income under s. 245), were such that a total of £6,413 was actually available from the commercial profits, and from profits tax repaid in consequence of the surtax notice, for distribution to the taxpayer towards the dividend of £7,820. The Crown

* The relevant terms of s. 249 (5) of the Income Tax Act, 1952, are printed at p. 753, letter G, post.

A claimed that the taxpayer's relief from surtax under s. 249 (5) should be limited to £6,413, since the balance of the dividend actually paid must have come from profits of other years.

B **Held:** the effect of s. 249 (5) was merely that the income on which the company was charged to surtax (computed at £16,824 and £15,906) was, when distributed, to be deemed not to be part of the taxpayer's total income for purposes of surtax; but that did not prevent his actual income from the distribution by way of dividend in 1956 (viz., £7,820) being attributable in part only to profits of the relevant years of assessment (1950-51 and 1951-52), and his relief from surtax under s. 249 (5) should be limited to the amount so attributable (viz., £6,413), income of the company attributable to other years of assessment than those that had been subjected to surtax under s. 249 being excluded from relief.

C Appeal allowed.

[As to the effect of distribution following a surtax direction, see 20 HALSBURY'S LAWS (3rd Edn.) 565, para. 1099.

For the Income Tax Act, 1952, s. 245, s. 249 (5), see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 237.]

D Case Stated.

E The taxpayer appealed to the Special Commissioners of Income Tax against an assessment to surtax in the sum of £10,596 for 1955-56, on the ground that the whole of a dividend of £7,820 8s. (gross) received from a company, Holland & Webb, Ltd., should be deemed not to form part of his total income for surtax purposes under s. 249 (5) of the Income Tax Act, 1952. The taxpayer was the chairman of the company and held 2,800 of the 10,000 issued ordinary 10s. shares. For the year ending on Mar. 31, 1951, the net profit of the company after the provision for taxation of £8,563, was £8,032 and a dividend of £2,300 (gross) was paid, and for the year ending on Mar. 31, 1952, the net profit after provision for taxation of £7,947, was £7,019 and the dividend paid was £2,500 (gross). On F June 17, 1955, the Special Commissioners of Income Tax issued notices to the company that they had computed the actual income from all sources of the company for surtax purposes under s. 21 of the Finance Act, 1922, at £16,824 for the year ended Mar. 31, 1951, and at £15,906 for the year ended Mar. 31, 1952, and had apportioned these amounts by reference to para. 8 of Sch. 1 to the Act as stated in the notices. The amounts apportioned to the taxpayer were G £4,626 14s. 6d. for 1950-51 and £4,453 13s. 6d. for 1951-52, subsequently amended by deductions of £560 and £700 relief under s. 21 (1) of the Act of 1922 to £4,066 14s. 6d. and £3,753 13s. 6d. respectively. The amended surtax assessments on the taxpayer under s. 21 of the Act of 1922 were based on the following computation of income: Personal income £2,580 plus £4,066 apportioned income less relief, giving £6,646 for 1950-51; and personal income £2,676 plus £3,753 apportioned income less relief giving £6,429 for 1951-52.

H On Feb. 20, 1956, an extraordinary general meeting of the company passed the following resolution:

I "That as a result of a direction by the Special Commissioners of Income Tax under s. 21 Finance Act, 1922, whereby the profits of the company for the years ended Mar. 31, 1951 and 1952 respectively have been subjected to surtax, the said profits should now be distributed in the form of a dividend pro rata amongst the shareholders amounting to £2 15s. 11d. per share less income tax at 8s. 6d. in £."

As a result of the passing of the resolution the taxpayer received from the company on Feb. 21, 1956, a dividend of £7,820 8s. (gross) and he returned this in his annual return of income for 1955-56. His total income for 1955-56 for surtax purposes was computed by the Special Commissioners at £10,596, which included the £7,820 8s. He claimed relief under s. 249 (5) of the Act of 1952 on the whole of the £7,820 8s. The Special Commissioners wrote a letter indicating

that they proposed that the relief should be restricted to £6,413 13s. 6d. on the footing that the dividends paid in respect of the years to Mar. 31, 1951 and 1952, exceeded the profits available according to the "commercial" accounts. They stated:

"In the commissioners' view the dividend of £27,930 gross (£16,059 15s. net) cannot wholly be regarded as a distribution of the company's income of the years ended Mar. 31, 1951 and 1952. The available net profit of these two years, even after writing back the profits tax exempted following the surtax directions amounts only to £13,171 2s. 6d. [unappropriated profit to Mar. 31, 1951, £3,731 10s. 10d. plus £4,518 10s. 8d. to Mar. 31, 1952, plus £2,921 1s. profits tax exempted and repaid]. The balance of the distribution of Feb. 20, 1956, £2,888 12s. 6d. net (i.e. £16,059 15s. less £13,171 2s. 6d.) must therefore have come from the profits of other years. The commissioners propose accordingly to allow relief to the members under the provisions of s. 249 (5), Income Tax Act, 1952, on their proportionate shares of that part only of the dividend declared on Feb. 20, 1956, that can properly be regarded as a distribution of the company's income of the years ended Mar. 31, 1951 and 1952, i.e. on £22,906, the gross equivalent of £13,171 net."

The proportion of the dividend received by the taxpayer of £7,820 8s. which in the commissioners' view was relievable, £6,413 13s. 6d., was 2,800 10,000ths of £22,906, based on his shareholding in relation to the total issued shares of the company.

The taxpayer declined to accept the proposal of the commissioners and the difference between £7,820 8s. and £6,413 13s. 6d. was the subject-matter of the appeal. The taxpayer contended that the whole of his dividend of £7,820 8s. (gross) should be deemed not to form part of his income for surtax purposes under s. 249 (5) of the Act of 1952. The Crown contended that, as the dividends paid by the company in respect of the years ended on Mar. 31, 1951 and 1952, exceeded the amount of the profits shown in the "commercial" accounts as earned for those two years, only the proportionate amount of the profits attributable to the taxpayer, £6,413 13s. 6d., should be deemed not to form part of his total income. The appeal commissioners held that (i) the expression "actual income from all sources" in Ch. III of Part 9 of the Income Tax Act, 1952, referred to a fictitious amount calculated in accordance with the rules prescribed in the Income Tax Acts for the purposes of Ch. III; as such it was incapable of distribution itself and all that could be distributed was a sum equivalent thereto; (ii) the expression "undistributed income" in s. 249 (5) referred to "actual income from all sources" because it was that "which has been assessed and charged to surtax under this Chapter"; (iii) the intention of s. 249 (5) being to give relief, it must be taken to refer to a sum capable of distribution and such a sum would be a sum equivalent to the "actual income from all sources" of the company which had been assessed and charged to surtax under Ch. III; relief fell to be given therefore, on the whole of such amount when subsequently distributed; (iv) accordingly, the amount distributed by the company being a sum equivalent to the "actual income from all sources", relief fell to be given to the taxpayer under s. 249 (5) in respect of the whole of the dividend received by him. The Crown appealed.

F. N. Bucher, Q.C., and A. S. Orr for the Crown.

P. W. I. Rees for the taxpayer.

VAISEY, J.: This is a short point. It is not a very easy one to grasp and I am not surprised that the learned commissioners have come to a conclusion which does not appeal to me, because I think that the matter is confused. I have been extremely attracted by the argument of Mr. Rees, learned counsel for the taxpayer, who appeared to support the findings of the commissioners. I thought

A he argued his case extremely well and forcibly, but I do not find myself able to concur in his conclusions.

The matter arises under Ch. III of Part 9 of the Income Tax Act, 1952, which is the fasciculus of sections which deal with surtax on undistributed income of certain bodies corporate. The relevant sections are s. 245 and s. 249 (5). Section 245 provides:

B “With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.”

The company here concerned is a company to which that section applies. Notices have been served in the present case and an order has been made, with the result that certain income of the company has been distributed and has come into the hands of the taxpayer and it is in regard to that income that this question arises.

E The case has been argued by Mr. Rees for the taxpayer and by Mr. Bucher for the Crown with great skill, and it really comes to this. There is no doubt that s. 245 is referring, not to the income of the taxpayer, but to the income of the company and that that income—viz., the income of the company from all sources for the period in question—is the subject-matter of taxation for the purposes of surtax. There is certainly no doubt that the whole of the company's income is subject to such an assessment, but we are now dealing with the question of the taxpayer's surtax for two years, the year ending on Mar. 31, 1951, and the year ending on Mar. 31, 1952. Distribution having been made by the company, we now come, by virtue of that distribution, to the income in the hands of the taxpayer and the question is: To what extent, if at all, is the taxpayer entitled to be relieved from the payment of surtax?

G The words of s. 249 (5) are apparently very simple, very plain and very easy to construe. They are:

“Any undistributed income which has been assessed and charged to surtax under this Chapter shall, when subsequently distributed, be deemed not to form part of the total income for the purposes of surtax of any individual entitled thereto . . .”

H Under that direction the taxpayer claims to be totally exempted from the payment of surtax on the whole of the moneys which he received from the company, by virtue of the operation carried out under s. 245. Section 249 (5) begins by referring to “any undistributed income”, which is undoubtedly a reference to the income of the company, but the rest of that subsection is dealing with the position not of the company but of the shareholder, the taxpayer. It looks as though that which is free from any further charge to surtax is something which has already been assessed and charged to surtax under the provisions of that section, and it seems to me to be an almost inevitable consequence that the taxpayer is not entitled to exemption from surtax unless he can prove that the money which he has received has already been—in the words of the subsection—assessed and charged to surtax. Unless he can show that he is going to be asked to pay surtax on money which has already been subjected to surtax, he does not really come within the provisions of the subsection.

In this case a larger sum than the amount which I shall mention in a moment has been received by the taxpayer from the company in the shape of dividends, and only part of that sum can be attributable or referable to the years in question, 1951 and 1952, and only that part of the sum which the taxpayer received which is referable to those years has already been subjected to and has borne surtax. So far as that part of the money which he has received from the company is concerned, the taxpayer is exempted from surtax or, at any rate, is not bound to bring it in in any return which he makes for the purposes of surtax. But, as regards any money which he has received from the company which is not referable to those two years and has been derived by the company from some source other than the profits and gains of those two years, that is something which has not been assessed to surtax and has not borne surtax. Therefore, in regard to that part of the amount, the taxpayer is not entitled to any relief.

The taxpayer cannot predicate that the whole of the money which he has received from the company has borne, has been assessed to and has been charged with, surtax. He can only establish that as regards part of the sum, and the dividend, in so far as it is not referable to the two years in question, has not at present been subjected to surtax. It is not a very large sum. The bulk of the money which the taxpayer received from the company amounted to £6,413 13s. 6d. That sum has been assessed to and charged with surtax under the provisions of the Chapter. It has, to that extent, been subsequently distributed along with other moneys which are not franked, so to speak, by a previous payment of surtax.

The taxpayer's claim was that, because the company itself was liable to surtax on the whole amount, he ought to have a corresponding relief in respect of the whole sum, but I do not think that can be so, because, as is pointed out in the Case, part of the total sum which the taxpayer claimed to be exempt must have come from the profits of other years, i.e., years other than those which ended on Mar. 31, 1951, or Mar. 31, 1952.

The Special Commissioners of Income Tax in the first place allowed relief to the taxpayer under the provisions of s. 249 (5) on that part only of the dividend declared that could properly be regarded as a distribution of the company's income for the years in question. As there is no doubt about the figures the result of my decision is that the relief is limited to the sum which I have already mentioned—£6,413 13s. 6d.—and does not extend further to the larger sum in respect of which the appeal commissioners were disposed to extend relief.

As I say, I am not at all surprised that there has been some confusion of thought in this case because I have not myself found it altogether easy to grasp the various considerations. However, looking at it broadly, it seems to me that the object of this subsection is to ensure that the taxpayer should not have to pay surtax twice in respect of the same sum of money. The only sum of money as to which the present question arises is the difference between the larger sum which the commissioners have found to be exempt and the sum of £6,413 13s. 6d. which seems to me to be the proper figure.

This is a complicated section in a way, but the key to it seems to be this: That the undistributed income (meaning the income of the company which was assessed and charged to surtax, i.e., the appropriate surtax which is not necessarily all the surtax but the surtax referable to the relevant years) when distributed is to be deemed not to be part of the total income of the taxpayer for the purposes of surtax. That is the whole operation of the subsection and I think that the appeal commissioners came to a wrong conclusion. Therefore, this appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Nordon & Co. (for the taxpayer).*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A **WATSON v. CAMMELL LAIRD & CO. (SHIPBUILDERS & ENGINEERS), LTD.**

[COURT OF APPEAL (Lord Eversherd, M.R., and Willmer, L.J.), April 21, 1959.]

B *Discovery—Privilege—Hospital notes—Copy of hospital case notes—Copy prepared by plaintiff's solicitors for purposes of action for damages for personal injuries.*

C For the purpose of assisting and advising the plaintiff in connexion with a claim for damages for personal injuries, and after the proceedings were clearly contemplated, the plaintiff's solicitors prepared a copy of the case notes made and kept by the hospital which the plaintiff had attended. In the action the defendants applied for disclosure of the copy.

Held: as the copy of the case notes had been prepared by the solicitors for the purposes of the action, the document was privileged from production.

The Palermo ((1883), 9 P.D. 6) applied.

Chadwick v. Bowman ((1886), 16 Q.B.D. 561) distinguished.

Appeal dismissed.

D [As to privilege against production in respect of documents prepared for contemplated litigation, see 12 HALSBURY'S LAWS (3rd Edn.) 44, para. 62; and for cases on the subject, see 18 DIGEST (Repl.) 103-105, 879-896.]

Cases referred to:

- E (1) *Chadwick v. Bowman*, (1886), 16 Q.B.D. 561; 54 L.T. 16; 18 Digest (Repl.) 104, 894.
(2) *The Palermo*, (1883), 9 P.D. 6; 53 L.J.P. 6; 49 L.T. 551; 18 Digest (Repl.) 104, 892.

Interlocutory Appeal.

F Early in 1957 the plaintiff, having returned to work after an accident, developed meningitis which had permanent disabling effects. In an action against the defendants for damages for personal injuries, he alleged that the meningitis was a result of the accident. Among the documents referred to in the affidavit of documents of the plaintiff was a copy of the Birkenhead Hospital Management Committee's case notes in respect of the plaintiff's attendance at hospital for treatment of the meningitis. The copy had been prepared by the plaintiff's solicitors for the purposes of the action, and the plaintiff objected to its production on the ground that it was privileged. The hospital management committee G having refused to allow the defendants to see the case notes, the defendants applied to the court for discovery of the copy referred to in the affidavit of documents of the plaintiff. By an order dated Feb. 26, 1959, ELWES, J., refused the application. The defendants appealed from his decision.

C. M. Clothier for the defendants.

H *D. B. McNeill* for the plaintiff.

I **LORD EVERSHERD, M.R.:** I am clearly of opinion that the learned judge rightly rejected the defendants' claim to disclosure of the document with which we are concerned. The action is one for damages for personal injuries. It seems that after the plaintiff had returned to work in the beginning of 1957 he developed meningitis; and it is his case in the action that the meningitis, which has had permanent disabling effects, was a result of the accident. That, therefore, is an important issue in the case. The writ was issued on Dec. 4, 1957, but several months earlier it had been made plain by those advising the plaintiff that proceedings would be taken to recover damages in respect of the alleged injuries. On being afflicted with meningitis, the plaintiff went to a hospital in Birkenhead, and, in accordance with routine practice, case notes were made and kept by the hospital of his condition. As counsel for the defendants pointed out, no doubt rightly, meningitis may be of two kinds, traumatic or infective, and, according

as it is one or the other, it may be deduced whether it was or was not the result of the accident. A

The affidavit of documents of the plaintiff contains, in Sch. 1, Part 2, the following item: "Copy of Birkenhead Hospital Management Committee's case notes relating to the plaintiff"; and under the column "Date" is the word "Various". In regard to it, following a common enough form, the plaintiff has said:

"I object to the production of the documents set forth in Part 2 of Sch. 1 hereto on the ground that such documents are privileged." B

I ventured to point out to counsel for the plaintiff that that bare statement of itself might not have sufficed. But that point was not taken in this court, in the exercise of what probably is common sense; because the facts are clear. This document, this copy of the case notes, was, admittedly, prepared by the solicitors for the plaintiff after the litigation had either commenced or was clearly contemplated. Also it is not in doubt that the document was prepared by the solicitors for the purpose of assisting and advising the plaintiff in connexion with his claim. C

Prima facie, therefore, it would appear clear that the document is privileged, being of the class which is described in the ANNUAL PRACTICE, 1959, in the notes at p. 691, that is, copies which have come into existence or have been made D

"for the purpose of obtaining for or furnishing to the solicitor evidence to be used in the litigation, or information which might lead to the obtaining of such evidence . . ."

It was, however, contended with vigour by counsel for the defendants that that general rule ought not to apply where the document was a mere verbatim copy of a document not itself the subject of privilege, because (as he said) the making of such a copy involved, in itself, no exercise of skill, properly so called. Counsel said that, if the solicitor had exercised some kind of eclectic judgment in making the copy, leaving out bits that were irrelevant or unhelpful, then it would be another matter; and that, since the actual case notes would be liable to be produced at the trial, on service of a subpoena duces tecum on the appropriate hospital officer, and since, therefore, the original would never be privileged, in any proper sense, a mere verbatim copy could be in no better position. I am unable to accept that view. The question of privilege does not really have any significance in regard to the original: that is a document which is not, and never has been, in the possession or power of the plaintiff. It is a document which is in the possession of a third party, and, undoubtedly, by the appropriate means, G it can be produced at the trial. But that fact seems to me to have very little to do with the question whether this copy document did or did not come into existence in the way which I have indicated, namely, by being obtained by the solicitor for the purpose of advising the plaintiff in regard to the litigation. E F

Counsel for the defendants relied on *Chadwick v. Lowman* (1) ((1886), 16 Q.B.D. 561), a decision of the Divisional Court of the Queen's Bench Division. That, however, as it seems to me, was a different case, because there the essential fact was that certain letters which the defendant had received and copies of letters which he had written had been at some stage destroyed by him, and in order to replace them he obtained from the third persons, by or to whom they had been written, copies, which therefore would be available as secondary evidence of the original documents which he himself had lost or destroyed. The court said, accordingly, that these copies, the mere replacements of something which the defendant himself would have had to produce, must be produced. As I

MATHEW, J., put it (16 Q.B.D. at p. 562):
 "It does not appear to me that these documents really came into existence for the purposes of the action within the true meaning of the rule upon which the defendant's counsel relied."

But the copy document with which we are concerned undoubtedly did so come

A into existence. There can have been no conceivable reason for the solicitor having made the copy save for the purpose of the action which was then contemplated or pending: and in so far as skill is involved it was part of his professional skill in assisting his client to go to the hospital to get it. It seems to me, therefore, that the case is within the scope of the principle illustrated in *The Palermo* (2) (1883), 9 P.D. 6). In that case there had been a collision between two
 B vessels, the Rivoli and the Palermo; and under the Merchant Shipping Act, 1854, s. 432, certain depositions had been taken by the Board of Trade from the master and members of the crew of the Rivoli. The owners of that vessel brought the proceedings against the owners of the Palermo, and the defendants sought to obtain from the plaintiffs copies of the Board of Trade depositions which the plaintiffs' solicitors had obtained. It was, on the face of it, I should have thought,
 C a parallel case. BUTT, J., at first instance, said (9 P.D. at p. 7):

"Here discovery is sought of copies of certain depositions, and these were obtained for the purposes of this action, and as the phrase is, 'to form part of the brief'. Therefore I think that they are privileged, and I shall not inquire for what purpose the original depositions were taken, since it is the copies of which discovery is sought, and which were obtained for the purposes I have stated."

D The defendants appealed and this court dismissed the appeal without calling on learned counsel for the respondents.

E It seems to me that in this case, as in *The Palermo* (2), the document with which we are concerned is a copy which was made by the plaintiff's advisers for the purposes of the litigation in which the solicitors were acting for the party. That being so, it seems, I think, clear that the learned judge was right to say that he could not make the order.

As a matter of common sense, I felt sympathy with counsel for the defendants, because plainly his conduct of the defence, including the matter of possible payment into court, would be materially affected by the medical evidence which the case notes would supply. I am, however, happy to say that anxiety and
 F sympathy on those grounds is greatly lessened because counsel for the plaintiff has pointed out that he has, or that those advising him have—very sensibly, if I may say so—offered to disclose these documents provided that a similar courtesy or facility is shown on the other side, that offer being expressed to be without prejudice to what the strict rights may be; and that counsel for the defendants has not accepted that offer, preferring to treat this as a matter of right or principle
 G which, he says, may be important, at any rate in the area of Liverpool and Birkenhead. If it is important as a matter of principle, I have stated the answer; and, as WILLMER, L.J., observed, if the answer were otherwise, if we accepted the argument of counsel for the defendants that some slight exercise of selection in making the copy would make all the difference, perhaps it would not amount to very much anyway if we decided the case in favour of counsel for the defendants.
 H However that may be, I conclude, for the reasons which I have stated, that the appeal cannot succeed. I add again that I am happy to think that those advising the parties in practice have shown good sense in trying to assist to a conclusion of the matter. I would dismiss the appeal.

I WILLMER, L.J.: I am of the same opinion. Apart from the other reasons which my Lord has given and with which I wholly agree, we are, in my judgment, bound by the decision in *The Palermo* (2) (1883), 9 P.D. 6), which was a decision of this court. That, in my judgment, of itself is sufficient to conclude this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Carpenters, agents for Lucas & Co., Liverpool (for the defendants); Field, Roscoe & Co., agents for Barkson & Barkson, Birkenhead (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

WATERSON AND OTHERS *v.* HENDON BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Salmon, J.), June 1, 2, 22, 1959.]

Rates—Limitation of rates chargeable—Industrial Orthopaedic Society—Society occupies of hospital and other medical units—Objects of society to provide free medical treatment to its members—Membership of 400,000 nearly all of whom were industrial workers contributing minimum of 3d. a week—Whether society concerned with advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1).

Rates—Limitation of rates chargeable—Full amount of rates without claiming relief paid in first year of new valuation list—Whether ratepayer loses right to claim relief in subsequent years—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (2).

The Industrial Orthopaedic Society, a society registered under the Friendly Societies Acts, occupied certain hereditaments which included a hospital, equipped to treat nearly every type of surgical and medical case, a nurses' home and an optical clinic. The objects of the society as set out in its rules were to provide, by members' voluntary contributions, for "the relief of members in sickness or infirmity"; these objects were carried out by providing at the society's hospital and other medical units free orthopaedic, surgical, medical, dental and optical treatment. The rules provided that membership of the society was to be unlimited in numbers and that every member should have an equal voice in the concerns of the society. Membership was open to all who were engaged in industry or commerce (industrial members) including their wives and children over fifteen, and also to founder members (subscribers of not less than one hundred guineas), life members (subscribers of not less than twenty-five guineas) and annual members (annual subscribers of not less than one guinea). Industrial members were required to pay a minimum contribution of 3d. a week except those who had contributed for not less than ten years and at sixty-five, on retiring from work, were unemployed, who paid 1d. a week. Anyone twenty-six weeks in arrears with contributions ceased to be a member. The society had a membership of 400,000 all of whom, except about 2,000, were industrial members. Patients at the hospital were all members of the society apart from a few persons accepted as emergency cases. The society was not established or conducted for profit. In August, 1956, the plaintiffs, the trustees of the society, applied for relief from rates charged on the society for the year ending Mar. 31, 1956, under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8. The rating authority refused to grant relief and the plaintiffs then appealed to quarter sessions but their notice of appeal was out of time and they withdrew it. Subsequently, the plaintiffs paid the full amount of rates for the year ending in March, 1957. They now sought a declaration that the society was an organisation within s. 8 (1) of the Act of 1955, viz., an organisation "whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare", and therefore entitled to relief from rates under sub-s. (2) of s. 8.

Held: (1) the court had jurisdiction to grant the declaration, which, if granted, would be effective to entitle the society to obtain relief for the years following that ending in March, 1957, since on the true construction of sub-s. (2)* of s. 8 "the amount of rates chargeable for the first year" meant the amount of rates for which the ratepayer would have been liable after any relief to which he was entitled, and the fact that there had been an overpayment in the first year was irrelevant in considering the ratepayer's right to relief in the following years.

* For the terms of s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act 1955, see p. 763, letters F to H, post.

(ii) the society was not an organisation within sub-s. (1) of s. 8, because its main object was to do good to itself, that is, to the members of the society themselves, and such a purpose was not charitable, for it lacked the element of public benefit (dictum of LORD SIMONDS in *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. at p. 34 applied), nor was it "otherwise concerned with the advancement of social welfare", for it lacked the requisite element of altruism (*National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1958] 2 All E.R. 601 and *Independent Order of Odd Fellows Manchester Unity Friendly Society v. Manchester Corpn.*, [1958] 3 All E.R. 378 followed; dictum of VISCOUNT SIMONDS in *Skegness U.D.C. v. Derbyshire Miners' Welfare Committee*, ante at p. 263 considered).

[**Editorial Note.** Although the hospital itself, which served the needs of a very large number of members, made a notable contribution to social welfare, the purpose of the society was not social welfare but self-help, notwithstanding that social welfare was a by-product of its activities (see p. 765, letter B, post).

As to public benefit being a requisite of charity, see 4 HALSBURY'S LAWS (3rd Edn.) 209, para. 488; and for cases on the subject, see 8 DIGEST (Repl.) 313-315, 3-6.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *Berry v. St. Marylebone Corpn.*, [1957] 3 All E.R. 677; [1958] Ch. 406; 3rd Digest Supp.
- (2) *General Nursing Council for England and Wales v. St. Marylebone Corpn.*, [1957] 3 All E.R. 685; [1958] Ch. 421; 122 J.P. 67; *affd.* H.L., [1959] 1 All E.R. 325; 3rd Digest Supp.
- (3) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (4) *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.*, [1958] 2 All E.R. 601.
- (5) *Independent Order of Odd Fellows Manchester Unity Friendly Society v. Manchester Corpn.*, [1958] 3 All E.R. 378.
- (6) *Skegness U.D.C. v. Derbyshire Miners' Welfare Committee*, ante p. 258.

Action.

In this action Alfred Edward Waterson, John Albert Flaxman and William James Henry Bray Redwell, the plaintiffs, as trustees of the Industrial Orthopaedic Society (hereafter referred to as "the society"), claimed against Hendon Borough Council, the defendants, a declaration that the society was an organisation within the meaning of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) and accordingly entitled to relief from rates under s. 8. The society was an unincorporated society, registered under the Friendly Societies Acts, 1896 to 1948, and by its rules the plaintiffs were authorised to sue on behalf of the society. The society owned and occupied certain hereditaments in Golders Green, London, N.W.11, the most important being the Manor House Hospital in North End Road (where the society had its registered office), including an out-patients' department and consulting rooms in North End Road, a nurses' home and an optical clinic. The hospital was large, well equipped and fully staffed for treating almost every type of surgical or medical case. In August, 1956, the plaintiffs applied to the defendants, who were the rating authority, for relief from rates under s. 8 of the Act of 1955, in respect of the rates charged on them for the year ending Mar. 31, 1957. On Mar. 28, 1957, the defendants notified the plaintiffs that they refused to grant this relief, and on Oct. 25, 1957, the plaintiffs gave notice of appeal from this refusal to Middlesex Quarter Sessions. The notice of appeal was out of time and invalid and the plaintiffs subsequently withdrew it and paid the full amount of rates with which

they had been charged without any deduction. The objects of the society were set out in its rules which provided as follows:

"Rule 1. (1) The society is a friendly society. It shall be called the Industrial Orthopaedic Society. (2) The society shall consist of an unlimited number of members and every member shall have an equal voice in all the property and concerns thereof except as otherwise provided in these rules or by law.

"Rule 3. (1) The objects of the society shall be to provide by the voluntary contributions of the members for the relief of members in sickness or infirmity. (2) Such objects shall be carried into effect by the provision of orthopaedic treatment and such surgical and medical treatment at the [Manor House] hospital's rehabilitation or other medical units of the society as the executive committee may from time to time determine. (3) The provision of dental and optical benefits at the Manor House hospital or its clinics for members.

"Rule 4. (1) Membership of the society shall be open to the following classes of persons:—(a) Founder members who shall subscribe a sum of not less than one hundred guineas. (b) Life members who shall subscribe in one sum twenty-five guineas. (c) Annual members who shall make an annual subscription of not less than one guinea. (d) Industrial members. (2) Any person desiring to become a founder or a life or annual member may on application to the executive committee be accepted by them into membership of the society and shall thereupon be entitled to such benefits as are provided by these rules. (3) Industrial membership shall be open to all engaged in industry or commerce. The wives and children (over the age of fifteen) of industrial members shall also be eligible for industrial membership.

"Rule 5. (1) Every member of the society, other than founder, life or annual members, shall pay a minimum contribution of threepence per week except members who have contributed for not less than ten years and who on retirement at sixty-five are not gainfully employed shall pay one penny per week.

"Rule 6. (1) Any member twenty-six weeks in arrears with contributions shall cease to be a member of the society. Group members shall retain their membership and right to benefit whilst their contributions are being paid but shall cease to be members directly their contributions are discontinued by the group, unless application be made to the appropriate area organiser, district secretary or local secretary for transfer of membership within a period of thirteen weeks.

"Rule 8. (1) The executive committee may accept donations from persons in sympathy with the objects of the society or desirous of furthering such objects. Such donations in the absence of any expressed desire by the donor that the gift shall be applied to any particular purpose shall be placed to the credit of the general funds.

"Rule 11. (1) Should any member require treatment as laid down in these rules and have been in the society for six months and be not more than thirteen weeks in arrears . . . the organiser of the area . . . shall be informed . . . of the circumstances . . . If in order the member will be sent for examination to the society's medical referee. The area organiser shall thereafter . . . arrange for such treatment as the referee prescribes provided such treatment is within the society's scope and he shall be entitled to free treatment and maintenance . . ."

At the time of this action there were 400,000 members of the society all of whom, except about 2,000, were industrial members. The patients at the Manor House hospital, apart from a few who were accepted as emergency cases, were all members of the society. The society was not established or conducted for profit.

A The defendants contended that the court had no jurisdiction to grant the declaration claimed by the plaintiffs, and further, that the objects of the society were not charitable or otherwise concerned with social welfare within the meaning of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

J. L. Arnold, Q.C., and G. V. Owen for the plaintiffs.

B *J. T. Molony, Q.C., and Monique S. Viner for the defendants, the rating authority.*

Cur. adv. vult.

June 22. SALMON, J., read the following judgment: The first point taken by the defendants is that the court has no jurisdiction to hear the present action. Counsel for the defendants argued that even if the plaintiffs are right in their contention that they would have been entitled to relief in respect of the rates for the year ending Mar. 31, 1957, nevertheless no declaration should be granted since it would be wholly ineffective. He contends (1) that if the plaintiffs paid more than they need have done in respect of the year ending Mar. 31, 1957, such overpayment was made under a mistake of law and is irrecoverable; (2) that on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, a ratepayer who pays the full rate in the first year without claiming relief loses his right to relief for all subsequent years; and (3) that the payment of the full rate and the withdrawal of the notice of appeal to quarter sessions operate as a species of *res judicata* or estoppel. In my judgment counsel for the defendants' first point is clearly a sound one and has not been seriously contested; the declaration could not operate to enable the plaintiff to recover any amount that he may have overpaid. Counsel did not press his third point and it seems to me clearly to be unarguable. As to the second point I cannot find anything in the language of s. 8 (2) of the Act of 1955 or in the language of para. 3 of Sch. 5 to the Act to support the contention put forward on the part of the defendants. Subsection (2) reads as follows:

F "For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (b) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion: Provided that this subsection shall have effect subject to the provisions of Sch. 5 to this Act in cases falling within that schedule."

I Paragraph 3 of Sch. 5 deals with the position where structural alterations are made to the hereditament during the first year of the new list, but its language so far as it is relevant to counsel for the defendants' point is substantially the same as the language of s. 8 (2).

In my judgment "the amount of rates chargeable for the first year" means the amount of rates for which the ratepayer would have been liable after any relief to which he was entitled. This means that the amount of rates chargeable for the following year is calculated under the Act not in relation to the amount

which he paid in the first year but in relation to the amount of rates less relief for which the ratepayer would have been liable in the first year. Accordingly, in my judgment, the fact that he may have made an overpayment in the first year is quite irrelevant in considering his rights to relief in the following years. A

It has also been faintly suggested that a ratepayer can in any event claim relief only by way of appeal to quarter sessions or by contesting the rating authority's application for a distress warrant which would follow a refusal to pay. There does not seem to me to be anything in this suggestion. I can see no reason why proceedings in this Division or in the Chancery Division should not be instituted for a declaration. Indeed, *Berry v. St. Marglebone Corpn.* (1) ([1957] 3 All E.R. 677), and *General Nursing Council for England and Wales v. St. Marglebone Corpn.* (2) ([1957] 3 All E.R. 685), are examples of actions for a declaration in similar circumstances. It was not suggested in either case that the action was not maintainable. I therefore come to the conclusion that the court has jurisdiction to entertain this action and that if the society is an organisation within the meaning of s. 8 (1) of the Act of 1955, a declaration to that effect would entitle it to obtain relief for the years following the year ending Mar. 31, 1956. B C

The real question in this case turns on whether the hereditaments in question are occupied for the purpose of an organisation which is not established or conducted for profit and whose main objects are charitable or otherwise concerned with the advancement of social welfare within the meaning of s. 8 (1) (a) of the Act of 1955. It is conceded that the society is an organisation which is not established or conducted for profit. Counsel for the plaintiffs contends first that the main object of the society is charitable. It is now generally accepted that, for the object of an organisation to be charitable, the object must confer a public benefit except only where the object is to relieve poverty. Here the object is the relief of sickness and infirmity. Although counsel for the plaintiffs has kept the point open, he virtually concedes that this court cannot depart from the generally accepted view. He argues, however, that the object of the society confers a public benefit. In considering a similar point in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3) ([1951] 1 All E.R. 31 at p. 34), LORD SIMONDS said: D E F

"The difficulty arises where [the object] is . . . for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a 'section of the community' as to satisfy the test of public benefit. These words 'section of the community' . . . indicate (i) that the . . . beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual . . . A group of persons may be numerous, but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes." H

In the present case the beneficiaries are certainly not numerically negligible. There is, however, in my judgment the closest nexus between the beneficiaries and the society since de minimis they are all members of it. This is apparent from the evidence and the rules to which I will presently refer. Moreover, the object of the members of the society is not to do good to others but to themselves. This object is not altruistic and is in my judgment not charitable. I

Counsel for the plaintiffs contends secondly that the main object of the society if not charitable is at any rate "otherwise concerned with the advancement of . . . social welfare". This raises a familiar and usually perplexing problem. The society is an unincorporated society registered under the Friendly Societies Acts, 1896 to 1948. [His LORDSHIP then referred to the relevant rules of the society (see p. 762, ante) and continued:] There are today about 400,000 members of the society, all of whom except about 2,000 are industrial members.

- A The Manor House Hospital is a large well-equipped hospital fully staffed for treating almost every type of surgical or medical case. The patients at the hospital are all members of the society, except only a very few accepted as emergency cases. The main object of the society as the rules make plain is to afford its members (who are the society) free medical services and maintenance at the Manor House Hospital in return for their subscriptions. This object seems
- B to me to be concerned primarily with self-help and the private interests of the society's own subscribing members rather than social welfare. I have no doubt that the hospital itself makes a notable contribution to social welfare. In my judgment the main object of the society, however laudable, is not social welfare notwithstanding that social welfare is a by-product of its activities. Although there are differences on the facts, this case in my judgment is indistinguishable
- C in principle from *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (4) ([1958] 2 All E.R. 601). No precise definition has ever been attempted of the words "otherwise concerned with the advancement of social welfare" nor perhaps is any such definition possible. I shall certainly attempt none. The cases, however, seem to support the view that the main object of the organisation in question must be characterised by altruism inasmuch as the words in the statute connote doing good for others rather than for oneself; see for example *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (4) and *Independent Order of Odd Fellows Manchester Unity Friendly Society v. Manchester Corpn.* (5) ([1958] 3 All E.R. 378). Counsel for the plaintiffs contends that although this may have been the correct view before the decision of the House of Lords in *Skegness U.D.C. v. Derbyshire Miners' Welfare Committee* (6) (ante p. 258), that
- D view can no longer prevail. He relies on a passage in the speech of VISCOUNT SIMONDS (ibid., at p. 263) with which LORD MORTON OF HENRYTON, LORD REID and LORD KEITH OF AVONHOLM agreed and from which LORD DENNING did not dissent. This passage reads as follows:
- E

"They urge that a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors, and that that element is absent in the present case. Next, they say, that, just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as 'otherwise concerned with the advancement of social welfare' unless it, too, has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived."

- F
- G It may be that VISCOUNT SIMONDS meant no more than that it is unnecessary for the donors of the funds which support the organisation to be actuated by benevolence so long as the main object of the organisation and the purpose for which the money is devoted has an altruistic character. If that is so, the fact on which counsel for the plaintiffs relies strongly, namely that this society is partly supported by donations from benevolent outside sources, is irrelevant.
- H In *Skegness U.D.C. v. Derbyshire Miners' Welfare Committee* (6) a holiday centre was provided and maintained by a statutory levy and by contributions from the National Coal Board and those who made use of the holiday centre. Accordingly the money did not come from donors actuated by benevolence. The precise composition of the organisation which occupied the holiday centre was never ascertained. It was, however, clear that whatever the organisation's composition
- I might be, its object was not to benefit itself but to benefit Derbyshire miners generally. Accordingly the object of the organisation may be said to have been characterised by altruism and the money used for a benevolent purpose. If the House of Lords in *Skegness U.D.C. v. Derbyshire Miners' Welfare Committee* (6) intended to disapprove or question the dicta or indeed the ratio decidendi of the opinions of LORD MACDERMOTT and LORD DENNING in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (4) ([1958] 2 All E.R. 601), it is perhaps strange that it did not expressly do so. However this may be, I find it impossible

on the facts of this case to hold that the main object of this society is concerned with the advancement of social welfare. The main object of the members of the society, who are the society, is to benefit themselves. There will accordingly be judgment for the defendants.

Judgment for the defendants, the rating authority.

Solicitors: *Pattinson & Brewer* (for the plaintiffs); *R. H. Williams* (for the defendants, the rating authority).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

BAMPTON v. BAMPTON.

COURT OF APPEAL (Hodson, Sellers and Harman, L.J.J.), June 22, 23, 24, 1959.]
Divorce—Sodomy—Consent—Condonation—Whether bars to relief—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4.

Consent and condonation are both absolute bars to the grant of a decree of divorce on the ground of sodomy.

Statham v. Statham ([1928] All E.R. Rep. 219) considered and followed.

Per HODSON, L.J.: it is not readily to be taken against a wife, especially a young wife, that there has been a real consent. If the same acts were under consideration between two persons not . . . husband and wife . . . the presence or absence of consent would have to be considered in a different way (see p. 767, letter D, post).

[Editorial Note. So far as the proposition stated above relates to condonation, the authority is the decision in *Statham v. Statham*, supra, as explained in this case. HARMAN, L.J., states that condonation is a bar (see p. 772, letter D, post), but HODSON, L.J., expressly treats his observations on condonation as not being the ground of his decision (see p. 770, letter I, post).

As to consent as a defence to a charge of adultery, see 12 HALSBRURY'S LAWS (3rd Edn.) 281, para. 544, as to condonation, see *ibid.*, 292, para. 576 and 302, para. 599; and for a case on the subject, see 27 DIGEST (Repl.) 294, 2394.]

Cases referred to:

(1) *C. v. C.*, (1905), 22 T.L.R. 26; 27 Digest (Repl.) 332, 2763.

(2) *Statham v. Statham*, [1928] All E.R. Rep. 219; [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 27 Digest (Repl.) 294, 2394.

(3) *Young v. Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 2nd Digest Supp.

Appeal.

A wife appealed against the dismissal by BARNARD, J., on Nov. 27, 1958, at Winchester, of her petition for divorce on the grounds of sodomy and cruelty. BARNARD, J., having found that the cruelty had not been proved and that the sodomy, though proved, had been consented to, held that consent was an absolute bar to relief on the ground of sodomy. The facts are stated in the judgment of HODSON, L.J.

John Thompson, Q.C., and *E. T. S. Read* for the wife.

T. G. Field-Fisher for the husband.

HODSON, L.J.: This is an appeal from a judgment of BARNARD, J., sitting at Winchester on Nov. 27, 1958, when he dismissed a petition for divorce presented by Mrs. Doris Eileen Bampton against her husband founded on

A sodomy and cruelty. The learned judge found that the cruelty was not proved, partly because he did not find that the wife's health had been injured, or that she was in reasonable apprehension of injury to health, but he also held in respect of the serious allegation of cruelty as opposed to sodomy, that the wife was a consenting party to some disgusting sexual perversions which had taken place between them, the husband using the wife's mouth. The sodomy charge was B dismissed on the ground that the wife had consented to the sodomy, and therefore was not entitled to relief. The husband by his pleading had denied the charges of sodomy and the charges of cruelty, and in the alternative had pleaded that his wife had condoned both by living with him until Sept. 10, 1957, when he left this country for Jamaica in the course of his service as a steward on board a merchant ship. By a supplemental petition, the wife referred to an incident C which took place on Feb. 11, 1958, when the parties met at Portsmouth and there were hard words between them, but that has no prominence in this case now.

The question which falls for decision (and it is the main ground of appeal) is whether the consent of the wife to the act of sodomy, as opposed to the cruelty, was a bar to her obtaining relief; and, if such consent is a bar, whether it is right to say that there was here a real consent. In considering the second ques- D tion, the relationship of husband and wife lies in the background. It should be recognised that the relationship of husband and wife being what it is, and the obligations of one to the other being what they are, it is not readily to be taken against a wife in a situation such as exists in this case, especially a young wife, that there has been a real consent. If the same acts were under consideration between two persons, not being husband and wife, where this relationship did E not exist, the presence or absence of consent would have to be considered in a different way.

First as to the facts. Was there a real consent? The learned judge held that, as to the act of sodomy, there was. The parties were married in the year 1953 when the wife was only nineteen years of age, and the husband was twenty-five; and the acts of sodomy which were proved took place from 1955 onwards, F beginning with an attempt made in April, 1955, before the birth of the younger child on June 6, 1955. That attempt was rejected and was successfully opposed by the wife; but, as the judge found, subsequently, during the next two years of the married life, there were attempts which were successful. In this connexion I should say that the wife was a witness who was obviously a straightforward witness, frank and simple in character, and moreover intelligent, able to appreciate the questions which were put to her, and fully alive to her obligations to her husband which she had taken on herself on marriage. She was by no means G anxious to bring this marriage to an end; she was very much in love with her husband, and was anxious to keep it in being not only for her own sake, but for that of her children. There were two children of the marriage, the one whom I have already mentioned, and one born in the same year as the marriage. The H husband's evidence, in so far as it was in conflict with that of the wife, was rejected by the learned judge; but in finding the sodomy proved, he was supported in his finding by an admission which the husband himself made that he may have penetrated the back passage of the wife on one occasion. Another witness, a friend of the parties, gave evidence that the husband made an admission to I him which supported the wife's case. The learned judge did not express himself as feeling wholly ready to rely on that: but there was that further corroborative evidence, and so the finding of sodomy has not been challenged in this court.

As to consent, I think that it is necessary to read what the wife said in her evidence about this. First, as to the attempt. She was asked to say when her husband first made the desire to enter her rectum apparent, and she answered:

"In 1955. . . . We were lying in bed, and I had my back to him, and he started messing around with himself on my buttocks, and he said he had

always fancied some of that. . . . I said, 'Well, you are not going to get it from me' . . . He then said something to the effect, 'Let me have a little try' . . . He continued to mess around with me. He was trying to insert his penis into my rectum."

She was asked if he succeeded, and she replied: "No, because I told him it was becoming too painful. He tried about six or seven times altogether" during the period 1955 to 1957. Then she said that he succeeded on about five occasions. She was asked:

"Q.—Did you object to that, or consent to it, or what? A.—I told him it was very painful, and that I wouldn't consent to it, but he was always so affectionate to me at those times. That was the only thing I enjoyed. He was always very affectionate with it and before and during the time he was working up to it. Q.—It may be said that you should have fought him off, or something of that kind. I think you agree you didn't fight him off? A.—I didn't fight, no. Q.—Tell my Lord why. A.—Well, because for one thing I was glad of the affection he was showing me, and he always bragged what other women did. I was worried if I might lose him if I didn't let him try."

She was then asked her age, and she said twenty-four, so that in 1955 she was just twenty-one, the husband being six years older. She was asked why she had not complained, and her answer was:

"Because I thought that was something I could handle myself . . . I thought that once I was sterilised, my husband would stop those things."

She had had a very difficult confinement on the birth of each of her children, and the danger of her having any further children was so great that it was thought right, with the consent of both the husband and the wife, that she should be sterilised, and that had been done in 1957. The last occasion when sodomy was committed, she said, was in August, 1957, which was the year that she left. She had sexual intercourse with her husband after the last occasion. It was on Sept. 10 that he actually went to sea, and she would not have anything more to do with him.

With regard to the question of consent, so far as ordinary sexual intercourse was concerned, it is clear that the wife was able, when she wished, to refuse the husband sexual intercourse because she said that sometimes, when he required sexual relations, she did refuse it. In another part of her evidence, in cross-examination—the cross-examination was not directed, of course, to the question of consent because the husband's case was that the sodomy had not been committed—she was asked to remember the particular occasion when she complained that he was hurting her, and she spoke of two different occasions and said:

"There was a time when he started in my rectum and I asked him to carry on in a normal fashion, which he did, and there was a time",

and then she refers to another occasion. That answer indicates that he did not continue in the act of sodomy, or attempt to commit the act of sodomy, when she asked him to do otherwise. In that state of the evidence, bearing in mind not only the relationship between husband and wife which I have mentioned, but also the fact that there were still other disgusting activities which took place between these two people which the wife, whether she disliked them or not, assented to over a period of time, I feel it impossible to find my-self in disagreement with the learned judge in holding that there was consent—and when I say consent, I mean a real consent. There was no question of consent being compelled by fraud or duress; there was no threat, nothing of that kind. There is nothing in the case, having regard particularly to the number of occasions when this act was successfully achieved, which enables me to form an opinion different from that which the learned judge, in my view, rightly formed, namely, that there was here the element of consent which would bar the wife's claim to relief.

- A So far as the law about consent is concerned, the submission made was (i) that consent in itself is no bar; and (ii) that there was here no real consent. As to the first submission, it was pointed out that in the statute (and, indeed, in all the statutes relating to this offence) there is no reference to consent. The history of the matter appears from the historical introduction in *RAYDEN ON DIVORCE* (7th Edn.), p. 4, that in the ecclesiastical courts divorce *a mensa et*
- B there could be granted on the ground of adultery, cruelty or unnatural offences, and sodomy would be an unnatural offence. When the matter came to be regulated by statute in 1857, divorce *a vinculo matrimonii* was for the first time made available, and the grounds* which were open to a wife were these, that the husband had been guilty of adultery coupled with such aggravated enormity as incest, bigamy, rape, sodomy, bestiality, cruelty or desertion without reasonable excuse
- C for two years or upwards. The word "sodomy" appears there between the words "rape" and "bestiality", which would not involve the relationship of husband and wife; and it may be that the legislature had in mind sodomy committed by the husband with a third party. But there were cases brought by wives on the ground of sodomy with themselves, as appears from a decision of *BARGRAVE DEANE, J.*, in *C. v. C.* (1) ([1905], 22 T.L.R. 26), where the point was
- D taken on behalf of the husband that sodomy with a wife was not a matrimonial offence under s. 27 of the Act of 1857, which included an offence with a third person; and the learned judge said that within his own knowledge "many decrees have been pronounced in similar cases".

- That statement of the law and interpretation of the statute has been accepted. It was accepted in *Statham v. Statham* (2) ([1928] All E.R. Rep. 219), with which
- E the attention of the court has been much engaged. In that case there was a charge of sodomy brought by the wife based on sodomy by the husband with herself, and she had succeeded in establishing that charge before a jury. The case went to appeal. It was argued by counsel for the wife here that although in that case the consent, or the presence of consent, was insisted on as being a bar to the relief claimed by at least two members of the court, those statements
- F were obiter. I cannot accept that view. I think that what happened in *Statham v. Statham* (2) was that the members of the court first considered the question whether the jury had been properly directed in regard to the necessity of corroboration. That question does not arise in this case. If that had been the only question, and the court had thought that there had been an insufficient direction, there would, I think, have been an order for a new trial. The members of the
- G Court of Appeal were, however, unanimously of the opinion that there should not be a new trial, and that the petition should be dismissed; and amongst their grounds for that view were three matters:—first, the want of corroboration, which, as I say, would probably not have been a ground for dismissing the petition, but was only relevant on the question of directing a new trial; secondly, the fact that the wife had consented; and thirdly, condonation. As to the second
- H point, the learned Master of the Rolls (*LORD HANWORTH*), perhaps because it was a jury case, did not say that the wife's evidence was conclusive on consent. He said ([1928] All E.R. Rep. at p. 221): "... there is, according to her own story, strong evidence of consent on the part of the wife". He used the same expression about condonation (*ibid.*, at p. 222); and, in considering the question whether there ought to be a new trial or whether the petition ought to be dis-
- I missed, he said (*ibid.*, at p. 223):

"In view, however, of the evidence of the consent of the wife to the act at the time, of the distance of time which separated the act alleged from any charge made in respect of it, the condonation over a long period of time, the doubt whether there is any sure evidence on which the revival of the charge can be established, the negation of the evidence of cruelty which was the pretext for separation, and the abundant opportunity afforded of collecting all

* These grounds were set out in s. 27 of the Matrimonial Causes Act, 1857.

the available and material evidence, I have come to the conclusion that it would not be right upon this evidence to send the case for a new trial . . .”

GREER, L.J., said (*ibid.*, at p. 224):

“ It seems to me impossible to say that where two people commit sodomy together, either of them is entitled to ask the court for a decree based on an act to which he or she was a party, and if the facts appear in the evidence, the judge . . . cannot shut his eyes to them.”

He then read some of the evidence which the wife gave in that case, and concluded with these words (*ibid.*):

“ This falls far short of showing that she did not understand that what she was consenting to was wrong. She must have known that it was wrong, improper, and unnatural, and she does not venture to say that she did not. There is no indication of any sort of duress exercised by the husband, and it is noteworthy that when he suggested doing it again, she maintained her refusal without difficulty. In my judgment, the learned judge ought to have dismissed the claim for divorce on the ground that the wife was a willing party to the act on which she founded her claim.”

The learned lord justice deals with the question of condonation and consent to some extent together, although no doubt he recognised that the question of consent would arise before or contemporaneously with the act charged, and condonation would arise subsequently. RUSSELL, L.J., in his judgment analysed the wife's evidence, which, he said ([1929] P. at p. 156), made it quite clear:

“ (1) that her husband explained to her quite plainly the exact physical act which he wished to do upon her; (2) that she assented and placed her body at his disposal for the purpose of that act being committed; (3) that no compulsion of any kind was brought to bear upon her; and (4) that the only reason given by her for refusing subsequent invitations to a similar act was fear of pain. It thus appears that the wife was a consenting party to the only act upon which a decree for divorce could be founded. It is immaterial whether or not she knew that the act to which she consented was called sodomy or that it was a crime. The act was accurately explained to her beforehand, she must have known that it was against nature, yet she consented of her free will to its commission. In these circumstances it is impossible for her to obtain a decree for divorce based solely upon an act of the husband to which she was a consenting party. The husband is entitled, in my opinion, to have the petition for divorce dismissed.”

Part of the ratio of *Statham v. Statham* (2), in so far as the question to be determined was whether the petition should be dismissed or whether there should be a new trial, was that the presence of consent was a bar to the wife claiming relief notwithstanding the fact that no words which carry the necessity of showing absence of consent appear in the statute, although it is otherwise where the offence of adultery appears, for the statute* provides that connivance (which is consent in advance) is a bar to relief on the ground of adultery. I think that unless this court could come to a different conclusion on the facts—which I do not think it can—it is bound by the decision of the Court of Appeal in *Statham v. Statham* (2) to support the learned judge's judgment, and to uphold his dismissal of the petition on that ground.

So far as condonation is concerned, it is not necessary for this court to express any opinion about it. As, however, the matter has been argued, I should mention what the point is in order that it may be understood that I for my part think that the question of condonation is also governed by the decision in *Statham v.*

* Matrimonial Causes Act, 1857, s. 31: see now Matrimonial Causes Act, 1950, s. 4 (2) (b).

- A *Statham* (2). It is said that, although the various Acts of Parliament* refer to condonation as a bar to relief where adultery and cruelty are concerned, the wording of the statute is such that the maxim "expressio unius est exclusio alterius" applies, and accordingly that condonation covers only those matters to which it was expressly directed, and does not apply to sodomy. In view of the decision in *Statham v. Statham* (2)—where again condonation was one of the grounds on which the court came to its conclusion that the petition should be dismissed—that argument is not open. I need not refer to the argument in great detail. Our attention was drawn to a change in the language of the statute since 1857*, repeated in the later statute in 1925*, which was the actual form of the statute under consideration in *Statham v. Statham* (2). There is an alteration in the Act of 1937* repeated in the consolidating Act of 1950*; but for reasons which I need not enter into, except to say that I have noted the change, it does not appear to me that that change in the language of the statute—the omission of the word "adultery" in the first paragraph—really enables the court to entertain the argument that the decision in *Statham v. Statham* (2) should be distinguished by reason of the change in language. This decision of the Court of Appeal cannot be treated as a decision given per incuriam, or in circumstances in which, within the principles of *Young v. Bristol Aeroplane Co., Ltd.* (3) ([1946] 1 All E.R. 98), the court can refuse to follow a decision of this court. The omission in the relevant statute under consideration of reference to condonation in connexion with sodomy was noticed expressly by GREER, L.J., ([1928] All E.R. Rep. at p. 223) who gave the second of the three judgments in *Statham v. Statham* (2), so there is no question of that point having been passed over per incuriam.
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There is no need to pursue the question of condonation further. It was argued, on the wife's behalf, that even if there were condonation, there were facts here—grave breaches of conjugal duty on the part of the husband to the wife—which would be sufficient to revive the offence of sodomy if she had established that offence. When the parties separated, the wife was complaining that, notwithstanding that she had had a minor operation and was suffering from the effects of the anaesthetic, the husband insisted on intercourse with her, and that on the night before his departure he went out with another woman, and told her a lie about it when he came back. But those matters were never investigated, and in any event it is not possible in this court to arrive at the truth about that. It is significant on the whole case that it was this fact that he had behaved in this callous way towards his wife at the end of their time together when she had this small operation, telling her about going out with another woman and lying to her about it, which was the thing that finally moved her to depart. That was the principal matter about which she was complaining in the letter which she wrote him after he went to sea, in which she said that she could not go back to him again. However, it is unnecessary for this court to express an opinion about those matters. Her letter shows quite clearly, no doubt, that he told her this lie about going out with this other woman, saying that in fact he had been out with another man; he lied to her, and he does not dispute it, but he does not admit adultery. Whatever proceedings may be open to the wife in the future, I think that this petition was rightly dismissed, and I would dismiss the appeal.

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- I **SELLERS, L.J.:** I agree. For the reasons given by my Lord I am of the same opinion that *Statham v. Statham* (2) ([1928] All E.R. Rep. 219) is an authority of this court which is binding on us in the matters which have been under review here. Its finding that consent to an act of sodomy prevents a wife relying on it as a matrimonial offence, and also its finding on the question of condonation, were matters which were not obiter but were the heart of that decision, particu-

* See Matrimonial Causes Act, 1857, s. 31; Supreme Court of Judicature (Consolidation) Act, 1925, s. 178; Matrimonial Causes Act, 1937, s. 4; Matrimonial Causes Act, 1950, s. 4.

larly in respect of the consideration and decision by all the members of the court whether there should be a new trial or not. If *Statham v. Statham* (2) is, as I believe it to be, binding on this court in these matters it was binding on the learned judge. As I read his judgment, he applied it properly. Notwithstanding the argument which has been addressed to us by counsel for the appellant wife, I can find no ground for legitimate criticism of the way in which the learned judge dealt with the facts.

One of the strong points which counsel for the wife advanced at several stages in the argument was that the motives of the wife were motives which might well affect a wife who felt a duty and obligation towards her husband, and a desire to retain him on some sort of matrimonial basis and to make the marriage work. Whether it be the right view to take or not that the motives might be said to be excusable or understandable, what they do clearly establish is that, for reasons which the wife thought good, she did eventually consent to not one but several acts of this type of intercourse which is the very basis of her claim. I think that the facts completely negative, and indeed there is no suggestion of, any force or threat.

HARMAN, L.J.: I see no way out of the position already stated by my Lords that as long as the decision in *Statham v. Statham* (2) ([1928] All E.R. Rep. 219) stands, as it does, consent and condonation are bars to a decree of divorce on the ground of sodomy. The evidence of consent here seems to me a great deal stronger than it was in *Statham v. Statham* (2); and, if that be so, for this court it is an end of the matter whatever one might think if the question were res integra. In that event I think that it might be at least a tenable argument that, as the Matrimonial Causes Act, 1950 and its predecessors say nothing about consent or condonation in this particular connexion, they should be no bar. It may well be that the whole difficulty arises out of a misreading of the Act of 1857 and of its successors, and that sodomy in the context in which it appears means sodomy with a third party, sodomy with the wife being left among acts of cruelty which can, of course, be condoned. If one is bound after so long a time to hold that sodomy on the body of the wife herself is a separate act justifying divorce, then I think that the bars of condonation and consent are judge-made additions. For when one looks at s. 4 of the Act of 1950, I cannot but think that condonation is expressly left out as a bar to this particular cause of action.

These, however, are mere speculations. We must stand by *Statham v. Statham* (2), and that is conclusive in this case.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: Booth & Blackwell, agents for Brutton, Birkett & Walsh, Portsmouth (for the wife); Amphlett & Co., agents for Donnelly & Elliott, Gosport (for the husband).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A

ADDIS v. CROCKER AND OTHERS.

[QUEEN'S BENCH DIVISION (Gorman, J.), July 8, 9, 13, 1959.]

*Libel—Privilege—Absolute privilege—Whether proceedings before disciplinary committee set up by Solicitors Act, 1957, are absolutely privileged.*B *Solicitors—Discipline—Disciplinary committee—Privilege against liability for defamation—Solicitors Act, 1957 (5 & 6 Eliz. 2 c. 27), s. 46.*

For the purposes of privilege against liability for defamation in respect of statements made on a privileged occasion, proceedings before the disciplinary committee constituted under s. 46 of the Solicitors Act, 1957, are judicial in character, and the privilege attaching to the publication of the findings and order of the committee is absolute privilege.

C

Principles laid down by LORD ESHER, M.R., in *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* ([1892] 1 Q.B. at p. 442) applied.

[As to the tribunals and proceedings to which absolute privilege extends, see 24 HALSBURY'S LAWS (3rd Edn.) 49-52, paras. 90, 91; and for cases on the subject, see 32 DIGEST 102-109, 1328-1413.]

D For the Solicitors Act, 1957, s. 46, see 37 HALSBURY'S STATUTES (2nd Edn.) 1090.]

Cases referred to:

- (1) *Munster v. Lamb*, (1883), 11 Q.B.D. 588; 52 L.J.Q.B. 726; 49 L.T. 252; 47 J.P. 805; 32 Digest 105, 1368.
- E (2) *Scott v. Stansfield*, (1868), L.R. 3 Exch. 220; 37 L.J.Ex. 155; 18 L.T. 572; 32 J.P. 423; 32 Digest 104, 1352.
- (3) *Royal Aquarium & Summer & Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 32 Digest 128, 1592.
- (4) *Lilley v. Roney*, (1892), 61 L.J.Q.B. 727; 32 Digest 109, 1406.
- F (5) *Barratt v. Kearns*, [1905] 1 K.B. 504; 74 L.J.K.B. 518; 92 L.T. 255; 32 Digest 104, 1346.
- (6) *Copartnership Farms v. Harvey-Smith*, [1918] 2 K.B. 405; 88 L.J.K.B. 472; 118 L.T. 541; 32 Digest 104, 1347.
- (7) *Gerhold v. Baker*, [1918] W.N. 368; 35 T.L.R. 102; 82 J.P.Jo. 549; 32 Digest 121, 1526.
- G (8) *O'Connor v. Waldron*, [1934] All E.R. Rep. 281; [1935] A.C. 76; 104 L.J.P.C. 21; 152 L.T. 289; Digest Supp.
- (9) *Proprietary Articles Trade Assn. v. A.-G. for Canada*, [1931] All E.R. Rep. 277; [1931] A.C. 310; 100 L.J.P.C. 84; 144 L.T. 577; Digest Supp.
- (10) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- H (11) *Abbott v. Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp.
- (12) *Seaman v. Netherclift*, (1876), 2 C.P.D. 53; 46 L.J.Q.B. 128; 35 L.T. 784; 41 J.P. 389; 32 Digest 106, 1374.
- (13) *Allardice & Boswell v. Robertson*, (1830), 1 Dow & Cl. 495; 6 E.R. 610; 32 Digest 104, 1349.
- I (14) *Albutt v. General Council of Medical Education & Registration*, (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 34 Digest 544, 28.

Preliminary point of law.

By a writ issued on Jan. 6, 1959, the plaintiff, Jasper Jocelyn John Addis, inquiry agent, claimed damages for libel contained in a document headed Findings and Orders, No. 2627-1958, dated Aug. 14, 1958, signed by Sir William Charles Crocker, which the plaintiff alleged was falsely and maliciously published

by Sir William Charles Crocker, the first defendant, with the knowledge, consent and agreement of the second and third defendants, Sir William Charles Norton and Sir Leslie Peppatt. The defendants were solicitors and were members of the council of the Law Society. Further, at all material times the defendants were properly appointed members of the disciplinary committee (referred to hereinafter as "the committee") set up by the Master of the Rolls under s. 46 (1) of the Solicitors Act, 1957. By his statement of claim the plaintiff alleged that on May 23, 1958, an application in writing, numbered 2627-1958, was made to the committee on behalf of the Law Society, asking that one Leslie Granville Jones, a solicitor, should be required to answer allegations of professional misconduct which were set out in the application: that on June 12, 1958, the committee met to hear this application and that the plaintiff applied to give evidence before the committee regarding allegations in the application which referred to the plaintiff, but his request was refused; that on Aug. 14, 1958, the defendants as members of the committee published their findings and orders relating to the above application (these being the findings and orders complained of by the plaintiff). By para. 6 of the defence, the defendants pleaded that the publication of the findings and orders was made by them as members of the committee under the provisions of s. 46 to s. 49 of the Solicitors Act, 1957, and under the Solicitors (Disciplinary Proceedings) Rules, 1957, and that the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions and was therefore absolutely privileged. Alternatively, the defendants pleaded (by para. 7) that the publication was protected by qualified privilege. By his reply, the plaintiff denied that there was absolute privilege and, in answer to the plea of qualified privilege, alleged malice against the defendants. An application was made by the defendants, under R.S.C., Ord. 25, r. 4, to strike out the statement of claim and on Feb. 6, 1959, Master JACOB ordered that the statement of claim be struck out on the grounds that it disclosed no reasonable cause of action and that the action was frivolous and vexatious. On appeal to the judge in chambers (DEVLIN, J.), this order was reversed on Mar. 23, 1959, and by a subsequent order of Master JACOB, dated May 11, 1959, it was ordered that the question whether the publication complained of was absolutely privileged and was made under and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, should be set down for hearing before the trial of the action.

The constitution of the disciplinary committee is laid down in s. 46 of the Solicitors Act, 1957, which provides:

"(1) The Master of the Rolls shall appoint from among members of the council [of the Law Society] and such former members of the council as are practising as solicitors in England a disciplinary committee consisting of such number of persons, not being less than three nor more than nine, as he may from time to time think fit, and may from time to time remove any member from, or fill any vacancy in, or, subject to the limits aforesaid, increase the number of the members of, that committee.

"(3) The quorum of the disciplinary committee or a division thereof shall for all purposes be three: Provided that the decision of the committee or division on an application or complaint may be announced by a single member thereof."

By s. 46 (4), the disciplinary committee, with the concurrence of the Master of the Rolls, may make rules regulating the making, hearing and determination of applications or complaints, and sub-s. (5) deals with various provisions which may be made in the rules. Subsection (6) of s. 46 provides that the committee may administer oaths and that the applicant or complainant and any person with respect to whom the application or complaint is made, may issue writs of subpoena ad testificandum and duces tecum. Section 47 is concerned with jurisdiction and powers of the committee and provides that on the hearing of

A any application or complaint the committee shall have power to make any order which they think fit, and in particular, they may order the name of the solicitor to whom the application relates to be struck off the roll; may suspend the solicitor from practice; may impose a penalty not exceeding £500, and may order the payment of costs by any party. Section 48 relates to appeals to the High Court against the committee's order. Section 49 makes additional provisions regarding orders of the committee and provides that every order shall be prefaced by a statement of the findings of the facts of the case and shall be signed by the chairman of the committee or some other authorised member. Section 50 is concerned with the jurisdiction of the Supreme Court over solicitors. In exercise of the powers conferred by s. 46 (4) of the Act of 1957, the Solicitors (Disciplinary Proceedings) Rules, 1957 (S.I. 1957 No. 2240), were made. These rules came into force on Dec. 31, 1957, and applied to the proceedings of the committee which were under consideration. By r. 21 of the rules it is provided that: "The committee shall hear all applications in private, but shall pronounce their findings and orders in public".

The plaintiff appeared in person.

T. G. Roche, Q.C., and H. P. J. Milmo for the defendants.

D GORMAN, J., having referred to the pleadings and to the master's order for the hearing of the preliminary question of law (see p. 774, letter F, ante), pointed out that it was wrong to refer to the disciplinary committee as the Law Society or as a committee of the Law Society, for the committee was a body constituted under the Solicitors Act, 1957. His LORDSHIP then referred to the provisions of the Act of 1957 relating to the constitution, jurisdiction and powers of the committee, and to the Solicitors (Disciplinary Proceedings) Rules, 1957. His LORDSHIP continued: It is the plaintiff's case that the findings and orders of the committee which were so published libelled him. On the matter with which I am concerned the plaintiff says that the defence of absolute privilege does not apply, and, further, denies that the publication was made under the provisions and in accordance with the authority of the Solicitors Act, 1957, and the rules made thereunder.

F Leading counsel for the defendants, at the opening of this case, quite properly accepted the position that the onus was on him. It is necessary to refer to some of the authorities which counsel for the defendants and the plaintiff have brought to my notice, but I want to make it clear that I do not propose to deal with all the submissions made on all these cases; I have the cases fully in my mind and it must not be taken that I am considering certain passages only in them.

G The first case to which I was referred was *Munster v. Lamb* (1) ((1883), 11 Q.B.D. 588). This case is of importance as stating, somewhat historically, what is meant by "privilege". I want to refer to two paragraphs, the first of which H (*ibid.*, at p. 601), is where BRETT, M.R., said:

"There have been decisions with regard to three of these classes, namely, judges, parties, and witnesses, and it has been held that whatever they may have said in the course of an inquiry as to the administration of the law, has been said upon a privileged occasion, and that they are not liable to any action for libel or slander."

I Then the Master of the Rolls, referring to *Scott v. Stansfield* (2) ((1868), L.R. 3 Exch. 220) said (11 Q.B.D. at p. 603) that it had been

"... held that all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously and without reasonable or probable cause. The ground of the decision was that the privilege existed for the public benefit: of course it is not for the public benefit that persons should be

slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty."

There are other passages in the case to a like effect.

[His Lordship then referred to the fact that the plaintiff was appearing in person and that expressions had been used seeming to impute bad faith on the part of the defendants. His Lordship found no evidence of bad faith by the defendants as members of the committee. His Lordship continued:]

The next case to which I refer is *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* (3) ([1892] 1 Q.B. 431) which is a very important case. The headnote reads:

"A meeting of the London County Council for granting music and dancing licences . . . is not a court within the meaning of the rule by which defamatory statements made in the course of proceedings before a court are absolutely privileged . . ."

In the course of that case, the principles governing the position of courts or tribunals which are concerned with matters of the kind with which I am now concerned were set out, and Lord Esher, M.R., said ([1892] 1 Q.B. at p. 442):

"It was argued, in the first place, on behalf of the defendant, that he was exercising a judicial function when he spoke the words complained of, and therefore was entitled to absolute immunity in respect of anything he said. It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. In the case of *Dunkins v. Lord Rokeby** the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act."

That statement by Lord Esher, M.R., is, of course, of the first importance in considering this case. Fry, L.J., made certain other observations and Lopes, L.J., dealt with the question of absolute privilege when he said ([1892] 1 Q.B. at p. 451):

"The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse . . ."

Returning to the present case, very much of the plaintiff's argument has been directed to the thesis that it is quite absurd to say that the test laid down by Lord Esher, M.R., applies in a case of this kind. To summarise his argument, he said that the committee has not similar attributes to a court of justice, nor

* (1873), L.R.8 Q.B. 255; *affd.* (1875), L.R. 7 H.L. 744.

A can it be said that the committee acted in a manner similar to that in which such courts act: the plaintiff contests the position by saying that, accepting what is laid down by LORD ESHER, M.R., in *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* (3), the facts in this case are that the powers of this committee and the manner in which it is set up make the committee quite different from a court of justice, and it would be wrong to apply to the committee

B the protection of absolute privilege.

The next case was *Lilley v. Roney* (4) ([1892], 61 L.J.Q.B. 727). This was a case under the Solicitors Act, 1888, under which the power of the committee was different* from the power in the present case.

Next I was referred to *Barratt v. Kearns* (5) ([1905] 1 K.B. 504), the headnote of which reads:

C "A commission, issued by the bishop of a diocese under the Pluralities Act, 1838, and the Pluralities Acts Amendment Act, 1885, to inquire into the inadequate performance of the ecclesiastical duties of any benefice, creates a judicial tribunal, and the occasion on which a witness gives evidence before the commissioners is absolutely privileged, and no action is maintainable in respect of evidence so given."

D COLLINS, M.R., cited with approval (*ibid.*, at p. 510) what LORD ESHER, M.R., said in *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* (3) ([1892] 1 Q.B. at p. 442), to which I have already referred. In view of what has been said to me by the plaintiff, there is one further matter in this case to which I will refer. In the speech of COZENS-HARDY, L.J. ([1905] 1 K.B. at p. 511),

E he dealt with the position that the evidence before the commissioners was not given on oath.

Another case of interest and some little importance was *Copartnership Farms v. Harcey-Smith* (6) ([1918] 2 K.B. 405). This was a case decided by SANKEY, J. The headnote reads:

F "The local military tribunal constituted under the Military Service Acts, 1916, and the Military Service Regulations (Amendment) Order, 1916, and the regulations annexed thereto is a judicial body, and defamatory statements made by a member in the course of proceedings before it are absolutely privileged."

SANKEY, J., said ([1918] 2 K.B. at p. 408):

G "A number of cases have been cited, but in my opinion there cannot be any controversy upon the principle of law which is applicable to the present case. The principle I conceive to be this, that where a tribunal is a court of justice, or a body acting in a manner similar to that in which a court of justice acts, any statement made by a member thereof is absolutely privileged and no action can be brought thereon."

H Then he approached the question in a different manner by putting to himself this question (*ibid.*, at p. 409):

"The question which I have to decide is, therefore, under which category does this local tribunal fall? Does it come within that which I may describe shortly as a judicial tribunal, or does it come within a merely administrative tribunal?"

I What the plaintiff has urged before me in this case is that the disciplinary committee is a purely domestic tribunal exercising administrative functions amongst

* The intention of the reform introduced by the Solicitors Act, 1919 (9 & 10 Geo. 5 c. 56), establishing the disciplinary jurisdiction of the committee was to make solicitors as far as possible masters in their own house (see per LORD HEWART, C.J., in *Re A Solicitor* ([1928], 72 Sol. Jo. 368, 369). Formerly the committee had the preliminary investigation of an application to strike the name of a solicitor off the roll and reported thereon, in the case of adverse applications, to the High Court (see CORDERY ON SOLICITORS, 4th Edn., 223).

the profession of solicitors, and that to say that it is a judicial tribunal is wrong. A
 SANKEY, J., dealt with the matter in *Co-partnership Farms v. Harvey-Smith* (6) by
 referring to three considerations. He turned to the regulations to consider the con-
 stitution, the functions, and the procedure of the tribunal: and in the course of
 his judgment he directed his mind for a consideration of the true nature of the
 tribunal in question to those three considerations; and, having dealt with those, B
 he came to the view, as appears from the report, that the tribunal was in fact
 a judicial body and the proceedings were absolutely privileged. That case was
 considered in a later case, *Gerbold v. Baker* (7) ([1918] W.N. 368) in the Court
 of Appeal, and the paragraph to which I refer is where BANKES, L.J., (*ibid.*,
 at p. 369) said that the contention in that case, that the occasion was absolutely
 privileged, was not well founded, and then went on to say that, "... the law was
 well established, and was accurately stated by SANKEY, J., in *Co-partnership Farms* C
v. Harvey-Smith (6) ([1918] 2 K.B. at p. 408)"; he cited with approval the
 judgment of SANKEY, J.

The next case was *O'Connor v. Waldron* (8) ([1935] A.C. 76). This was a
 case before the Privy Council. It concerned an inquiry held under the Combines
 Investigation Act, which was held by the Privy Council not to be an absolutely
 privileged occasion. LORD ATKIN quotes (*ibid.*, at p. 81) with approval LORD D
 ESHER, M.R., in the *Royal Aquarium* case (3), and says:

"In their Lordships' opinion the law on the subject was accurately
 stated by LORD ESHER, M.R., in *Royal Aquarium & Summer & Winter Garden*
Society v. Parkinson (3) ([1892] 1 Q.B. at p. 442) where he says that the
 privilege 'applies wherever there is an authorized inquiry which, though not
 before a court of justice, is before a tribunal which has similar attributes ... E
 This doctrine has never been extended further than to courts of justice and
 tribunals acting in a manner similar to that in which such courts act'."

LORD ATKIN referred to an earlier case of *Proprietary Articles Trade Assn. v.*
A.G. for Canada (9) ([1931] A.C. 310), and said ([1935] A.C. at p. 82):

"... it seems clear from the judgment that they came to the conclusion F
 that the sections dealing with the investigations by commissioners and others
 were merely administrative machinery for inquiring whether offences had
 been committed."

Based on those authorities, it was the submission of the defendants that
 the disciplinary committee was not an administrative tribunal; that this was an
 authorised inquiry which was by nature a judicial inquiry; that, as such, G
 the committee was not merely performing administrative functions, and that
 it was right that the findings of the committee should be subject to absolute
 privilege. I do not intend to go through all the references made by counsel for the
 defendants to the various sections of the Solicitors Act, 1957, and to the rules; I
 have them in my mind. Having regard particularly to the fact that the plaintiff
 conducted his case alone, I shall quite shortly set out his submissions on the H
 sections of the Act of 1957 and the various rules which were made under the Act.

[The following were the submissions made by the plaintiff. While accepting
 that the principles to be applied were those laid down in the authorities to which
 the court had referred, the plaintiff submitted that to come within those principles
 the committee must be a tribunal which was equivalent to a court of law, that
 is, a tribunal which acted in a manner similar to a court of law and which had I
 similar attributes to those of a court of law. On consideration of the matters
 dealt with by the authorities, the committee was not a tribunal to which the
 protection of absolute privilege should attach. In particular, by r. 21 of the
 Solicitors (Disciplinary Proceedings) Rules, 1957, the committee must hear all
 application in private. In judicial tribunals the judge was independent and took
 an oath; but the members of the committee were not independent of the Law
 Society, nor did they take an oath. The test whether the proceedings were

- A judicial was the rule which forbade tribunals to have self-interest, but the committee, as solicitors, had an interest in the proceedings before them. In view of the Supreme Court's jurisdiction over solicitors, proceedings before the committee should be treated as administrative proceedings. The plaintiff referred to *Leeson v. General Council of Medical Education & Registration* (10) ((1889), 43 Ch.D. 366) and *Abbott v. Sullivan* (11) ([1952] 1 All E.R. 226). He said that
- B it was a fundamental principle of justice that a person should be allowed to reply to allegations, but that his application to give evidence before the committee was refused. He commented on the fact that the committee had no power to issue a writ of subpoena, and referred to r. 27, r. 29, r. 30, r. 31 and r. 34 which latter rule expressly applied the Evidence Act, 1938, and the Evidence and Powers of Attorney Act, 1940, to proceedings before the committee. He contended that, in substance, the committee was a domestic, disciplinary court, similar
- C to that of a club, and that the word "court" was nowhere used to refer to the committee. He relied on *Seaman v. Netherclift* (12) ((1876), 2 C.P.D. 53 at p. 58) but His LORDSHIP would say no more about that case because it was discussed in a later case* where it was said that *Allardice & Boswell v. Robertson* (13) ((1830), 1 Dow & Cl. 495), the case referred to in *Seaman v. Netherclift* (12)
- D (2 C.P.D. at p. 58), never was the law of this country. The plaintiff also referred to *Albutt v. General Council of Medical Education & Registration* (14) ((1889), 23 Q.B.D. 400).

Summarising his case, the plaintiff contended that, at the highest, the committee was an administrative tribunal, administering in private discipline to solicitors, with powers which were limited to imposing fines, striking off, or

E suspending, solicitors from the roll; the committee had no power to imprison. HIS LORDSHIP continued:]

- I do not propose to go through the plaintiff's other submissions; I have them all in my mind. Those to which I have referred are the main submissions. All the matters dealt with by the plaintiff were referred to by counsel for the defendants in his reply, and I have had the benefit of a very full argument on both sides.
- F Bearing in mind the fact that the onus is on the defendants, I have to decide which of these contentions is right. I have no doubt at all, having thought over the matter carefully, and having considered the authorities and the submissions, that the submissions made to me by the defendants are right. The publication of the words complained of in para. 5 of the statement of claim was absolutely
- G privileged, and the publication was made under the provisions and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957.

Judgment for the defendants.

Solicitors: *Charles Russell & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* *Law v. Llewellyn*, [1906] 1 K.B. 487 at p. 491.

NOTE.

Re INCORPORATED NATIONAL ASSOCIATION OF BRITISH AND IRISH MILLERS, LTD.'S SCHEME.

[RESTRICTIVE PRACTICES COURT (Upjohn, J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), May 26, 1959.]

Restrictive Trade Practices—Default of appearance—Representation order—Certain members of Association refusing to be represented or to take part in the proceedings—Undertaking by consent from members represented and appearing—Whether registrar entitled to injunction against dissenting members—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 20 (3) (a), (b)—Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), r. 23.

[For the Restrictive Trade Practices Act, 1956, s. 20, see 36 HALSBURY'S STATUTES (2nd Edn.) 952.]

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a)*, the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court the Scheme for Deferred Rebates sponsored by the Incorporated National Association of British and Irish Millers, Ltd., which was a formal agreement inter partes, whereby those who dealt with the members of the Association were given aggregate deferred rebates irrespective of the member from whom the purchases making up the aggregate had been made. On Dec. 12, 1957, a representation order was made under the Restrictive Practices Court Rules, 1957, r. 11† ordering that all the parties to the agreement who either consented to the representation order or did not dissent, but with the exception of six members who refused, should be represented in the proceedings by the Association. The notice of reference and notice of the hearing were properly served on the six dissenting members but they did not enter appearances and they were not before the court at the hearing of the reference, when the registrar asked the court to make an agreed order that, the Association admitting that the scheme contained restrictions within the meaning of s. 6 (1) of the Act of 1956, and that they had not offered any evidence in justification of them, the court declared the restrictions to be contrary to the public interest. But, in view of the undertaking given by the Association not to revive the scheme nor to introduce another scheme without giving twenty-eight days' notice to the registrar, the registrar did not ask for an order pursuant to s. 20 (3) (a) and (b) of the Act of 1956*.

* Section 20, so far as relevant, provides: “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8) of this Act) are contrary to the public interest.

“(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar; . . .

“(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and without prejudice to the foregoing provision the court may, upon the application of the registrar, make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect.”

† Rule 11, so far as relevant, provides: “Where a numerous class of persons have a common interest in the proceedings by reason that they are all parties to the same agreement . . . the court may . . . make an order . . . that the class, or any members thereof, shall be represented by such representative respondents as the court may direct . . .”

A *Arthur Bagnall* for the registrar.

H. A. P. Fisher for the Incorporated National Association of British and Irish Millers, Ltd.

B *Arthur Bagnall*: Rule 23 of the Restrictive Practices Court Rules, 1957*, is the only rule which appears to have any application, and it would have been open to the registrar to have applied under that rule at any time to obtain an order debarring the six dissentient members from taking any further part in the proceedings. It would be open to the registrar now to ask the court for an order under s. 20 (3) of the Act. From a practical point of view, unless the Association and their agents operate the deferred rebate scheme, that scheme cannot operate no matter how much the six dissentient members would wish it to operate. The sole reason for this application is that the registrar does not wish it to be thought that a respondent in this type of case who refuses to be represented by his Association and takes no action and does not appear is going to find himself in a better position when the matter comes on for trial than those respondents who have agreed to be represented.

D **UPJOHN, J.:** I think that the registrar is entitled to a general order against the six dissentients. The question is whether, having regard to the practical aspect of this case, he is entitled to an immediate injunction against them or merely liberty to apply for an injunction.

E *Arthur Bagnall*: The part of the general order declaring the deferred rebate scheme to be contrary to the public interest presents no difficulty, since it is not made by consent and the six dissentients have been properly served with the proceedings. A general liberty to apply for an injunction would include liberty to apply against all the parties to the agreement. But as the undertaking has been worked out as a matter of convenience and practice between the parties, there might be difficulty in having both an injunction and an undertaking in the order and an injunction precisely in its terms might not be authorised by s. 20 (3) of the Act.

F **UPJOHN, J.:** The registrar is plainly entitled to a declaration, in a form which binds the dissenting companies, that the restriction is contrary to the public interest. The order should distinguish them from the other respondents. It might do so by defining the represented respondents and reciting the admission that they make and by saying as against the other six respondents, the dissenting companies, "and it appearing"—not using the word "admitting"—"that
G the agreement contains restrictions" and that the six respondents, naming them, "not having entered appearance", declare that the restrictions are contrary to the public interest. Then there will be general liberty to apply.

Order accordingly.

Solicitors: *Treasury Solicitor; Coward, Chance & Co.* (for the Incorporated National Association of British and Irish Millers, Ltd.).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

* Rule 23 provides: "If a respondent fails to deliver a statement of his case or to comply with any order of the court within the time limited for doing so, the court may, on the application of the registrar, direct that the respondent be debarred from taking any further part in the proceedings . . . or make such other order as the court may think just".

Re SHUTER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Slade and Davies, JJ.), July 7, 1959.]

Extradition—Fugitive offender—Evidence of local law—Remission of case—Whether offence punishable by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment—Inherent jurisdiction of Divisional Court to remit case for further evidence—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 9.

In cases under the Fugitive Offenders Act, 1881, to show cause why an alleged offender should not be returned out of England, there should be a settled practice that an expert on the local law should give evidence that the offences came within s. 9 of the Act; this evidence may be either in the form of deposition which comes to England with the warrant, or by giving evidence before the magistrate in England (see p. 785, letter D, post).

The applicant was detained in prison pursuant to a committal order made under the Fugitive Offenders Act, 1881, by the chief metropolitan magistrate, before whom the applicant was brought under a warrant of arrest issued in Kenya on accusation of eleven offences alleged to have been committed there. Each of the offences was alleged to be punishable in Kenya "by imprisonment with hard labour for a term of twelve months or more or" by some greater punishment, within s. 9* of the Act of 1881. The evidence before the magistrate raised the presumption that the applicant had committed the offences, but the only evidence before the magistrate in regard to the punishment by which the alleged offences were punishable under the law of Kenya was contained in an order of the senior resident magistrate at Nairobi that the warrant of arrest should be issued. This document set out the eleven offences charged in the counts, each of which was followed by the words "rendering the offender liable to imprisonment for . . . years", the period being three years as regards each of nine of the counts. The document contained no reference to imprisonment with hard labour†. By s. 29* of the Act of 1881 "judicial documents stating facts" might be received in evidence. On an application on behalf of the applicant for a writ of habeas corpus,

Held: (i) there was no evidence before the chief magistrate that the alleged offences came within s. 9 of the Fugitive Offenders Act, 1881, as it was not shown that the offences were punishable in Kenya "by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment", since what was set out in the order of the magistrate at Nairobi was a statement of law not fact.

Dicta of LORD ALVERSTONE, C.J., in *R. v. Brixton Prison (Governor)*, *Ex p. Percival* ([1907] 1 K.B. at p. 706) applied.

(ii) the court had inherent jurisdiction in a proper case to remit the matter to the chief magistrate; and the present case would be so remitted for him to receive evidence as to the local law.

Dicta of LORD ALVERSTONE, C.J., in *R. v. Brixton Prison (Governor)*, *Ex p. Percival* ([1907] 1 K.B. at p. 705) applied.

[**Editorial Note.** Jurisdiction over an apprehended fugitive is not confined in England to the chief metropolitan magistrate, but extends to a magistrate of the Bow Street court; see 16 HALSBURY'S LAWS (3rd Edn.) 587, para. 1221.

As to the offences to which the Fugitive Offenders Act, 1881, Part 1, applies, see 16 HALSBURY'S LAWS (3rd Edn.) 585, para. 1217.

* The relevant terms of s. 9 and s. 29 are printed at p. 783, letter I, and p. 784, letter E, post.

† It seems that imprisonment with hard labour had been abolished in Kenya (see p. 786, letter I, post).

A For the Fugitive Offenders Act, 1881, s. 9, s. 10, see 9 HALSBURY'S STATUTES (2nd Edn.) 900, 901.

For the Evidence (Colonial Statutes) Act, 1907, s. 1 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 619.]

Case referred to:

B (1) *R. v. Brixton Prison (Governor), Ex p. Percival*, [1907] 1 K.B. 696; 76 L.J.K.B. 619; 96 L.T. 545; 71 J.P. 148; 24 Digest (Repl.) 1012, 161.

Motion for habeas corpus.

C The applicant, Victor Charles Shuter, was brought before the chief magistrate at the Metropolitan Magistrates' Court at Bow Street on June 17, 1959, under a warrant of arrest issued by the Government of Kenya and indorsed in the United Kingdom under the Fugitive Offenders Act, 1881, s. 3. The warrant was in respect of eleven offences (forgery, uttering false documents, theft, and obtaining cash and goods by false pretences) alleged to have been committed by the applicant in Kenya. The chief magistrate made an order, under s. 5 of the Act of 1881, committing the applicant to Brixton Prison to await his return to Kenya. Counsel for the applicant now moved for a writ of habeas corpus on the ground that his detention was unlawful in the absence of evidence before the chief magistrate that the Act of 1881 applied to the offences with which he was charged, there being no evidence that, under the law of Kenya, any of the offences was punishable by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment, within s. 9 of the Act. In the alternative, the applicant applied for relief under s. 10 of the Act.

E *Neil Butter* for the applicant.

J. C. Mathew for the Government of Kenya.

J. H. Buzzard for the Governor of Brixton Prison and the Secretary of State for Home Affairs.

F LORD PARKER, C.J.: In these proceedings counsel moves for a writ of habeas corpus on behalf of one Victor Charles Shuter now detained in Brixton Prison pursuant to an order of committal made by SIR LAURENCE DUNNE, the chief metropolitan magistrate, under the Fugitive Offenders Act, 1881. There is, in the alternative, an application for relief under s. 10 of that Act.

G The applicant is accused of having committed a number of offences in Kenya at the end of 1958 and the beginning of 1959. There are some eleven charges, consisting of forgery, uttering false documents, theft, obtaining cash and goods by false pretences and obtaining credit. There is a warrant from Kenya, duly authenticated, for his apprehension and return to Kenya, and there is also no doubt that the depositions from Kenya, which were admissible as evidence before the chief magistrate, raised a strong or probable presumption that the applicant had committed the offences mentioned in the warrant so as to justify the chief magistrate in committing him to prison to await his return, under s. 5 of the Act of 1881. It is said, however, that there was no evidence before the chief magistrate that the offences with which the applicant was charged were offences to which the Act applied.

By s. 9 of the Act it is provided:

I "This Part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

The only evidence before the chief magistrate of the law of Kenya—what I may refer to as the local law—in regard to the punishment for these offences, if it be evidence at all, is to be found in a document which was attached with the depositions to the warrant, and which was an order by the senior resident magistrate in Nairobi ordering that a warrant of arrest be issued. It reads in this way:

"INQUIRY UNDER THE FUGITIVE OFFENDERS ACT, 1881

Regina v. Victor Charles Shuter

ORDER

"I order that a warrant of arrest be issued for the apprehension of Victor Charles Shuter formerly an officer of the Kenya Prisons Service on the eleven counts in the charge sheet hereto attached marked 'A'."

There then follows a reference to the eleven counts:

"Count 1: Forgery, being a felony rendering the offender liable to imprisonment for three years."

Thereafter the remaining ten counts are set out together with the period of imprisonment for which the offender is liable in respect of each count. It is to be observed that, in nine cases out of the eleven, the liability to imprisonment was to imprisonment for more than a year; and, secondly, that in no case is there any reference to imprisonment with hard labour. I have very grave doubts, however, whether that document which I have read is any evidence of the punishment for which the offender would be liable in Kenya. Whether it is any such evidence depends on the construction of s. 29 of the Fugitive Offenders Act, 1881. The relevant part, for this purpose, of that section is in these words:

"Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act."

No doubt the order to which I have referred is a judicial document, but, so far as the author, the senior resident magistrate at Nairobi, is concerned, what is set out in the order in regard to the liability to punishment can hardly be said to be a setting out of facts by him: he was setting out the law. Accordingly, I have very grave doubts whether, under s. 29 of the Act of 1881, that document was admissible before the chief magistrate as evidence of the law of Kenya in regard to punishment. Quite apart from that, however, there is nothing in the document to indicate that the respective periods of imprisonment there referred to are periods of imprisonment with hard labour or periods of imprisonment of such a character as to come within the last few lines of s. 9:

"... for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

It is true that, on one reading of that section, it could be said that, as in nine out of the eleven offences the punishment set out in the document is more than twelve months, they are covered by the words in the section, "or any greater punishment". I feel great difficulty in any such construction. It seems to me that the more natural way to read the section is that the words "or more" are referring to a sentence of imprisonment of more than twelve months accompanied by hard labour.

There is no doubt that this is a technical objection. It is most unlikely, looked at as a matter of common sense, that the senior resident magistrate in Nairobi would set his hand to such a document as this order, headed, as it is, under the Fugitive Offenders Act, 1881, without verifying that the offences were offences within the Act. It would be, as a matter of common sense, still more extra-

A ordinary if these offences of forgery, false pretences and the like were not offences to which the Act applied at all; but, be that as it may, the matter must be looked at strictly.

In *R. v. Brixton Prison (Governor), Ex p. Percival* (1) ([1907] 1 K.B. 696), a case not unlike the present case, LORD ALVERSTONE, C.J., said (*ibid.*, at p. 706):

B “In my opinion every person who comes and asks for an order for the delivery up of a fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled. That is a very important matter, and having regard to the fact that we are dealing with the criminal law, we must apply the general principles of the criminal law, and the prosecutor must make out his case. We are also dealing with a branch of the criminal law which affects the liberty of the subject, and that condition should under
C ordinary circumstances be clearly fulfilled.”

That view was expressed directly in regard to the calling of evidence as to the local law. I incline to the view that there was no evidence at all before the chief magistrate as to the law in regard to punishment, and, in any event, no evidence that the offences came within s. 9 in regard to hard labour. But whether I am
D right or wrong, I feel very strongly that in these cases there should be a settled practice, and that in every case an expert on the local law should give evidence either in the form of a deposition which comes over with the warrant or by giving evidence before the chief magistrate in this country. So far as the present case is concerned, I think that the proper course is to remit the matter to the chief magistrate in order that it may be dealt with in accordance with what I hope
E will become the settled practice.

Counsel for the applicant, to whom the court is greatly indebted for his argument, contended that there was no jurisdiction in this court to remit the matter. He pointed out, what is undoubtedly true, that, on the view which I have expressed, the chief magistrate had no jurisdiction to commit the applicant, and that the applicant was at this moment wrongly detained. That I fully appreciate,
F but it seems to me that in a proper case—and I think that this is a proper case—the court must have inherent jurisdiction to take that course. Indeed, in *R. v. Brixton Prison (Governor), Ex p. Percival* (1), LORD ALVERSTONE, C.J., and DARLING, J., both took the view that there was jurisdiction to send the case back. LORD ALVERSTONE, C.J., began his judgment by saying ([1907] 1 K.B. at p. 705):

G “Having regard to the serious nature of the offence if proved, I have been much pressed with doubt as to whether we ought not to send the case back in order that the evidence which is suggested as being wanted should be supplied.”

DARLING, J., said (*ibid.*, at p. 708):

H “What I have a doubt about in this case is whether we are justified in deciding it without doing that which I am quite clear we could do, viz., either send it back to the magistrate and point out to him the defect in the proceedings as they at present come before us, and allow him to have the prosecution reopened and evidence given, or else require for our own information an affidavit showing what the law of Victoria applicable to this case is.”

I Both LORD ALVERSTONE, C.J., and DARLING, J., clearly took the view that it was possible to remit the case or, alternatively, to receive further evidence in this court. It is true that in that case they did not do so, but that was for particular reasons, one of which was that the alleged offence had occurred some five or six years earlier, and other matters, such as that the prisoner had endeavoured to make reparation and was now carrying on an honest life. Thus in all the circumstances of that case they did not exercise what they undoubtedly considered to be their inherent powers to remit.

At one time I was inclined to the view that the matter might be most conveniently dealt with by invoking the Evidence (Colonial Statutes) Act, 1907, which provides, by s. 1 (1), that copies of Acts, ordinances, and statutes passed by the legislature of any British possession, if purporting to be printed by the government printer,

"... shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed."

Following the power in that section, it seemed that it might be a convenient course if this court received, and counsel tendered on behalf of the Kenya Government, the printer's copies of the relevant code and ordinances dealing with punishment for these offences: but, as counsel for the Governor of Brixton Prison quite rightly pointed out, no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law. For all one knows, it may have been recently amended, and, as I am very anxious that there should be a settled practice in the matter, and a safe practice, it seems to me that in this and all cases there should be evidence from an expert on the local law. Accordingly, in this case I would remit the matter to the chief magistrate for him to receive evidence as to that local law.

As regards the application for relief under s. 10 of the Act of 1881, it is sought to make out the case that the application for the return of the applicant was not being made in good faith in the interests of justice. That is one of the grounds on which the court has a discretion to discharge the fugitive either absolutely or on bail under s. 10 of the Act. The case, quite shortly, sought to be made is that the applicant had, before leaving Kenya, apparently sworn an affidavit and submitted it to the Kenya Government, making allegations of grave irregularities in camps where Mau Mau prisoners were detained. In effect, he says that the Attorney-General of Kenya and the deputy public prosecutor, knowing full well that he had committed the offence with which he is now charged, allowed him to leave Kenya, and that it is only as the result of an inquiry and a report made by Mr. Jack (the deputy public prosecutor), who found that all, except a very few minor allegations made by Mr. Slatyer, were completely unfounded, that the Kenya Government are now seeking to have him returned to Kenya in order that he should be punished for making those allegations or, alternatively, that he should be detained so that he should not make further allegations. The court has had the advantage of reading affidavits from Mr. Jack and from the Attorney-General, and it is enough, in my judgment, to say that, on a reading of the affidavit evidence here as a whole, the case sought to be made under s. 10 is not made out and should be refused.

SLADE, J.: I agree. I desire to add only, in relation to s. 9 of the Fugitive Offenders Act, 1881, that there was no evidence of any kind whatsoever before the chief magistrate to bring the offences within s. 9, even assuming that the order signed by the senior resident magistrate at Nairobi was admissible in evidence. The argument, as I understand it, is this: that though the evidence in regard to the offences contains no reference to hard labour, which originally was a condition precedent for bringing the offences within s. 9, unless they came under the words which meant at that time penal servitude or something other than imprisonment, and though one will not get much assistance from the Kenya Penal Code (at which, I understand, the chief magistrate looked), yet if one were further informed that there was an ordinance, the Criminal Justice Ordinance, 1957 (No. 26 of 1957), and looked at that, one would see that hard labour had been abolished in Kenya. One would see, further, that imprisonment could take the form either of rigorous imprisonment or some other form of imprisonment which falls within the words in s. 9 of the Act of 1881:

... and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

That ordinance was not before the chief magistrate, and that again emphasises the anxiety which counsel for the Governor of Brixton Prison expressed that the mere production of an Act of Parliament or of a penal code does not necessarily mean that all of it is still extant or remains unaltered, and, indeed, we know that the Kenya Penal Code which was before the chief magistrate had been altered by the Criminal Justice Ordinance, 1957 (No. 26 of 1957). That is sufficient to send this case back to the chief magistrate.

With regard to the construction of s. 9, the point does not now arise, and I say no more, but I find it difficult to believe that imprisonment for life is not a greater punishment than twelve months' hard labour.

DAVIES, J.: I entirely agree with the judgments of my Lords.

[LORD PARKER, C.J., said that the applicant would be granted bail and that the terms of bail would be fixed by the chief magistrate.]

Case remitted. Bail allowed.

Solicitors: *Official Solicitor* (for the applicant); *Charles Russell & Co.* (for the Government of Kenya); *Director of Public Prosecutions* (for the Governor of Brixton Prison and the Secretary of State for Home Affairs).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

R. v. BISHOP.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Slade and Wynn, J.J.), June 15, 1959.]

Criminal Law—Supervision order—Discharged prisoner—Registration of address—“Address”—Person having no fixed abode—Trial by jury, on offender’s election—Maximum sentence—“On summary conviction”—Prison Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 52), s. 29 (1) (b), Sch. 1, para. 1 (1), para. 2 (1), para. 4 (1).

By the Prison Act, 1952, Sch. 1, para. 1 (1): “Any person to whom this schedule applies shall—(a) register at an appointed police station in any police area in which he is from time to time residing the address of his residence . . .” By para. 2 (1): “If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph, he shall be guilty of an offence and liable on summary conviction thereof to imprisonment for a term not exceeding six months . . .” By para. 4 (1): “. . . a person shall be deemed to reside at any . . . place of whatever description at which he spends a night.”

The appellant, a person in respect of whom an order had been made that he should be subject to s. 29 of the Act of 1952 failed, on his discharge from prison on Oct. 25, 1958, to inform the appointed society of his address. In accordance with s. 29 (1) (b) the society notified the Commissioner of Police of the Metropolis and thereon, by s. 29 (1), the society became bound to “use their best endeavours to inform the appellant” that they had notified the commissioner, and Sch. 1 of the Act applied to the appellant. The appellant arrived in Portsmouth on Feb. 18, 1959. He was arrested on Feb. 20, and was charged with having failed to register his address at a police station as required by Sch. 1 to the Act of 1952. He elected to be tried by jury, and,

at his trial, said that he had no fixed abode and had spent the time in Portsmouth wandering about. He was convicted and was sentenced to nine months' imprisonment. On appeal,

Held: (i) the appellant was rightly convicted of having failed to register his address because the word "address" in Sch. 1 to the Prison Act, 1952, was not confined to a postal address, and the obligation to register an address could be fulfilled by giving a reasonable identification of any place of whatever description at which the appellant spent a night.

(ii) the fact that the appointed society had not informed the appellant that they had given notice to the Commissioner of Police did not afford a defence where, as here, no address had been notified to the society on the appellant's discharge, for it was difficult to see what steps the society could have taken to inform the appellant.

(iii) the provision in para. 2 (1) of Sch. 1 that a person guilty of an offence was liable "on summary conviction" thereof to imprisonment for a term not exceeding six months meant that he was so liable on conviction in proceedings initiated in a court of summary jurisdiction; accordingly the election to be tried by a jury had not enlarged the sentence that might be imposed, and the sentence should be reduced to a term of six months.

Appeal against conviction dismissed; appeal against sentence allowed.

[**Editorial Note.** The provision of para. 4 (1) of Sch. 1 to the Prison Act, 1952, that a person is deemed to reside at any house or other place of whatever description at which he spends a night is expressed to apply for the purposes of Sch. 1, but is not expressed to apply for any other purposes of the Act. It is intimated at p. 791, letter C, *post*, that the word "address" in s. 29 is also not limited to a postal address. It seems that in relation to s. 29 this view is obiter, as the offence charged was that created by para. 2 of Sch. 1.

As to supervision orders, see 10 HALSBURY'S LAWS (3rd Edn.) 513, para. 933.

For the Prison Act, 1952, s. 29 and Sch. 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 642, 658.]

Appeal.

The appellant, Edwin Francis Bishop, was charged, at Portsmouth City Sessions, with failing to comply with the requirements of Sch. 1 to the Prison Act, 1952, in that, being a person to whom the schedule applied, he had resided between Feb. 18 and Feb. 20, 1959, at Portsmouth and had failed to register his address at the appointed police station pursuant to para. 1 (1) of the schedule. The defence was that he had no fixed abode and was wandering about Portsmouth all the time. He was convicted of the offence and was sentenced to nine months' imprisonment. He appealed against both the conviction and the sentence.

R. S. J. Brock for the appellant.

J. B. S. Edwards for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was sentenced on Sept. 23, 1957, to eighteen months' imprisonment and an order was made under s. 22* of the Criminal Justice Act, 1948. On

* Section 22 (except for sub-s. (1)) was repealed by the Prison Act, 1952, s. 54 (2), and Sch. 4, Part I, and was replaced by s. 29 of the Act of 1952. Section 22 (1) of the Act of 1948 was amended by s. 54 (1) of and Sch. 3 to the Act of 1952, and, as amended, reads:

"Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of s. 29 of the Prison Act, 1952."

A Oct. 25, 1958, he was released after serving that sentence, and he failed to register with the appointed society. As a result, the appointed society notified the Commissioner of Police of the Metropolis, and in February, 1959, he was found at Southsea by the police and was charged with having failed to register his address pursuant to Sch. 1 to the Prison Act, 1952. In due course he elected to go for trial before Portsmouth City Sessions, where he was convicted and sentenced by the learned recorder to nine months' imprisonment. He now appeals to this court by leave of the court both against his conviction and his sentence.

B The case raises an interesting question which, as far as the court knows, has never arisen before, on the true interpretation of the Prison Act, 1952, and, in particular, of Sch. 1 to the Act. By s. 29 (1) of the Act it is provided:

C "Where an order has been made under s. 22 of the Criminal Justice Act, 1948 (which, as amended by this Act, requires a court in certain circumstances to order that a person shall for a period of twelve months be subject to the provisions of this section)—(a) the offender shall, on his next discharge from prison and thereafter from time to time, inform the appointed society of his address in accordance with such instructions as may be given to him by or on behalf of the society; (b) if the offender fails to comply to the satisfaction of the appointed society with the aforesaid requirement to notify his address on his discharge, the society shall, and if he subsequently fails to keep the society informed of his address to their satisfaction the society may, give notice by registered post of the failure to the Commissioner of Police of the Metropolis, and shall use their best endeavours to inform the offender that the notice has been given; and as from the date on which any such notice has been given as aforesaid, the provisions of Sch. 1 to this Act shall apply to the offender."

E It is provided by para. 3 (3) of Sch. 1 to the Act:

F "A certificate purporting to be signed by or on behalf of the Commissioner of Police of the Metropolis and certifying that he has received a notice given pursuant to s. 29 (1) (b) of this Act to the effect that a person has failed to comply with any requirement under that subsection shall, in any such proceedings as aforesaid, be evidence of the notice having been duly given and of the contents of the notice."

G In the present case there was such a certificate, and, accordingly, there was evidence, which was uncontroverted, that the appointed society had notified the Commissioner of Police of the Metropolis of a failure by the appellant to inform the society of his address, and there was also evidence of the contents of the notice, namely, that the appellant had failed to notify his address to the society. Therefore, there is no doubt that he thereupon became subject to Sch. 1 to the Act of 1952.

H Paragraph 1 of Sch. 1 provides:

I "(1) Any person to whom this schedule applies shall—(a) register at an appointed police station in any police area in which he is from time to time residing the address of his residence; (b) report once in each month, on such day as may be directed by or on behalf of the chief officer of police, at the police station at which his address for the time being is registered.

"(2) Where any person to whom this schedule applies changes his residence, he shall, on registering his new address under this paragraph, state the address which was last registered by him thereunder."

Then by para. 2 (1) it is provided:

"If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph, he shall be guilty of an offence and liable on summary conviction thereof to imprisonment for a term not exceeding six months: Provided that: (a) in proceedings for a failure to

register an address it shall be a defence for the defendant to prove either that— (i) being on a journey to a particular destination he remained no longer in the place in which he failed to register his address than was reasonably necessary for the purposes of that journey; or (ii) his absence from his registered address was temporary and that he kept the officer in charge of the police station at which that address was registered sufficiently informed of his whereabouts . . .”

The other provisions of para. 2 do not, I think, matter. Finally, by para. 4 (1) it is provided:

“ For the purposes of this schedule, a person shall be deemed to reside at any house or other place of whatever description at which he spends a night.”

The appellant arrived in Portsmouth on Feb. 18. He was arrested on Feb. 20, and the indictment alleged:

“ That between Feb. 18 and 20, 1959, at Portsmouth, you, being a person to whom the schedule applied, resided within the police area of Southsea Police Station, being the appointed police station for the said area, and that you unlawfully failed without reasonable excuse to register the address of your residence at the police station.”

At first the appellant said that he had spent the two nights at the reception centre. When he came to give evidence, he denied that and said that he had no fixed abode and that he was wandering about Portsmouth all the time. The learned recorder told the jury that it mattered not whether the appellant had an address in the ordinary sense of the word, and that it was enough if he had come to Portsmouth other than merely for the purpose of passing through it to get to another destination; in other words, that he had come there to stay, albeit he spent part of the time in a bus shelter or whatever it might be. It is sufficient to refer to a passage in the summing-up, where the recorder said this:

“ The first issue of fact for you is: Did [the appellant] in fact stay at the reception centre? He said he did, but now he says that is untrue, that he did not, that he had no place of residence. I have pointed out to you that he became under an obligation to report as soon as he arrived, with an intention to stay, even if he had not acquired a place of residence. Any place where he spent a night is a place within the meaning of the Act, even if it is only a bus shelter; and it is no answer to say ‘ I did not have a house to sleep in, I did not have lodgings ’.”

The first ground of appeal against conviction is based on that passage in the summing-up. It is said, and said with some force, that one cannot register the address of a residence if the place where one has resided is a place such as a bench on the promenade or a bus shelter, which is not an “ address ” in the ordinary sense of the word. It is true, so the argument runs, that para. 4 (1) of Sch. 1 provides that

“ . . . a person shall be deemed to reside at any house or other place of whatever description at which he spends a night.”

Despite those words, so it is said, what is there deemed to be a residence or a residing must be cut down to such house or other place of whatever description which can be said to have an “ address ” in the ordinary sense of the word.

This is a novel point, and not without difficulty, but the court has come to the conclusion that that argument is wrong. It is to be observed, in the first place, that, on the prisoner's discharge from prison there is a duty on him, under s. 29 (1) (a), to inform the appointed society of his address. It would be a very curious result if a person could avoid his obligations under the statute by sleeping rough and saying, in effect, “ I have no address ”. Similarly, in the case of a man

- A who had failed to inform the appointed society of his address and had been reported to the police, it would be even more curious if he were able to say: "I do not have to report at the police station; I do not have to register anything at the police station because I have no address at all in the ordinary sense of the word". Clearly the whole object of the Act would be defeated if such an argument were to prevail, but, quite apart from that, the court feels that, as a matter of construction, there is no reason to give that effect to the statute. The residence which calls for registration and a monthly report is something which is described* by the words "shall be deemed to reside": "a person shall be deemed to reside", that is, to have his residence, "at any house or other place of whatever description at which he spends a night". Observe, therefore, that even one night in such a place brings on him the obligation to register and that the residence can be any place "of whatever description". Wider words could not be imagined, and the whole question is whether there is any justification for cutting down those very wide words by reading into para. 4 (1) of Sch. 1 to the Act of 1952, words to the effect "provided always that such place has an address". It seems to this court that "address", both in s. 29 of the Act of 1952 and in Sch. 1, is not referring to an address in the ordinary sense of the word as a postal address. It denotes something less than that, and the court thinks that the obligation which arises on a deeming to reside in any "place of whatever description at which he spends a night" can be fulfilled, and should properly be fulfilled, by giving a reasonable identification of such a place, not necessarily a postal address but something which describes or identifies the place with reasonable certainty. Accordingly, the court feels in the present case that the direction by the learned recorder is unobjectionable. The appellant clearly did "spend a night" in Portsmouth—it is to be observed that para. 4 (1) does not say "sleeps for a night". He spent the night in a place of some description in Portsmouth, and, therefore, it became his obligation to register, at the appointed police station, a reasonable identification of that place.

The second ground of appeal concerns the phrase in para. 2 (1) of Sch. 1:

- F "If any person fails without reasonable excuse to comply with any of the requirements of the preceding paragraph . . ."

- G Here a number of points have been taken by counsel for the appellant, but it is sufficient, the court thinks, to deal with only one of them, namely, that the appellant had not been informed and was ignorant of his obligation. It had not been proved by the prosecution, so it is said, first, that the governor of the prison had given him information as to his liability under the order, and, secondly, that the appointed society had used their best endeavours to inform the appellant that they had given notice to the Commissioner of Police. As to the duty of the governor, it is provided by s. 29 (2) of the Act:

- H "It shall be the duty of the governor of a prison on the discharge from prison of an offender against whom an order has been made under the said s. 22 to serve upon him a notice stating the effect of the order."

- I It seems clear on that provision that it is the duty of the governor to serve on a prisoner in such circumstances a notice which not merely says that it is his duty to inform the appointed society of his address, but which also explains to him what will happen to him if he fails to give that information and, in particular, that he will then become subject to Sch. 1. The court finds it unnecessary in this case to consider exactly where the onus of proof lies, although it certainly looks as if it would be for the prisoner in the first instance to put forward what he considered to be some reasonable excuse, although it might well be that at the end of the day the question would arise whether the prosecution had proved that he failed without reasonable excuse to comply with the requirement. So far as the present case is concerned, it seems perfectly clear that the governor gave

* In para. 4 (1) of Sch. 1 to the Prison Act, 1952; see p. 790, letter B, ante.

a notice to the appellant, for the appellant himself admits that when he was discharged from Preston Prison on Oct. 25, 1958, he was told to report to the After-Care Association. So far as concerns the failure of the appointed society to use their best endeavours to inform the appellant that the notice had been given, it is really difficult in a case such as this to see how the society can do anything in the matter, having taken the steps which they have taken, namely, notifying the Commissioner of Police, for the very reason that the man who was a prisoner has not given an address. Therefore, there can in the present case, so it seems to the court, be no question of the appellant being able to say: "I was acting under a reasonable excuse in that I did not appreciate that I was going to make myself liable to Sch. 1". So much for the appeal against conviction.

As regards the appeal against sentence, the learned recorder sentenced the appellant to nine months' imprisonment, whereas para. 2 (1) of Sch. 1 provides that a person guilty of this offence shall be

"... liable on summary conviction thereof to imprisonment for a term not exceeding six months."

What happened in this case was this. Under para. 2 (1), the offence is triable summarily, but as the maximum sentence is in excess of three months*, the appellant was entitled to elect, and elected, to be tried at sessions. It was submitted by the prosecution that, in effect, para. 2 (1) of Sch. 1 was merely saying that, if the trial was a summary trial, the maximum sentence was a term of six months, whereas, if the offender elected to be tried at sessions, the punishment was entirely at large. The court cannot accede to that argument. It seems plain that the provision in para. 2 (1) of Sch. 1 that an offender is liable on summary conviction to imprisonment for a term not exceeding six months means that he is so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the court feels that in the present case the maximum sentence was a term of six months. Lastly, it was urged by counsel for the appellant that in all the circumstances of the case six months would be excessive and that there ought to be some further reduction. The court sees no reason to give a sentence in the present case of less than six months' imprisonment, and, therefore, while the sentence of nine months' imprisonment cannot stand, the court will substitute a sentence of six months. Accordingly, the appeal against conviction is dismissed; the appeal against sentence is allowed and six months is substituted for nine months.

Appeal against conviction dismissed; appeal against sentence allowed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Town Clerk, Portsmouth (for the Crown).

[Reported by KEVIN WINSTAIN, ESQ., Barrister-at-Law.]

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